STATE OF ILLINOIS )
) SS.
COUNTY OF WILL )

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CHER SMITH,

Petitioner,

vs.

NO: 11 WC 19917

MANHATTAN PARK DISTRICT,

**17IWCC0462**

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical, and permanent partial disability (PPD), and being advised of the facts and applicable law, reverses the Decision of the Arbitrator and finds that Cher Smith failed to establish a work-related accident arising out of and in the course of her employment on December 13, 2010. Petitioner's claim for compensation is, therefore, denied.

So that the record is clear, and there is no mistake as to the intentions or actions of this Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical/legal perspective. We have considered all of the testimony, exhibits, pleadings and arguments submitted by the Petitioner and the Respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission makes the following findings:

17IWCC0462

1. Cher Smith filed an Application for Adjustment of Claim on March 24, 2011, alleging injury to her right leg as the result of a slip and fall on December 13, 2010.

2. Smith was employed as a program coordinator. On December 13, 2010, she completed her shift at 4:00 p.m., left the building and walked towards her car located in the parking lot. She was "probably" carrying her work bag with 2 to 3 files in the bag. T.21, T.36. Smith walked to her car and put her hand on the door handle when she fell down and backwards onto her collapsed knee. T.23. Her co-workers came to her assistance and an ambulance was called. T.24.

3. Smith testified that it was very snowy on December 13, 2010 and that it had snowed throughout the entire day. T.19. Smith described the snow as wet. T.37. She stated that the superintendent cleared the parking lot prior to the start of the work day. T.19. To the best of her knowledge the lot was salted. T.20. Smith did not know if the superintendent attempted to clear the parking lot after the employees began working in the morning. T.21.

4. Smith testified that she thought there was ice on the lot as the ambulance men were sliding around and had to brace themselves between two cars to get her up. T.37. She is 5'4" tall and weighs 260 pounds. T.42.

5. Smith testified that she was told where to park when she began working for the Park District. T.16. She stated that there are 7 parking spaces along the far left of the driveway and 2 on the right side at the back door. There were 8 employees working in the building. She was told that this was their parking lot and they could park anywhere in the lot. She never gave it any thought whether she could have parked elsewhere. T.38.

6. Smith stated that at the time of the accident, the lot was not used much by the general public. T.17. She stated that the district had just purchased an additional building a block up that had a very large parking lot. That new building was where the public would go and sign up for the park district programs. The old building where she worked became the office primarily for employees. *Id.* Smith stated there was very little interaction with the public at her building as all public business was now done in the new building, which was a block away. T.18.

7. Smith's supervisor, Julie Popp, testified that she did not witness the fall, but went out to help Smith after the fall. Popp testified that she did not see anything lying on the ground next to Smith. T.47. Popp did not see any snow accumulation on the ground when she went outside. *Id.* She stated that the lot is open to the general public and the lot at the new building is next door and has 40 parking spots. That lot is also used by the public. T.49. Popp further testified that employees are not told where to park and are also free to park in the street, which does not require a special permit. T.50. The employee handbook also does not indicate that employees have to park in a specific location. T.51.

**17IWCC0462**

8. Popp stated, on cross-examination, that members of the general public would come into their office about twice a day. T.54. She stated that the lot was cleared of snow that day. T.55. She does not know how many times it was cleared during the day. T.56. Popp further stated that the superintendent did salt the lot. T.57. It was probably applied in the morning before the employees arrived. *Id.*

9. Smith presented to Silver Cross Hospital on December 13, 2010 following her fall. The x-ray of the right knee revealed moderate to severe degenerative changes of the right knee. The impression was right ankle sprain, and right knee and leg sprain. PX.2.

10. Smith presented to Dr. Bradley Dworsky of Hinsdale Orthopaedics on January 17, 2011 for bilateral knee pain. Her left knee pain had since resolved. Her right knee pain had not diminished. She walked with a limp and could not bend her knee. Examination revealed that she was exquisitely tender over the medial joint line and mildly tender laterally. Smith had mild patellofemoral crepitation. The diagnosis was medial meniscal tear with pre-existing degenerative joint disease of the right knee. An MRI was recommended. PX.1.

11. Smith underwent an MRI of the right knee at Advanced Medical Imaging on March 3, 2011. The impression was fairly severe tricompartmental degenerative changes and a lateral meniscal tear. PX.1.

12. Smith was seen by Dr. Dworsky on March 14, 2011. Dr. Dworsky noted that the MRI showed a distinct horizontal tear of the lateral meniscus of the knee consistent with her symptomatology. The tear was traumatic in origin as Smith had described. Dr. Dworsky opined that Smith could attempt to ambulate with her condition, but she would have intermittent recurrence of sharp pain and discomfort. Dr. Dworsky recommended arthroscopic lateral meniscectomy of the knee to decrease her symptoms. PX.1.

13. Smith spoke with Samantha Smith, LPN at Hinsdale Orthopaedics on March 23, 2011. Per the medical record, Smith noted that she wanted to hold off on surgery as long as possible. Smith reported that she first wanted to lose weight. PX.1.

14. Smith presented to Dr. W.A. Earman of Orthospine Center on June 7, 2011 for a second opinion regarding her work injury. Smith reported that she was feeling better and her symptoms had improved. She still had occasional pain over the medial aspect of the knee. She has been increasing her activities. Examination revealed tenderness along the medial joint line. Dr. Earman noted that the MRI revealed degenerative changes of the knee as well as a degenerative tear located over the medial meniscus with significant narrowing of the medial meniscus. There was a possible tear of the posterior horn of the lateral meniscus that did not appear to be symptomatic. The impression was a significant degenerative change in the right knee with possible degenerative tears of the medial

meniscus of the right knee. Dr. Earman did not believe surgery would get rid of enough of her pain to require surgical intervention. Smith was going to attempt anti-inflammatory medication, a knee support, and a possible injection. RX.1.

15. Smith testified that she does not want to undergo surgery. T.34. She still uses a walker a few times a week. She will experience an ache every now and then. T.33. She tries to not let it get her down and she just goes about her day. She does not walk outdoors as much as she does not feel as steady. *Id.* She resigned at the end of May 2012. T.42. She has no future medical appointments and is not taking any prescription medication. T.43. She is 5'4" tall and weighs 260 pounds. T.42.

The burden lies with the claimant to establish the elements of her right to compensation. *Nabisco Brands, Inc. v. Industrial Comm'n*, 266 Ill. App. 3d 1103, 1106, 641 N.E.2d 578, 581, 204 Ill. Dec. 354 (1994). For accidental injuries to be compensable, a claimant must show that the injuries arose out of and in the course of employment. *Nabisco*, 266 Ill. App. 3d at 1106, 641 N.E.2d at 581. To arise out of one's employment, an injury must (1) have an origin in some risk connected with or incidental to the employment; or (2) be caused by some risk to which the employee is exposed to a greater degree than the general public by virtue of his employment. Dodson v. Industrial Comm'n, 308 Ill. App. 3d 572, 575-76, 720 N.E.2d 275, 278, 241 Ill. Dec. 820 (1999). Typically, an injury arises out of employment if, at the time of the occurrence, the employee was performing an act that he or she was instructed by the employer to perform, an act that he or she had a common-law or statutory duty to perform, or an act that the employee might reasonably be expected to perform incident to assigned duties. *Nabisco*, 266 Ill. App. 3d at 1106, 641 N.E.2d at 581. "In the course of" refers to the place, time, and circumstances under which the accident occurred. *Illinois Consolidated Telephone Co. v. Industrial Comm'n*, 314 Ill. App. 3d 347, 349, 732 N.E.2d 49, 51, 247 Ill. Dec. 333 (2000). An injury that results from a hazard to which an employee would have been equally exposed apart from the employment or a risk purely personal to the employee is not compensable. *Nabisco*, 266 Ill. App. 3d at 1106, 641 N.E.2d at 581.

The purpose of the Act is to protect employees against hazards and risks that are peculiar to the nature of the work they do. *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 483, 546 N.E.2d 603, 605, 137 Ill. Dec. 658 (1989). The mere fact that duties take the employee to the place of injury and that, but for the employment, the employee would not have been there is not sufficient to give rise to the right to compensation. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 63, 541 N.E.2d 665, 669, 133 Ill. Dec. 454 (1989).

The evidence establishes that the parking lot was open to and used by members of the general public. While the parking lot was also used by employees of the Park District, there is no evidence establishing that the Park District instructed their employees to park in that lot. Rather, employees were free to park anywhere in the lot, park in the street, or park in the Park District's other parking lot. Thus, the employees and members of the general public were exposed to the same risk.

17IWCC0462



By Smith's testimony, the Park District plowed and salted the lot prior to the start of the work day. She testified that it continued to snow and described the snow as very wet. Smith, however, was unsure as to whether the Park District continued to plow the lot throughout the day, and no evidence was offered establishing that the Park District attempted to clear the lot during the day. The Commission finds that the accumulation of snow in the parking lot represented a natural accumulation as there was no evidence that Respondent created or contributed to a hazard. As the lot was open to the general public, Smith's fall resulted from a hazard to which she and the general public were equally exposed. Thus, the Commission finds that Smith's injury did not arise out of her employment.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on June 13, 2016 is hereby reversed. Petitioner's claim for compensation is therefore denied.

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.

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 21 2017

MJB/tdm
O: 6-6-17
052

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

STATE OF ILLINOIS )
)SS.
COUNTY OF WILL )

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

# ILLINOIS WORKERS' COMPENSATION COMMISSION
## ARBITRATION CORRECTED DECISION

**Cher Smith**
Employee/Petitioner

v.

**Manhattan Park District**
Employer/Respondent

Case # 11 WC 19917

**17IWCC0462**

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 **Christine M. Ory**, Arbitrator of the Commission, in the city of **New Lenox**, on **February 8, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **December 13, 2010,** Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**21,663.20**; the average weekly wage was $**416.63**.

On the date of accident, Petitioner was **60** years of age, ***married*** with **0** dependent children.

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

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

To date, Respondent has paid $ **0** in TTD and/or for maintenance benefits, and is entitled to a credit for any and all amounts paid.

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

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

ORDER

***Medical Benefits***

Respondent shall pay the bills totaling **$3,151.93**, subject to the fee schedule and pursuant to §8 and §8.2.

***Permanent Disability***

Respondent shall pay the sum of **$253.00** week for a period of **32.25** weeks, as provided in **§8 (e) 12**of the Act, because the injuries sustained caused **15% loss of use of the right leg.**.

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

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

Christine Moy

Signature of Arbitrator

06/10/2016

Date

**BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION**

| | | |
|---|---|---|
| **Cher Smith** | ) | |
| **Petitioner,** | ) | |
| **vs.** | ) | **No. 11 WC 19917** |
| **Manhattan Park District** | ) | **17IWCC0462** |
| **Respondent.** | ) | |
| | ) | |

**ADDENDUM TO ARBITRATOR'S DECISION**

**FINDINGS OF FACTS AND CONCLUSIONS OF LAW**

This matter proceeded to hearing in New Lenox on February 8, 2016. The parties agree that on December 13, 2010, the Petitioner and the Respondent were operating under the Illinois Worker's Compensation or Occupational Diseases Act and that their relationship was one of employee and employer. They agree that Petitioner gave Respondent notice of the accident within the time limits stated in the Act. They further agree that in the year preceding the injuries, the Petitioner earned $21,663.20, and that her average weekly wage was $416.63

At issue in this hearing is as follows:

1. Whether the petitioner sustained accidental injuries that arose out of and in the course of her employment;
2. Whether petitioner's current condition of ill-being is causally connected to the claimed injury.
3. Whether respondent is liable for the unpaid medical bills.
4. The nature and extent of petitioner's injury.

**FINDING OF FACTS**

Petitioner testified that she was hired by respondent in March, 2007. She was originally the receptionist and worked her way up to program coordinator. Her job as program coordinator involved setting up programs for children and teenagers.

Petitioner testified she worked in respondent's administration building, which was an old farmhouse. There were nine parking spots at the administration building; eight employees worked at this building. Petitioner testified the administration building parking lot was mainly used by employees, although occasionally the parking lot was used by the public. There was very little interaction with the public at the administration building. Petitioner testified she was advised by the Executive Director, Julie Popp, that the lot next to the administration building was an employee parking lot. Respondent owned another building with a large parking lot located down the block from respondent's administration building. Petitioner only used this larger lot to park when the administration building parking lot was being repaved.

Petitioner testified that on December 13, 2010, she arrived at work at 8 A.M. Petitioner understood the administration building parking lot was owned and maintained by respondent. Petitioner understood the parking lot had been plowed before petitioner arrived that morning by Bob Gainos, respondent's superintendent of maintenance. The lot and walk had been salted.

Petitioner was wearing tennis shoes and carrying a small bag or satchel with work papers in it, as well as a small handbag. Petitioner left at 4 P.M. It was dusk. She walked to her vehicle in the administration parking lot. As she put her hand on the driver's door she slipped and fell down on both knees with legs underneath, falling to her right. Petitioner testified she fell on wet snow. Petitioner screamed and co-worker Vicky came to her aid. An ambulance was called. Petitioner testified that the firefighters were also sliding around when they came to petitioner's aid. Petitioner felt pain in her right knee and right foot.

Julie Popp, respondent's executive director, testified in behalf of respondent. Popp had been respondent's executive director for 16 years. She had known petitioner for four years. Popp did not witness the accident but came outside immediately afterward to find petitioner was on the ground. Popp did not see any snow accumulation on the ground. Popp testified that the lot where petitioner fell was used by the public. There is a 40-space lot down the street at the program center that is also used by the public. The employee handbook did not direct petitioner to park in the administration lot.

Petitioner was taken via ambulance to Silver Cross Hospital. According to the emergency record she slipped and fell on ice. She complained of an ankle injury. X-rays of petitioner's right ankle and leg were negative for fractures. The diagnosis was right ankle and knee sprain. She was referred to orthopedic surgeon, Dr. Dworsky. (PX.2)

Petitioner first saw Dr. Dworsky on January 17, 2011. Petitioner's complaints to Dr. Dworsky was limited to her right knee. Petitioner indicated to Dr. Dworsky that the right knee pain had not diminished in four weeks. X-rays showed significant arthritic changes in three compartments with osteophyte formation. However, she had a very well preserved joint space equal both medially and laterally. Dr. Dworsky diagnosed a medial meniscal tear with preexisting degenerative joint disease of the right knee. An MRI was ordered. (PX.1)

An MRI of March 3, 2011 reportedly showed severe tricompartmental degenerative changes and a lateral meniscal tear. She returned to Dr. Dworsky on March 14, 2011 to discuss the results of the MRI. Dr. Dworsky believed the tear was traumatic in nature and recommended arthroscopic lateral meniscectomy. Petitioner called Dr. Dworsky's office on March 23, 2011 for a prescription of Naproxen as she was trying to hold off on surgery until she lost weight. (PX.1)

Although petitioner denied seeking a second opinion from Dr. Earman, who had performed her left knee replacement, the records of Dr. Earman reflect that she did see Dr. Earman on June 7, 2011 for a second opinion. Dr. Earman noted degenerative changes of the right knee and possible tear of the posterior horn of the lateral meniscus which appeared not to be symptomatic. (RX.1)

## CONCLUSIONS OF LAW

The Arbitrator adopts the Finding of Facts in support of the Conclusions of Law.

The Arbitrator found the petitioner to be credible.

**In support of the Arbitrator's decision with regard to whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator makes the following finding:**

The Arbitrator finds petitioner's sustained an injury which resulted from the work accident that arose out of and in the course of petitioner's employment with respondent on December 13, 2010. The Arbitrator considered the following facts in reaching this decision.

The parking lot was owned and maintained by respondent. Although it was used by the public occasionally, it was mainly used by employees as it was adjacent to respondent's administrative office where petitioner and the other employees worked. For this reason, the Arbitrator finds petitioner was in the course of her employment when she slipped and fell on December 13, 2010.

The other issue considered by the Arbitrator was whether the accident arose out of the petitioner's employment with respondent. The Arbitrator notes the parking lot was maintained by respondent. It was not a natural accumulation of ice and snow as respondent had plowed and salted the parking lot. The Arbitrator also notes petitioner's testimony that the firefighters, who came to petitioner's rescue, were also slipping. The facts as presented indicate petitioner was exposed to a risk greater than that of the general public and thus her injury arose out of her employment with respondent.

Therefore, the Arbitrator finds petitioner was injured in an accident which arose out of and in the course of her employment with respondent on December 13, 2010.

**In support of the Arbitrator's decision with regard to whether Petitioner's present condition of ill-being is causally related to the injury, the Arbitrator makes the following finding:**

As a result of the work accident, the Arbitrator finds petitioner sustained a sprained left ankle, that had resolved, and an injury to her right knee. Dr. Dworsky determined that although petitioner had pre-existing severe tricompartmental degenerative changes she also had a lateral meniscal tear that was acute. Dr. Earman found petitioner had a possible lateral meniscal tear, but it appeared to be asymptomatic as of June 7, 2011.

Based upon the foregoing, the Arbitrator finds petitioner sustained a tear of the lateral meniscus and a resolved sprained ankle as a result of the work accident of December 13, 2010.

**In support of the Arbitrator's decision with regard to the medical bills incurred, the Arbitrator finds the following:**

The Arbitrator, having found in favor of petitioner on the liability and as there does not appear there are any issues on the reasonableness and necessity of the medical treatment rendered, awards the following bills, to be paid in accordance with §8 and 8.2:

Manhattan F.P.D $950.00

Silver Cross Hospital -$1,330.45

Associated Radiologists - $37.00

EM Strategies LTD $419.00

Hinsdale Orthopaedics $298.00

Orthospine Center $80.00

Prescriptions $37.48

**In support of the Arbitrator's decision with regard to the nature and extent of injury, the Arbitrator finds the following:**

Petitioner sustained a sprained ankle that had resolved. Her treating physician, Dr. Dworsky, found petitioner had a torn lateral meniscus in petitioner's right knee which requires arthroscopic surgery. Although petitioner has been reluctant to have the surgery, the condition remains. The Arbitrator therefore finds petitioner's work injury has resulted in a 15% loss of use of the right leg, and awards 32.25 weeks permanent partial disability at $253.00 per week pursuant to §8 (e) 12 of the Act.

# ILLINOIS WORKERS' COMPENSATION COMMISSION
## NOTICE OF ARBITRATOR DECISION
CORRECTED

**SMITH, CHER**
Employee/Petitioner

Case# **11WC019917**

**17IWCC0462**

**MANHATTAN PARK DISTRICT**
Employer/Respondent

On 6/13/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.43% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2122 McNAMARA PHELAN McSTEEN LLC
RON S FLADHAMMER
3601 McDONOUGH ST
JOLIET, IL 60431

0507 RUSIN & MACIOROWSKI LTD
LINDSAY A BEACH
10 S RIVERSIDE PLZ SUITE 1925
CHICAGO, IL 60606

/api.js'>

Conr

Case

Cour

11 019917

SMITH, CHER A — NEW LENOX VILLAGE HALL

MANHATTAN PARK DISTRICT — 1 VETERANS PARKWAY

NEW LENOX — NEW LENOX IL 60451

ORY, CHRISTINE — 12/11/10

BRENNAN, MICHAEL — 05/24/11

LEG(S) RIGHT

MCNAMARA PHELAN MCSTEEN LLC — RUSIN MACIOROWSKI & FRIEDMAN L

3601 MCDONOUGH STREET — 10 S RIVERSIDE PLAZA

SUITE 1530

JOLIET IL 60431 — CHICAGO IL 60606

CC SUMMONS BY PET — WILL 0017MR2144

08/08/17

FOR INFORMATION ON SETTLEMENTS/AWARDS, CLICK WHITE BUTTON "MORE INFO."

QUESTIONS? CONTACT US AT 866/352-3033 OR INFOQUESTIONS.WCC@ILLINOIS.GOV.

/api.js'>

07:57:10 CASE DOCKET---ICDW

Conr

*** YOU MUST ENTER CASE NUMBER; TO INQUIRE PRESS ENTER ***

Case

Cour

CASE # 15 WC 003170

HEARING LOCATION

| | | |
|---|---|---|
| EMPLOYEE | HOFFMAN, MARK | IWCC OFFICE |
| EMPLOYER | ADVANCE MECHANICAL SYSTEMS INC | 100 W RANDOLPH ST STE 8-200 |
| SETTING | CHICAGO | CHICAGO IL 60601 |
| ARBITRATOR | MASON, MOLLY | ACCIDENT DATE 01/26/15 |
| COMMISSIONER | LUSKIN, JOSHUA | CASE FILED 01/30/15 |
| BODY PART | MULTIPLE PARTS N/A | |

| EMPLOYEE ATTORNEY | EMPLOYER ATTORNEY |
|---|---|
| CULLEN HASKINS NICHOLSON | MEACHUM & STARCK |
| AND MENCHETTI PC | 225 W WASHINGTON |
| 10 S. LASALLE SUITE 1250 | SUITE 500 |
| CHICAGO IL 60603 | CHICAGO IL 60606 |

STATUS ARBITRATION DECISION RENDERED

DECISION DATE 05/08/17

FOR INFORMATION ON SETTLEMENTS/AWARDS, CLICK WHITE BUTTON "MORE INFO."

QUESTIONS? CONTACT US AT 866/352-3033 OR INFOQUESTIONS.WCC@ILLINOIS.GOV.

/api.js'>

07:58:24 CASE DOCKET---ICDW

Conr

*** YOU MUST ENTER CASE NUMBER; TO INQUIRE PRESS ENTER *** Case

Cour

CASE # 15 WC 027577 HEARING LOCATION

| | | |
|---|---|---|
| EMPLOYEE | BUMPHUS, JOHN D. JR. | IWCC OFFICE |
| EMPLOYER | UNIQUE PERSONNEL CONSULTANTS | 1803 RAMADA BLVD, SUITE B201 |
| SETTING | COLLINSVILLE | COLLINSVILLE IL 62234 |
| ARBITRATOR | ROWE-SULLIVAN, MELIN | ACCIDENT DATE 07/17/15 |
| COMMISSIONER | BRENNAN, MICHAEL | CASE FILED 08/27/15 |
| BODY PART | TO BE SHOWN N/A | |

EMPLOYEE ATTORNEY

N. A.

EMPLOYER ATTORNEY

HENNESSY & ROACH, PC

415 NORTH 10TH STREET

SUITE 200

ST LOUIS MO 63101

STATUS CC SUMMONS BY PET MADISON 0017MR0187

SUMMONS DATE 06/08/17

FOR INFORMATION ON SETTLEMENTS/AWARDS, CLICK WHITE BUTTON "MORE INFO."

QUESTIONS? CONTACT US AT 866/352-3033 OR INFOQUESTIONS.WCC@ILLINOIS.GOV.

/api.js'>

08:01:19 CASE DOCKET---ICDW

Conr

*** YOU MUST ENTER CASE NUMBER; TO INQUIRE PRESS ENTER *** Case

Cour

CASE # 14 WC 041248 CONNECTED HEARING LOCATION

EMPLOYEE GAYTAN, NICOLASA 201 E MERCHANT ST PUBLIC LIB

EMPLOYER FLANDERS PRECISIONAIRE 4TH FLOOR AUDITORIUM

SETTING KANKAKEE KANKAKEE IL 60901

ARBITRATOR FALCIONI, ROBERT ACCIDENT DATE 12/01/14

COMMISSIONER LUSKIN, JOSHUA CASE FILED 12/08/14

BODY PART MULTIPLE PARTS N/A

| EMPLOYEE ATTORNEY | EMPLOYER ATTORNEY |
|---|---|
| BRISKMAN BRISKMAN GREENBERG | SMITH AMUNDSEN LLC |
| 351 WEST HUBBARD | 150 N MICHIGAN AVE |
| SUITE 810 | SUITE 3300 |
| CHICAGO IL 60654 | CHICAGO IL 60601 |

STATUS CC SUMMONS BY PET KANKAKEE 00017MR406

SUMMONS DATE 06/23/17

FOR INFORMATION ON SETTLEMENTS/AWARDS, CLICK WHITE BUTTON "MORE INFO."

QUESTIONS? CONTACT US AT 866/352-3033 OR INFOQUESTIONS.WCC@ILLINOIS.GOV.

/api.js'>

08:02:25 CASE DOCKET---ICDW

Conr

*** YOU MUST ENTER CASE NUMBER; TO INQUIRE PRESS ENTER *** Case

Cour

CASE # 10 WC 036348 HEARING LOCATION

EMPLOYEE SKOREPA, TIMOTHY IWCC OFFICE

EMPLOYER BERWYN PARK DISTRICT 100 W RANDOLPH ST STE 8-200

SETTING CHICAGO CHICAGO IL 60601

ARBITRATOR KANE, DAVID ACCIDENT DATE 08/21/10

COMMISSIONER SIMPSON, DEBORAH CASE FILED 09/22/10

BODY PART LEG(S) LEFT

| EMPLOYEE ATTORNEY | EMPLOYER ATTORNEY |
|---|---|
| FOHRMAN, DONALD W & ASSOCS | POWER & CRONIN LTD |
| 101 W GRAND AVE | 900 COMMERCE DRIVE |
| SUITE 500 | SUITE 300 |
| CHICAGO IL 60610 | OAKBROOK IL 60523 |

STATUS CC SUMMONS BY RESP COOK 0017L50489

SUMMONS DATE 05/24/17

FOR INFORMATION ON SETTLEMENTS/AWARDS, CLICK WHITE BUTTON "MORE INFO."

QUESTIONS? CONTACT US AT 866/352-3033 OR INFOQUESTIONS.WCC@ILLINOIS.GOV.

/api.js'>

08:02:58 CASE DOCKET---ICDW

Conr

*** YOU MUST ENTER CASE NUMBER; TO INQUIRE PRESS ENTER *** Case

Cour

CASE # 14 WC 030155 HEARING LOCATION

EMPLOYEE OLZEWKSI, KEN LAKE COUNTY COURTHOUSE

EMPLOYER CITY OF HIGHLAND PARK 18 N COUNTY, JURY ASSEMBLY RM

SETTING WAUKEGAN WAUKEGAN IL 60085

ARBITRATOR GLAUB, MICHAEL ACCIDENT DATE 07/31/14

COMMISSIONER GORE, DAVID CASE FILED 09/08/14

BODY PART ARM(S) & SHOULDER(S LEFT

| EMPLOYEE ATTORNEY | EMPLOYER ATTORNEY |
|---|---|
| OWENS & LAUGHLIN LLC | POWER & CRONIN LTD |
| 9 W CRYSTAL LAKE ROAD | 900 COMMERCE DRIVE |
| SUITE 205 | SUITE 300 |
| LK IN THE HILLS IL 60156 | OAKBROOK IL 60523 |

STATUS REMANDED-ARB

| | | | | | | |
|---|---|---|---|---|---|---|
| STATUS CALL | FIRST | 11/21/14 | LAST | 02/16/18 | NEXT | 05/18/18 |
| REVIEW | FIRST | 00/00/00 | LAST | 00/00/00 | NEXT | 00/00/00 |
| RETURN | FIRST | 11/18/16 | LAST | 00/00/00 | NEXT | 11/18/16 |
| ORAL | FIRST | 02/23/17 | LAST | 00/00/00 | NEXT | 02/23/17 |

FOR INFORMATION ON SETTLEMENTS/AWARDS, CLICK WHITE BUTTON "MORE INFO."

QUESTIONS? CONTACT US AT 866/352-3033 OR INFOQUESTIONS.WCC@ILLINOIS.GOV.

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08:04:36 CASE DOCKET---ICDW

Conr

*** YOU MUST ENTER CASE NUMBER; TO INQUIRE PRESS ENTER *** Case

Cour

CASE # 14 WC 035831 HEARING LOCATION

EMPLOYEE DIXON, VERNELL IWCC OFFICE

EMPLOYER CHICAGO TRANSIT AUTHORITY 100 W RANDOLPH ST STE 8-200

SETTING CHICAGO CHICAGO IL 60601

ARBITRATOR THOMPSON-SMITH, LYNE ACCIDENT DATE 06/23/16

COMMISSIONER COPPOLETTI, ELIZABET CASE FILED 10/21/14

BODY PART NECK & BACK N/A

| EMPLOYEE ATTORNEY | EMPLOYER ATTORNEY |
|---|---|
| MICHAEL A. HIGGINS | CHICAGO TRANSIT AUTHORITY |
| 6204 W. 63RD STREET | J BARRETT LONG |
| | 567 WEST LAKE STREET |
| CHICAGO IL 60638 | CHICAGO IL 60661 |

STATUS COMMISSION DECISION RENDERED

DECISION DATE 05/26/17

FOR INFORMATION ON SETTLEMENTS/AWARDS, CLICK WHITE BUTTON "MORE INFO."

QUESTIONS? CONTACT US AT 866/352-3033 OR INFOQUESTIONS.WCC@ILLINOIS.GOV.

/api.js'>

08:05:32 CASE DOCKET---ICDW

Conr

*** YOU MUST ENTER CASE NUMBER; TO INQUIRE PRESS ENTER ***

Case

Cour

CASE # 15 WC 029725 HEARING LOCATION

| | | |
|---|---|---|
| EMPLOYEE | POWELL, RICHARD | ADAMS COUNTY COURTHOUSE |
| EMPLOYER | MANCHESTER TANK & EQUIPMENT CO | 521 VERMONT ST, ROOM 2D |
| SETTING | QUINCY | QUINCY IL 62301 |
| ARBITRATOR | PULIA, MAUREEN | ACCIDENT DATE 04/08/15 |
| COMMISSIONER | TYRRELL, THOMAS J | CASE FILED 09/14/15 |
| BODY PART | WHOLE BODY N/A | |

| EMPLOYEE ATTORNEY | EMPLOYER ATTORNEY |
|---|---|
| RIDGE & DOWNES LLC | STEPHEN P. KELLY |
| 415 N E JEFFERSON AVE | 2710 N. KNOXVILLE |
| PEORIA IL 61603 | PEORIA IL 61604 |

STATUS REMANDED-ARB

| | | | | | | |
|---|---|---|---|---|---|---|
| STATUS CALL | FIRST | 12/02/15 | LAST | 00/00/00 | NEXT | 03/07/18 |
| REVIEW | FIRST | 00/00/00 | LAST | 00/00/00 | NEXT | 00/00/00 |
| RETURN | FIRST | 10/21/16 | LAST | 00/00/00 | NEXT | 10/21/16 |
| ORAL | FIRST | 02/06/17 | LAST | 00/00/00 | NEXT | 02/06/17 |

FOR INFORMATION ON SETTLEMENTS/AWARDS, CLICK WHITE BUTTON "MORE INFO."

QUESTIONS? CONTACT US AT 866/352-3033 OR INFOQUESTIONS.WCC@ILLINOIS.GOV.

/api.js'>

08:06:18 CASE DOCKET---ICDW

Conr

*** YOU MUST ENTER CASE NUMBER; TO INQUIRE PRESS ENTER *** Case

Cour

CASE # 09 WC 036001 HEARING LOCATION

EMPLOYEE AVDIS, IOANNIS (WIDOW)OF IWCC OFFICE

EMPLOYER NORTH PARK UNIVERSITY 100 W RANDOLPH ST STE 8-200

SETTING CHICAGO CHICAGO IL 60601

ARBITRATOR MASON, MOLLY ACCIDENT DATE 02/06/09

COMMISSIONER SIMPSON, DEBORAH CASE FILED 08/28/09

BODY PART BACK N/A

| EMPLOYEE ATTORNEY | EMPLOYER ATTORNEY |
|---|---|
| GALLIANNI DOELL & COZZI LTD | ASHER, RAYMOND L LTD |
| 20 N CLARK ST | 200 W JACKSON BLVD |
| 18TH FLOOR | SUITE 1050 |
| CHICAGO IL 60602 | CHICAGO IL 60606 |

STATUS SETTLEMENT CONTRACT APPROVED

SETTLEMENT DATE 08/07/17

FOR INFORMATION ON SETTLEMENTS/AWARDS, CLICK WHITE BUTTON "MORE INFO."

QUESTIONS? CONTACT US AT 866/352-3033 OR INFOQUESTIONS.WCC@ILLINOIS.GOV.

/api.js'>

08:07:10 CASE DOCKET---ICDW

Conr

Case

Cour

*** YOU MUST ENTER CASE NUMBER; TO INQUIRE PRESS ENTER ***

CASE # 15 WC 014703

| | | | |
|---|---|---|---|
| | | HEARING LOCATION | |
| EMPLOYEE | SIMMONS, TIMOTHY E. | IWCC OFFICE | |
| EMPLOYER | CINTAS FIRE PROTECTION | 100 W RANDOLPH ST STE 8-200 | |
| SETTING | CHICAGO | CHICAGO | IL 60601 |
| ARBITRATOR | KANE, DAVID | ACCIDENT DATE 03/03/15 | |
| COMMISSIONER | LUSKIN, JOSHUA | CASE FILED 05/01/15 | |
| BODY PART | MULTIPLE PARTS N/A | | |

| EMPLOYEE ATTORNEY | EMPLOYER ATTORNEY |
|---|---|
| CULLEN HASKINS NICHOLSON | POWER & CRONIN LTD |
| AND MENCHETTI PC | 900 COMMERCE DRIVE |
| 10 S. LASALLE SUITE 1250 | SUITE 300 |
| CHICAGO IL 60603 | OAKBROOK IL 60523 |

STATUS COMMISSION DECISION RENDERED

DECISION DATE 05/31/17

FOR INFORMATION ON SETTLEMENTS/AWARDS, CLICK WHITE BUTTON "MORE INFO."

QUESTIONS? CONTACT US AT 866/352-3033 OR INFOQUESTIONS.WCC@ILLINOIS.GOV.

/api.js'>

08:07:57 CASE DOCKET---ICDW

Conr

*** YOU MUST ENTER CASE NUMBER; TO INQUIRE PRESS ENTER *** Case

Cour

CASE # 15 WC 028154 HEARING LOCATION

EMPLOYEE GRADY, MARK GOVERNMENT CENTER

EMPLOYER CITY OF BLOOMINGTON 115 E WASHINGTON ST, LOWER LEV

SETTING BLOOMINGTON BLOOMINGTON IL 61701

ARBITRATOR GALLAGHER, WILLIAM ACCIDENT DATE 01/05/15

COMMISSIONER LUSKIN, JOSHUA CASE FILED 08/26/15

BODY PART MULTIPLE PARTS N/A

| EMPLOYEE ATTORNEY | EMPLOYER ATTORNEY |
|---|---|
| WILLIAMS & SWEE | BRADY, CONNOLLY & MASUDA, PC |
| 2011 FOX CREEK RD | 211 LANDMARK DRIVE |
| | SUITE C2 |
| BLOOMINGTON IL 61701 | NORMAL IL 61761 |

STATUS COMMISSION DECISION RENDERED

DECISION DATE 04/13/17

FOR INFORMATION ON SETTLEMENTS/AWARDS, CLICK WHITE BUTTON "MORE INFO."

QUESTIONS? CONTACT US AT 866/352-3033 OR INFOQUESTIONS.WCC@ILLINOIS.GOV.

/api.js'>

08:09:55 CASE DOCKET---ICDW

Conr

Case

Cour

*** YOU MUST ENTER CASE NUMBER; TO INQUIRE PRESS ENTER ***

CASE # 10 WC 000629

HEARING LOCATION

EMPLOYEE BROCK, ROBERT H

CIVIC CENTER

EMPLOYER CENTURION INDUSTRIES INC

101 S 16TH STREET

SETTING HERRIN

HERRIN IL 62948

ARBITRATOR GALLAGHER, WILLIAM

ACCIDENT DATE 12/18/09

COMMISSIONER LAMBORN, KEVIN

CASE FILED 01/08/10

BODY PART WHOLE BODY N/A

EMPLOYEE ATTORNEY

KEEFE & DEPAULI

#2 EXECUTIVE DR

FAIRVIEW HTS IL 62208

EMPLOYER ATTORNEY

PAUL A COGHLAN & ASSOC

15 SPINNING WHEEL ROAD

SUITE 100

HINSDALE IL 60521

STATUS REMANDED-ARB

| | | | | | | |
|---|---|---|---|---|---|---|
| STATUS CALL | FIRST | 01/14/13 | LAST | 01/08/18 | NEXT | 04/09/18 |
| REVIEW | FIRST | 00/00/00 | LAST | 00/00/00 | NEXT | 00/00/00 |
| RETURN | FIRST | 12/02/16 | LAST | 00/00/00 | NEXT | 12/02/16 |
| ORAL | FIRST | 12/14/10 | LAST | 12/14/10 | NEXT | 03/14/17 |

FOR INFORMATION ON SETTLEMENTS/AWARDS, CLICK WHITE BUTTON "MORE INFO."

QUESTIONS? CONTACT US AT 866/352-3033 OR INFOQUESTIONS.WCC@ILLINOIS.GOV.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Mark Hoffman,
Petitioner,

vs.

NO: 15 WC 03170

17IWCC0298

Advanced Mechanical Systems, Inc.,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, wage rate, medical expenses, prospective medical expenses, and employer-employee relationship and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 9, 2015 is hereby affirmed and adopted.

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

17IWCC0298

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $22,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 8 - 2017

Joshua D. Luskin

o-04/12/17
jdl/wj
68

Charles J. DeVriendt

DISSENT

"Proof that a relationship of employer-employee existed at the time of the accident is an essential element of an award under the Workmen's Compensation Act. [citation omitted]." *Alexander v. The Industrial Commission*, 72 Ill. 2d 444, 448, 381 N.E.2d 669 (1978). "A contract for hire is made where the last act necessary for the formation of the contract occurred. [citations omitted]." *Cowger v. The Industrial Commission*, 313 Ill. App. 3d 364, 370, 728 N.E.2d 789 (2000). The majority in adopting the decision of the arbitrator finding the employment relationship was established when Petitioner arrived at the Arlington Height's headquarters disregards the evidence in the record- Petitioner's employment was conditioned on his ability to 1) pass a drug test, and 2) report to the job site. Further assuming *arguendo* an employment contract was formed after Petitioner presented to Clinical Reference Laboratory for drug testing, "[t]his court has repeatedly held that 'when an employee slips and falls, or is otherwise injured, at a point off the employer's premises while traveling to or from [*484] work, his injuries are not compensable [internal citations omitted].'" *Illinois Bell Telephone Company v. The Industrial Commission*, 131 Ill. 2d 478, 483-4, 546 N.E.2d 603 (1989). Two exceptions exist: 1) falls on parking lots owned, maintained, or controlled by an employer; and 2) an employee is required to be at a certain location in the performance of his job duties where he is exposed to a risk common to the general public but to a larger degree. *Id.* at 484. Neither of these exceptions is applicable. Lastly, Petitioner is not a traveling employee as his job duties did not require him to travel away from the Respondent's premises. *The Venture-Newberg-Perini, Stone & Webster v. The Illinois Workers' Compensation Commission*, 2013 IL 115728. Accordingly, I respectfully dissent.

17IWCC0298

The last act necessary for the formation of the employment contract was Petitioner's presentation at the job site. Petitioner testified on Monday, January 26, 2015, he traveled to Arlington Heights where he participated in safety training, filed out forms, and was provided with safety equipment- a hard hat and glasses. T. 22-23. Following the completion of the safety training, Petitioner testified Mr. Bill Murray provided Petitioner with the address of his assigned job site in downtown Chicago as well as the address for the drug testing facility as a drug test was required prior to commencing work i.e. a job offer. T. 25. Mr. Brian Murray testified consistently with Petitioner regarding the necessity of a drug test and passing the same before any job offer would be extended. T. 81, 97. Additionally Mr. Murray testified Petitioner was required to report to the job site before wages would be paid. T. 108.

For a contract to form there must be a meeting of the minds and mutual acceptance by both parties. "'To be valid, an acceptance must be objectively manifested, for otherwise no meeting of the minds would occur.'" Citing *Rosin v. First Bank,* 126 Ill. App. 3d 230 (1984), *Energy Erectors Ltd. v. The Industrial Commission*, 230 Ill. App. 3d 158, 162, 595 N.E.2d 641 (1992). Petitioner testified during his initial conversation with Mr. Murray, he advised Mr. Murray he did not want the job. T. 21. It logically follows Petitioner's acceptance of the job and the formation of an employment contract would occur when he presented himself to the job site. How else would there be a meeting of the minds. As the Court noted in *Energy Erectors Ltd.*, "[t]he respondent as offeror had no way of knowing that John had accepted the offer for employment until he showed up at the job site." *Id.* Given Petitioner's failure to present at the job site, the last act necessary for the formation of an employment contract did not occur. As such no employer/employee relationship exists.

Even assuming *arguendo* the last act necessary was the passing of the drug test, such act occurred after Petitioner's fall. Petitioner testified he could not recall if he was advised of the results of the drug test at the time of testing. T.26. Mr. Murray testified the results were sent via email or a call was made the same day. T. 82, 93. Mr. Murray testified he did not actively look for the results on January 26, 2015 given Petitioner's fall and his inability to report to work. T. 99. Mr. Murray testified he was aware of the negative test results the following day. T. 99. At best the employment contract was binding on January 26, 2015 when Mr. Murray received the test results by email and at worst the next day. In either case the employment contract was formed after Petitioner's fall.

Even assuming *arguendo* an employer/employee relationship existed at the time of Petitioner's fall, Petitioner failed to prove he sustained an accident which arose out of or in the course of his employment. Again as a general rule accidents which occur on an employee's commute to or from work are not compensable. *Illinois Bell Telephone Company v. The Industrial Commission*, 131 Ill. 2d 478, 483-4, 546 N.E.2d 603 (1989). The courts recognize two exceptions: 1) falls on parking lots owned, maintained, or controlled by an employer; and 2) an employee is required to be at a certain location in the performance of his job duties where he is exposed to a risk common to the general public but to a larger degree. *Id.* The first exception is not applicable. Petitioner fell while leaving the facility where the drug testing occurred which is not the Respondent's premises. T. 40. As for the second exception, it too is not applicable. "This court has held, however, that 'the mere fact that the duties take the employee to the place of the injury and that, but for the employment, [s]he would not have been there, is not, [*486] of itself, sufficient to give rise to the right to compensation.'" *Id.* at 485-68 quoting *Caterpillar*

17IWCC0298

*Tractor Company v. The Industrial Commission*, 129 Ill. 2d. 52, 62 (1989). Illinois is not a positional risk state. *Brady v. Louis Ruffolo & Sons Construction Company*, 143 Ill. 2d. 542, 578 N.E.2d 921 (1991).

The exception requires Petitioner to be in performance of his job duties. Petitioner is a union pipefitter whose first interaction with the Respondent was on January 26, 2015. T. 14-15, 55. A pipefitter as briefly defined by the area agreement is one who participates in "[t]he handling, setting, moving, fabricating, assembling, installation, maintenance, repair and service of all piping systems and their associated equipment used for the transfer of heat, fluids, solids, chemicals or gases." RX1, p.11. The agreement continues on to provide an exhaustive explanation of the duties of a pipefitter. RX1, p. 11-12. Petitioner's job duties as a pipefitter did not require his presence at the public area where he fell. Moreover, the facts fail to establish Petitioner was exposed to a risk greater than the general public. Petitioner was leaving a medical clinic when he slipped and fell on an icy sidewalk. The general public was exposed to the exact same risk.

Further the majority's reliance on *Bolingbrook Police Department* is misplaced. In *Bolingbrook Police Department v. The Illinois Workers' Compensation Commission*, 2015 IL App (3d) 130869WC, a police officer injured his lower back while lifting his duty bag at home. The court reasoned the officer as part of his employment duties was required to secure his duty bag whether it is at work or at home. As such lifting the duty bag was an employment risk which directly arose out of his employment. Further given the sensitive nature of a duty bag which contains live ammunition and other potentially dangerous equipment which could pose a hazard to public safety coupled with the claimant's belief he was required to keep his duty bag on his person, such injury occurred in the course of his employment. Neither the facts nor the holding is applicable to the present matter. Petitioner was a union pipefitter who fell on a public sidewalk on his commute to his job site, again assuming *arguendo* an employment contract exists.

Lastly assuming *arguendo* an employment contract exists, Petitioner is not a traveling employee. A traveling employee is one "whose employment duties require travel away from the work site. [citation omitted]." *Lee v. The Industrial Commission*, 167 Ill. 2d 77, 81, 656 N.E.2d 1084 (1995). As detailed above, Petitioner's job duties did not require his travel nor did his job duties require him to leave the job site. Petitioner is a pipefitter who was to be assigned to a job site in Chicago. He simply is not a traveling employee.

For the reasons set forth above, I conclude Petitioner is not entitled to benefits under the Act as no employer/employee relationship existed at the time of his fall. As such I would reverse the decision of the arbitrator. Accordingly, I dissent.

L. Elizabeth Coppoletti

L. Elizabeth Coppoletti

# ILLINOIS WORKERS' COMPENSATION COMMISSION
# NOTICE OF ARBITRATOR DECISION

**HOFFMAN, MARK**
Employee/Petitioner

Case# **15WC003170**
15WC015877

**ADVANCE MECHANICAL**
Employer/Respondent

17IWCC0298

On 12/9/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.53% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0598 LUSAK AND COBB
JOHN E LUSAK
221 N LASALLE ST SUITE 1700
CHICAGO, IL 60601

1596 MEACHUM STARCK BOYLE & TRAFMAN
MICHAEL D SPINAZZOLA
225 W WASHINGTON ST SUITE 500
CHICAGO, IL 60606

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

**Mark Hoffman**
Employee/Petitioner

v.

**Advance Mechanical**
Employer/Respondent

Case # 15 WC 3170

Consolidated cases: 15 WC 15877

17IWCC0298

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Arbitrator Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **October 27, 2015 and November 19, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

**FINDINGS**

On the date of accident, 1/26/2015, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

Petitioner established causation as to the need for the treatment provided by Dr. Rhode but did not establish causation as to any current condition of ill-being.

Petitioner's average weekly wage was $1,840.00.

On the date of accident, Petitioner was **40** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of $**0.00** 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**

Respondent shall pay Petitioner reasonable and necessary medical expenses in the amount of $2,800.19 (Orland Park Orthopaedics/Dr. Rhode), subject to the fee schedule. PX 1. The other claimed medical expenses are denied, for the reasons set forth in the attached decision.

Respondent shall pay Petitioner temporary total disability benefits in the amount of $1,226.67 per week from January 28, 2015 through May 17, 2015, a period of 15 5/7 weeks, pursuant to Section 8(b) of the Act.

For the reasons set forth in the attached decision, the Arbitrator awards no permanency benefits.

**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.

Molly C Mason

Signature of Arbitrator

12/9/15
Date

ICArbDec19(b)

DEC 9 - 2015

17IWCC0298

Mark Hoffman v. Advance Mechanical Systems, Inc.
15 WC 3170 and 15 WC 15877 (consolidated)

**Procedural Note**

Both of Petitioner's claims allege a work accident of January 26, 2015. The Arbitrator granted Respondent's motion to consolidate on October 27, 2015, the date of hearing.

Because the claims are duplicate filings, the Arbitrator issues only one decision.

**Summary of Disputed Issues**

The threshold issue is employment.

Petitioner, a union pipefitter, alleges he received a job offer from Respondent via telephone on Friday, January 23, 2015 and underwent safety training, signed a W2 and received a work assignment at Respondent's offices on the morning of Monday, January 26, 2015. Petitioner further alleges he sustained a compensable work accident when he fell later the same morning, after exiting a facility in Elk Grove Village where he underwent required drug testing and while embarking on his trip to the assigned Chicago jobsite.

**Arbitrator's Findings of Fact**

Petitioner testified he was working at a power plant (for a company other than Respondent) on Friday, January 23, 2015, when he received a voice mail message on his cell phone. Petitioner testified the message was from Bill Murray, Respondent's shop superintendent, who stated, "I have an offer for you – give me a call." Petitioner testified he promptly returned the call and spoke with Murray, who offered him a job and told him to come in on Monday morning. Petitioner testified he told Murray he did not want to leave his current job. Murray replied, "if you want a job, be there by 6:30 AM on Monday."

have also signed a form acknowledging he attended a safety meeting.

participants they had to undergo drug testing before going to the jobsite. Murray provided them with the address of the testing facility.

17IWCC0298

Petitioner testified he left Respondent's shop at about 8:00 AM on January 26, 2015. He went to the drug testing facility. Petitioner identified PX 3 as a document showing that the facility was Alexian Brothers in Elk Grove Village. At the facility, Petitioner provided his identification and a urine sample.

PX 3 is a Clinical References Laboratory "on-site custody and control/result form." PX 3 lists "Advance" as the employer and Petitioner as the donor. The stated reason for the test is "pre-employment." The time of the analysis is shown as 08:57 on January 26, 2015. The form reflects that the urine specimen was released to "onsite analysis" as opposed to "short term storage." The test results are described as "negative."

Petitioner testified his accident occurred shortly after he and a co-worker exited the drug testing facility. The weather at that time was very cold. There were large amounts of snow and ice on the ground.

Petitioner testified he was about eight to ten steps away from the facility when his feet flew out from underneath him. He fell backward, initially striking his head and then his neck and lower back. He acknowledged there were no cracks or defects in the sidewalk. He was wearing construction boots at the time of the accident. He had had to exercise caution and walk slowly when he entered the facility, earlier that morning, but he had managed to stay on his feet.

Petitioner testified he felt "electricity" in his head after he landed. He was wheeled back into the facility. Personnel at the facility took his vital signs and called an ambulance. Paramedics transported him to the Emergency Room at Alexian Brothers Medical Center.

Petitioner testified he gave a history of the accident at the Emergency Room. He told his providers he fell on snow and ice.

Petitioner did not offer the Emergency Room records into evidence.

Petitioner testified he tried to reach Murray via telephone while he was at the Emergency Room. He wanted to ask Murray for a ride back to the drug testing facility because his car was parked there. Murray did not respond. Petitioner testified he eventually took a taxi back to the facility and drove home from there. At that point, he felt disoriented. He had a lump on his head and was having trouble turning his head.

Petitioner testified he called Murray two days later. Murray identified himself and asked Petitioner whether he would be returning to work in a day or two. Petitioner said no and indicated he was going to see a doctor later that week.

Petitioner testified he saw Dr. Rhode after the accident. He obtained the doctor's name from the telephone book.

Dr. Rhode's records reflect that Petitioner saw the doctor's assistant, Mark Bordick, P.A. [hereafter "Bordick"], on Wednesday, January 28, 2015. Bordick's note reflects that Petitioner complained of pain in his head, neck and back secondary to a slip and fall occurring two days earlier. Bordick noted that Petitioner reported slipping on a sidewalk and striking his head, neck and back after undergoing a "new employee screening" and a drug test. On initial neck examination, Bordick noted a limited active range of motion and negative Spurling's testing. On initial back examination, Bordick noted pain over the paraspinal muscles, a limited active range of motion and negative bilateral straight leg raising. Bordick noted that Petitioner provided reports concerning the head and neck CT scans he had undergone in the hospital. According to Bordick, the head CT showed no significant acute findings and the neck CT showed no fracture and a mild dextroscoliosis.

Bordick prescribed Flexeril and Norco. He took Petitioner off work and directed him to return in two days. PX 1.

Petitioner returned to Dr. Rhode's office on Friday, January 30, 2015 and again saw Bordick. Bordick noted a complaint of persistent daily headaches. His examination findings were unchanged. He recommended a course of physical therapy, ordered lumbar spine X-rays and directed Petitioner to remain off work. PX 1.

Petitioner underwent an initial physical therapy evaluation on February 3, 2015. The evaluating therapist noted complaints of non-radiating lower back pain, right worse than left, bilateral neck pain and associated headaches. He recommended that Petitioner attend therapy twice weekly for six weeks. PX 1.

Petitioner began attending therapy on a regular basis thereafter. PX 1.

Petitioner saw Dr. Rhode on February 20, 2015. The doctor noted improvement but indicated Petitioner expressed concern about an "indentation in his posterior skull where he impacted." He refilled Petitioner's medication and recommended he see his primary care physician "about the calcifications." PX 1.

Petitioner saw Dr. Rhode on March 9, 2015, with the doctor noting complaints referable to the head, neck, back and right lateral thigh. On lumbar spine examination, the doctor noted positive straight leg raising on the right. He prescribed Ultram and a lumbar spine MRI. PX 1.

The lumbar spine MRI, performed on March 11, 2015, showed a degenerative bulging disc and facet arthropathy at L3-L4, a degenerative bulging/protruding disc and facet degeneration at L4-L5 and a degenerative bulging disc with right foraminal protrusion accompanying marginal spurs and facet degeneration at L5-S1 with moderate right foraminal encroachment. PX 1.

On March 16, 2015, Dr. Rhode noted that Petitioner was still experiencing pain in his back, neck and right lateral thigh. On lumbar spine examination, he noted positive straight leg

raising on the right. After reviewing the MRI, he recommended an epidural injection and directed Petitioner to remain off work. PX 1.

On April 14, 2015, Dr. Rhode performed an epidurograph and a transforaminal lumbar epidural steroid injection on the right at L5-S1. PX 1.

Petitioner attended additional therapy sessions between April 21 and May 6, 2015. On May 6, 2015, the therapist indicated Petitioner remained symptomatic but was making "significant gains toward goals." PX 1.

On May 6, 2015, Bordick noted that Petitioner reported improvement of his leg pain following the injection but was still experiencing lateral back pain to the right. Bordick recommended that Petitioner continue therapy and remain off work. PX 1.

On May 15, 2015, Bordick noted that Petitioner had improved and wanted to return to work. He released Petitioner to full duty on a trial basis as of May 18, 2015. He recommended that Petitioner continue performing home exercises. PX 2.

Petitioner returned to Dr. Rhode on June 12, 2015. The doctor's note reflects that Petitioner returned to full duty "due to financial necessity." On cervical spine examination, the doctor noted pain over the bilateral paraspinous muscles and negative bilateral Spurling's testing. On lumbar spine examination, the doctor noted pain over the right lumbar paraspinal muscles and negative bilateral straight leg raising. He allowed Petitioner to continue full duty. PX 1.

Petitioner testified he eventually received three hours of pay for January 26, 2015. [PX 5 is a copy of a Respondent field payroll check stub dated March 19, 2015 reflecting a gross payment of $138.00 and a net payment of $118.87 for three hours worked. The hourly rate is described as $46.00. The pay period end date is designated as March 22, 2015.] Petitioner testified he never received any bills concerning his medical treatment. He directed his providers to send their bills to Liberty Mutual. He received no compensation other than the three hours of pay.

Petitioner testified he found the accident and its aftermath very difficult to deal with. He felt he had been mistreated after many years in the union. As of the hearing, he was "doing okay" and moving on with his life.

Petitioner testified his head, neck and lower back are now "fine." He is able to perform full duty.

**Under cross-examination,** Petitioner testified he spoke with Bill Beane, the business agent for his union, in late March or early April 2015. As of that point, he had not received any wages for January 26, 2015. The check he received for the three hours of pay was dated March 19, 2015. He has been a member of Local 597 for 21 years.

Petitioner could not recall the address or intersection of the jobsite that Murray directed him to on January 26, 2015. He did not work for Respondent on any other days. In May 2015, he began working for a different contractor, Chetny Mechanics. This contractor laid him off in August 2015. He applied for unemployment benefits on September 6, 2015. He did not claim any unemployment benefits from Respondent.

Petitioner testified he began working for his current employer, Hayes Mechanical, the Monday before the hearing.

Petitioner testified he has seen the collective bargaining agreement for Local 597. This agreement has been "around [his] family" for years. His father was a member of Local 597.

Petitioner acknowledged he never performed any installation work for Respondent. At the meeting held on the morning of January 26, 2015, Murray gave him a schedule indicating he would be working from 7 AM to 3:30 PM, Monday through Friday. On Tuesday, January 27, 2015, he called Respondent's shop and asked for Murray. He was put through to a woman. He did not call Respondent on Thursday, January 29, 2015. He had already spoken with Murray as of that date.

Petitioner testified he has not returned to Dr. Rhode. He reiterated that his head, neck and back are "fine."

**On redirect,** Petitioner testified that, on January 26, 2015, Murray gave him a piece of paper showing the address of the jobsite he was supposed to go to. He no longer has this piece of paper. When he talked with Murray on Wednesday, January 28th, Murray asked him if he was returning to work.

In addition to the exhibits previously discussed, Petitioner offered into evidence a two-page letter dated March 12, 2015 from the recording secretary of Local 597 to Petitioner's former counsel. In this letter, the recording secretary rendered an opinion as to whether Petitioner was Respondent's employee as of the accident. The Arbitrator sustained Respondent's hearsay and other objections to PX 2 and marked PX 2 as a rejected exhibit. Petitioner also offered into evidence a letter dated February 6, 2015 from Liberty Mutual Insurance Company to Petitioner (PX 4) referencing Petitioner's workers' compensation claim and advising Petitioner that his "employer" is participating in a Preferred Provider Program. The Arbitrator sustained Respondent's relevancy and hearsay objections to PX 4 and marked PX 4 as a rejected exhibit.

On the Request for Hearing form, Petitioner claimed bills from six medical providers. Of the enumerated bills, only the $2,800.19 bill from Dr. Rhode/Orland Park Orthopedics is in evidence. PX 1.

**Bill Murray** testified on behalf of Respondent. Murray testified he has worked for Respondent for 41 years. He has been a superintendent for the past 17 years. As a superintendent, he hires workers, runs the safety program and oversees labor at various jobsites. Before he became a superintendent, he worked as a foreman and general foreman. As a foreman, he ran smaller jobs.

Murray testified his job duties include hiring. He hires through the union hall and on his own. He has been a member of Local 597 for 41 years. Respondent faces a penalty if he fails to hire a certain percentage of employees through the union hall. He regularly transmits hiring and layoff paperwork to the union hall via E-mail.

Murray described Respondent as an HVAC contractor that works on commercial properties.

Murray testified he is familiar with a good portion of the collective bargaining agreement running between the union and contractors such as Respondent. He identified RX 1 as the area agreement dated June 1, 2015. He is familiar with the agreement that was in effect prior to June 1, 2015. He is not aware of there being any significant differences between the two agreements.

Murray testified that Respondent has a safety program. All Respondent employees are required to adhere to the safety rules of Respondent or the subcontractor, "whichever are more stringent." At a minimum, Respondent employees have to wear helmets at all times.

Murray testified that no Respondent hire can work until the results of his drug test are in. On some occasions, employees have attended a safety meeting and not gone to the drug testing facility. It is after an employee undergoes testing at the facility that he starts heading to the designated jobsite. Murray receives an employee's drug test results via E-mail from Karen in Respondent's accounting department. He usually receives these results before the worker show up at a jobsite. If a worker attends a safety meeting but does not undergo drug testing, he is not paid. Petitioner took the required drug test but did not show up at the jobsite. He first learned of Petitioner's test results the day after Petitioner's accident. He spoke with Petitioner on January 27 or 28, 2015. During that conversation, Petitioner told him he had fallen at the drug testing facility, that he did not like the physician at Alexian Brothers and that he was going to see a doctor on his own. He talked with Petitioner again a month or two later. He received a call from Bill Beane a month and a half or two after Petitioner's accident. After he spoke with Beane, he went to Respondent's accounting department and directed an employee to cut a paycheck for Petitioner. He knows the check was issued because, initially, it came back in the mail. The union called him and told him Petitioner did not receive it. He then called Petitioner, who provided a new address. He arranged for the check to be re-sent to this address.

Murray testified that, on some occasions, employees have shown up, taken the drug test and not started working due to lack of test results. Drug test results are sometimes

inconclusive. When he encounters an inconclusive result, he tells the worker he cannot start working absent definitive results.

Murray testified that the area agreement provides that a worker is entitled to "show up" time if he goes to a jobsite but cannot work for some reason, such as weather. The area agreement does not cover a situation in which a worker fails to make it to the jobsite for some reason.

Murray testified that, if a worker fails the drug test, he is not hired and not paid.

Murray testified that Petitioner was assigned to a jobsite at State and Chestnut in Chicago. In the Loop, work hours are generally 7 AM to 3:30 PM.

Murray testified that, on a normal workday, Petitioner would not have been required to go to Respondent's shop before going to a jobsite.

**Under cross-examination,** Murray identified PX 3 as a record from a medical facility called Advocate. He has sent employees to this facility.

Murray reiterated he did not receive Petitioner's drug test results on the day of the accident. He stated: "being that [Petitioner] fell, I wasn't looking for [the] results."

Murray acknowledged Petitioner's drug test results were negative.

Murray testified he reports employees' hours to Respondent's payroll department. Respondent ultimately paid Petitioner for three hours at the rate of $46/hour. He arranged for Petitioner to be paid because Bill Beane told him to pay Petitioner. Bill Beane is not his boss. Bill Beane told him to pay Petitioner because otherwise Respondent would have to "go before the [union] hall" and it was not worth doing this over three hours of pay.

Murray acknowledged giving Petitioner a helmet, safety glasses and a work assignment.

**On redirect,** Murray testified that a worker receives no pay if he does not show up at the jobsite.

**Karen Heindl** also testified on behalf of Respondent. Heindl testified she works as an accounting manager for Respondent. She oversees accounting, assists human resources with health and dental insurance issues and oversees drug testing paperwork. Respondent's superintendent sends potential employees for drug testing. She receives the test results via telephone and relays the results to the superintendent via telephone. Several days later, she receives a letter memorializing the results.

Heindl identified RX 3 as a log she maintains concerning Respondent's receipt of workers' drug test results. The log shows the worker's name, the date of testing, the results

and the invoice number. Petitioner's name appears on the log. She received a letter setting forth Petitioner's test results. She has never met Petitioner.

**Under cross-examination**, Heindl testified that PX 3 is not the letter she received concerning Petitioner's drug test results. She does not have the letter with her. The letter she received indicated that Petitioner's drug test results were negative. Most drug test results are immediate but, in Petitioner's case, she received a letter.

Heindl identified the check Respondent sent to Petitioner. Deductions were taken from Petitioner's pay. Respondent's accounting department generated the check. The check is a payroll check.

In addition to the exhibits previously discussed, Respondent offered into evidence, with no objection from Petitioner, a "Notice of Claim to Non-Chargeable Employer" sent to Respondent by the Department of Employment Security on September 11, 2015. The notice identifies Petitioner. It reflects that Petitioner "has filed a claim for unemployment insurance." The notice describes Petitioner's first and last days of work for Respondent as "unknown." It also describes the "reason for separation" as "unknown." It reflects $0 earnings for four different base period quarters in 2014 and 2015. The second page contains the following sentence: "this notice is being sent to you because the claimant worked for you during the past 18 months." RX 2.

After the Arbitrator rejected PX 2, Petitioner requested a continuance for the specific purpose of producing testimony from a representative of Local 597. Respondent objected to the motion. A discussion ensued as to the extent of the attorneys' pre-hearing communications, with Petitioner's counsel asserting he provided all of his exhibits to Respondent's counsel via hand delivery and Respondent's counsel indicating he did not receive PX 2. The Arbitrator ultimately overruled Respondent's objection and continued the hearing.

At the continued hearing, held on November 19, 2015, Petitioner's counsel did not call a union official, as he had previously indicated he planned to do. Instead, he offered into evidence a document entitled "Pipe Fitting Council of Greater Chicago Agreement and Declaration of Trust." PX 7. The Arbitrator sustained Respondent's hearsay and foundational objections to PX 7. The Arbitrator marked PX 7 as a rejected exhibit.

**Arbitrator's Credibility Assessment**

Petitioner's testimony concerning his initial interaction with Murray and the events preceding his accident was detailed and credible. Murray did not contradict that testimony. He readily acknowledged providing Petitioner with a hard hat and glasses and assigning Petitioner to a particular jobsite. While Petitioner did not recall the exact address of that jobsite, Murray did.

17IWCC0298

The Arbitrator had some problems with Murray's and Heindl's testimony concerning Respondent's receipt of Petitioner's drug test results. Murray claimed he did not learn of these results on the day the test was performed but also acknowledged he "wasn't looking for" the results, "being that [Petitioner] fell." Heindl claimed Respondent received the results via letter, rather than immediately, but did not produce the letter. Instead, she produced a "log" that she created. The log (RX 3) lists 43 HVAC employees, along with test dates and the manner in which Respondent purportedly received notice of the test results. 34 of the listed employees are described as having negative results. [Petitioner's negative results are not reflected.] The log reflects that, with respect to all 34 of those employees, including the 3 who underwent testing the same day Petitioner did, Respondent learned of the negative results via phone call. The Arbitrator questions the accuracy of the entry reflecting that Respondent learned of Petitioner's results solely via letter.

The Arbitrator relies on PX 3 rather than Murray or Heindl and concludes that Petitioner's negative test results were made available to Respondent on January 26, 2015. The "chain of custody" section of PX 3 reflects that Petitioner's urine sample was "released to on-site analysis" as opposed to "short-term storage." PX 3 also shows the time and date of the analysis to be 08:57 on January 26, 2015. It makes sense to the Arbitrator that the analysis was to be done immediately and that the results were to be transmitted as soon as available, given that Murray had already directed Petitioner to present to a particular jobsite after undergoing the testing.

**Arbitrator's Conclusions of Law**

On January 26, 2015, was the relationship of the parties one of employer and employee?

The Arbitrator finds that Petitioner was Respondent's employee at the time of his accident on January 26, 2015. Petitioner credibly testified that Murray, Respondent's superintendent, extended a job offer to him via telephone on January 23, 2015, and directed him to present to Respondent's offices the following Monday morning, which he did. Petitioner also credibly testified that, after he arrived, he and several other individuals participated in a meeting, conducted by Murray, and received safety equipment, including hard hats and glasses (bearing Respondent's name), from Murray. Petitioner further testified he received and signed a W2 form at that time and also received a piece of paper showing the address of the jobsite he was supposed to go to that day. Murray did not dispute any aspect of this testimony. In fact, he confirmed he gave Petitioner the address of a jobsite in Chicago.

Respondent asserts that its offer of employment to Petitioner was contingent on his passing a drug test and appearing at the jobsite. Petitioner did, in fact, pass the drug test but did not appear at the jobsite due to the accident.

The Arbitrator concludes that the parties entered into an employment relationship at the morning meeting on January 26, 2015 and that the activities Petitioner engaged in between the time he arrived at Respondent's offices that morning and the time of the accident were

incidental to his employment and in furtherance of Respondent's interests. See, e.g., Bolingbrook Police Department v. IWCC, 2015 IL App (3d) 130869 WC, citing Sears, Roebuck & Co. v. Industrial Commission, 79 Ill.2d 59, 71-72 (1980). Respondent's argument fails, in light of Petitioner's and Murray's testimony that Petitioner underwent training, received safety equipment bearing Respondent's name, signed a W2 form and received a specific job assignment before leaving Respondent's premises on the morning of January 26, 2015.

Did Petitioner sustain an accident on January 26, 2015 arising out of and in the course of his employment?

The Arbitrator has already found that Petitioner was Respondent's employee as of his January 26, 2015 accident. The Arbitrator further finds that Petitioner was a traveling employee at the time of his accident, since he was in the process of making a required trip from a drug testing facility to his assigned jobsite. In Kertis v. IWCC, 2013 Ill.App. LEXIS 410 (2nd Dist. 2013), the Appellate Court noted that "special rules" apply to traveling employees and that "the dispositive question" in determining the compensability of a traveling employee's claim is "whether the employee was injured while engaging in conduct that was reasonable and that might reasonably be anticipated or foreseen by the employer." The Arbitrator finds that Petitioner's conduct at the time of the accident was both reasonable and foreseeable. At the time of the accident, Petitioner was doing exactly what Murray had directed him to do. He was making his way from a medical facility in Elk Grove Village, where he had undergone Respondent-mandated drug testing, to his car, which he testified was parked at the facility, so that he could travel to his assigned jobsite in Chicago. It is not as if he was in the process of commuting from his home to Respondent's offices. He was traversing, or attempting to traverse, a sidewalk in wintry conditions when he lost his balance and fell. His conduct was reasonable and eminently foreseeable.

Based on the foregoing analysis, the Arbitrator finds that the accident of January 26, 2015 arose out of and in the course of Petitioner's employment.

Did Petitioner establish a causal connection between the accident of January 26, 2015 and any current condition of ill-being?

The Arbitrator finds that Petitioner established causation as to the need for the treatment he underwent at Orland Park Orthopaedics. Petitioner credibly testified he fell backward, striking his head, neck and back. Petitioner provided a consistent history of the accident to Dr. Rhode and his assistant. There is no evidence suggesting Petitioner had any problems with his head, neck or back before the accident.

The Arbitrator further finds that Petitioner failed to prove causation as to any current condition of ill-being. On direct examination, Petitioner readily, and rather emphatically, stated his head, neck and back are "fine" and he is able to perform full duty. He did not claim any current condition of ill-being.

What were Petitioner's earnings?

At the hearing, Petitioner claimed earnings of $93,103.92 and an average weekly wage of $1,790.46. Petitioner offered into evidence the paycheck he ultimately received from Respondent. This paycheck reflects gross earnings of $138.00 and an hourly rate of $46.00. [It is not clear how Petitioner arrived at $1,790.46 since, even if Petitioner relied on Murray's testimony and RX 1 to claim there were 40 hours in a work week, 40 hours multiplied by $46.00 equals $1,840.00] Respondent disputed this claim, arguing that Petitioner "had no earnings prior to the injury as he was not an employee." In its proposed decision, Respondent alternatively argued that Petitioner's average weekly wage is $138.00.

The Arbitrator, having already found that Petitioner was Respondent's employee as of his accident and that the activities he engaged in prior to the accident were incidental to his employment and of benefit to Respondent, finds Petitioner's average weekly wage to be $1,840.00. The Arbitrator arrives at this figure by incorporating Murray's testimony as to Petitioner's work schedule along with the "standard work week" and "standard work day" definitions set forth in Article IV of RX 1, and dividing $138.00 by .075 , with the former representing Petitioner's earnings before the accident and the latter representing the "weeks and parts thereof" Petitioner worked prior to the accident.

In calculating Petitioner's average weekly wage, the Arbitrator also notes that Respondent's own exhibit (RX 1), the area agreement, establishes that "no employer shall employ an employee for less than the rates established by negotiations through the Joint Arbitration Board nor under any terms and conditions less favorable to such Employee than are expressed in this Agreement."

Is Petitioner entitled to reasonable and necessary medical expenses?

As indicated above, Petitioner listed a number of bills on the Request for Hearing form but offered only one bill, that of Orland Park Orthopaedics/Dr. Rhode, into evidence. The Arbitrator has already found that Petitioner established causation as to the need for the treatment Dr. Rhode provided. The Arbitrator awards Petitioner the $2,800.19 bill from Orland Park Orthopaedics (PX 1), subject to the fee schedule.

Is Petitioner entitled to temporary total disability benefits?

At the hearing, Petitioner claimed he was temporarily totally disabled from January 26, 2015 (the date of accident) through May 18, 2015. Respondent claimed Petitioner was never its employee and is thus not entitled to any benefits. Arb Exh 1.

The Arbitrator has already found in Petitioner's favor on the issues of employment, accident and causation as to the treatment rendered by Dr. Rhode. Petitioner first sought treatment at Dr. Rhode's office on January 28, 2015, at which point the doctor's assistant took him off work and recommended treatment. Petitioner underwent therapy and an injection

thereafter. The records document gradual improvement. The doctor released Petitioner to full duty, at Petitioner's request, as of May 18, 2015.

Based on the foregoing, the Arbitrator finds that Petitioner was temporarily totally disabled from January 28, 2015 through May 17, 2015, a period of 15 5/7 weeks. The Arbitrator declines to award benefits from January 26, 2015 through January 27, 2015, as requested by Petitioner, because Petitioner did not submit his Emergency Room or any other records to support his claim of disability during this period. Having found Petitioner's average weekly wage to be $1,840.00, the Arbitrator awards temporary total disability benefits at the rate of $1,226.67 per week.

What is the nature and extent of the injury?

This is a post-amendatory case, since Petitioner's accident occurred after September 1, 2011. The Arbitrator would typically look to Section 8.1b of the Act for guidance in assessing permanency but, based on her previous causation finding and the state of the evidence, takes a different approach.

The Arbitrator has previously found that Petitioner failed to establish causation as to any current condition of ill-being, noting Petitioner's assertion that the body parts he injured in his fall (i.e., his head, neck and back) are "fine" and that he is able to perform full duty. When Petitioner last saw Dr. Rhode, in June 2015, the doctor noted some complaints of pain but described Spurling's and straight leg raise testing as negative. He released Petitioner from care and allowed him to continue full duty. Petitioner did not offer any medical records establishing permanent disability. Respondent, electing to rely on its other defenses, did not offer any impairment rating or Section 12 examination report.

Based on the foregoing, the Arbitrator awards no permanency benefits in this case.

STATE OF ILLINOIS )
) SS.
COUNTY OF MADISON )

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

John Bumphus,
Petitioner,
vs.

NO: 15WC 27577

17IWCC0240

Unique Personnel Consultants,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, medical, average weekley wage, permanent partial disability, penalties 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 April 25, 2016 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. 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: APR 19 2017

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

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MJB/jrc
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# ILLINOIS WORKERS' COMPENSATION COMMISSION
# NOTICE OF ARBITRATOR DECISION

**BUMPHUS, JOHN**
Employee/Petitioner

Case# **15WC027577**

**UNIQUE PERSONNEL CONSULTANTS**
Employer/Respondent

**17IWCC0240**

On 4/25/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0000 BUMPHUS, JOHN
221 S MYRTLE
EDWARDSVILLE, IL 62025-1510

2795 HENNESSY & ROACH PC
JENNIFER YATES WELLER
415 N 10TH ST SUITE 200
ST LOUIS, MO 63101

17IWCC0240

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

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

## ILLINOIS WORKERS' COMPENSATION COMMISSION
## ARBITRATION DECISION

**John Bumphus**
Employee/Petitioner

v.

**UniQue Personnel Consultants**
Employer/Respondent

Case # **15** WC **27577**

Consolidated cases: **n/a**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Melinda Rowe-Sullivan**, Arbitrator of the Commission, in the city of **Collinsville**, on **March 23, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

On **July 17, 2015** Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

17IWCC0240

**ORDER**

Petitioner failed to prove that he sustained an accident that arose out of and in the course of his employment with Respondent and, as such, all benefits are denied. The remaining issues are moot and the Arbitrator makes no conclusions as to those issues.

**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.

Melinda M. Pine-Sullivan

Signature of Arbitrator

4/19/16

Date



APR 25 2016

17IWCC0240

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

**John Bumphus**
Employee/Petitioner

Case # 15 WC 27577

v.

Consolidated cases: N/A

**UniQue Personnel Consultants**
Employer/Respondent

## MEMORANDUM OF DECISION OF ARBITRATOR

### FINDINGS OF FACT

Petitioner testified that on July 17, 2015 he sustained an injury to his psyche due to being denied a reasonable accommodation. He testified that on his first day of employment with Respondent which was June 21st at the Yazaki plant, he was working on the rework table, that there was one particular component which was large and awkward and that he felt pain in his lower back. He testified that he went to Dana Felton, his supervisor, and told her that if his table was going slow, it was because of a rod and two pins in his back that were causing pain when he was lifting.

Petitioner testified that for the next nine days he continued on the third shift working the rework tables and that after the ninth day he was promoted from a line table rework operator to line product coordinator ("LPC") which had the responsibility of supervising the tables. He testified that he worked a week as an LPC on the third shift at Yazaki, and that as he began to prepare to work the fourth week he was at the Yazaki plant he could not get into the warehouse. He testified that he called Ms. Felton to find out if a problem. He testified that he learned that the third shift had been disbanded and that he had to choose between a second shift transfer or a first shift transfer. He testified that he wanted to know if his pay rate would remain the same and learned that it would be reduced to a $10.00 an hour position for first shift or to a $10.25 position for the second shift, so he decided to take the second shift appointment.

Petitioner testified that on July 13th he worked as an LPC at Yazaki, and that after auditing and supervising the production of that table for his shift he came to understand that there was mandatory overtime. He testified that up until that time he had never been made aware of any mandatory overtime, but he worked for about 1-1.5 hours, again experienced pain in his back and indicated that he could not go any further and was going to leave.

Petitioner testified that after not being able to contact Ms. Felton the next morning on July 14th, he contacted his employer's Glen Carbon office and spoke to a phone receptionist named "Jamie" about his lower back pain, the mandatory overtime, and the situation about his leaving due the night before. He testified that he was then referred to Krista Findley, to whom he relayed the same issues. He testified that he thought they had resolved the issue and that he was pleased.

Petitioner testified that he continued to work that week as an LPC, and that he stayed after work on Tuesday, July 14th and Wednesday, July 15th, to make sure that his auditing paperwork was ready for presentation to Yazaki. He testified that on Thursday at the end of shift it was discovered that a component at one of the two tables he was supervising was lost or was placed wrongly into another box,

so he worked overtime to find the lost part. He testified that as he was about to leave, the same "conflict" which had arisen on Monday came up again.

Petitioner testified that on the morning of July 17th he went to the Glen Carbon office and wanted to find out about his reasonable accommodation which he thought he had received on July 14th. He testified that he got the impression that there was doubt about his having a rod and two pins in his back, so he offered to get medical evidence. He testified that he went to his primary care physician, Dr. Yablonsky, and obtained the medical documentation which described the rod and two pins in his back. He testified that his documentation was not accepted as being pertinent to the establishment of his reasonable accommodation, so he then began to feel flustered. He testified that he has "post-traumatic disorder" and had written a book about it, so he went to the trunk of his car and pulled out a copy of his book which described his being treated as a disabled person at Wellspring Resources. He testified that he was told to get different medical documentation and that unless he came up with this documentation, his employment would no longer be considered. He testified that he was offered no reason why his position was taken from him.

Petitioner testified that on July 23rd he brought the requested letter on the doctor's stationery to that same office and still had not been offered any employment or reasonable accommodation. He testified that on July 28th he presented a letter of concern that described the interactions, and that on August 6th after hearing nothing he went to the EEOC and filed a charge of discrimination. He testified that on August 14th he wrote a letter to the workers' compensation corporate specialist for his employer, David Scheibel, letting him know that he had tried wrongly to deliver a written note for notice of his injury and that he did not feel that he received any help with filing his claim from anyone at the office. He testified that on August 18th he spoke with his employer's insurance provider representative, Cathy Gober, and was interviewed about his medical provider, Wellspring Resources. He testified that he then received a denial letter for this claim.

Petitioner testified that his earnings were $10.50 an hour which was then reduced to $10.25 an hour, and that he earned $400.00 per week before taxes. He testified that he has not received any temporary total disability payments and is still receiving treatment at Wellspring (which he testified is now known as Centerstone). He testified that he tried to provide medical information in order to receive his temporary total disability benefits and that he felt that he was misled. He testified that he believed he was eligible for benefits under Section 8(d)2 for loss of use of the person-as-a-whole, and that he has an outstanding bill for Centerstone related to his claim.

On cross-examination, Petitioner denied that when he went to the Glen Carbon office on July 17, 2015 he was offered a job as a table person with a wage of $8.50. When asked if it was his testimony that he declined to work any job at UniQue making less than $10.00 an hour, Petitioner responded that when he first interviewed with UniQue he explained that he did not want to even be called out for a job less than $10.50 an hour.

The Application for Adjustment of Claim was entered into evidence at the time of arbitration as Arbitrator's Exhibit 2. The Application alleged a date of accident of July 17, 2015, that the alleged accident occurred related to being denied a reasonable accommodation for spinal fusion surgery, that Petitioner sustained stress and anxiety due to "bullying and duplicity" and that the nature of the injury was "mental-mental." (AX1).

The October 13, 2015 letter from the Social Security Administration was entered into evidence at the time of arbitration as Petitioner's Exhibit 1. The letter indicated that Petitioner was entitled to hospital insurance under Medicare beginning March 2011, and that he was entitled to medical insurance under Medicare beginning March 20112. (PX1).

The office note of Dr. Mirza Baig dated January 20, 2015 was entered into evidence at the time of arbitration as Petitioner's Exhibit 1. It was noted that Petitioner was making his own progress, that he had no stressors and that he had no major behavioral or management problems. The note indicated that Petitioner's current diagnoses included under Axis I a history of PTSD, a history of generalized anxiety disorder, a history of polysubstance abuse and a history of alcohol abuse. (PX2).

The medical records of Washington University Physicians were entered into evidence at the time of arbitration as Petitioner's Exhibit 3. The records reflect that Petitioner was seen on June 15, 2015 related to his thoracoabdominal aortic aneurysm and infrarenal abdominal aortic aneurysm, and that diagnostic imaging suggested that he had previously undergone an anterior and posterior fusion with instrumentation at L4-5. (PX3).

The script dated July 23, 2015 was entered into evidence at the time of arbitration as Petitioner's Exhibit 4. The script requested that Petitioner be exempt from mandatory overtime that involved heavy lifting. (PX4).

The *Position Statement of UniQue Personnel Consultants, Inc. to Notice of Charge of Discrimination Filed by John Bumphus* was entered into evidence at the time of arbitration as Petitioner's Exhibit 6.

The August 14, 2015 letter of complaint to David Scheibel was entered into evidence at the time of arbitration as Petitioner's Exhibit 8. The letter pertained to a purported lack of assistance provided regarding the filing of Petitioner's claim for benefits and alleged issues pertaining to workplace notices. (PX8).

The medical bills exhibit was entered into evidence at the time of arbitration as Petitioner's Exhibit 9. The Arbitrator notes that the corresponding medical records for the bills were not entered into evidence at the time of arbitration, nor were they even proffered.

The wage statement was entered into evidence at the time of arbitration as Respondent's Exhibit 1.

## CONCLUSIONS OF LAW

With respect to disputed issue (C), the Arbitrator finds that Petitioner failed to prove that he sustained an accidental injury on July 17, 2015 that arose out of and in the course of his employment with Respondent.

In Illinois, psychological injuries are compensable under one of two theories, either "physical-mental," when the injuries are related to and caused by a physical trauma or injury (*Matlock v. Indus. Comm'n, 321 Ill. App. 3d 167, 171, 746 N.E.2d 751, 253 Ill. Dec. 930 (2001)*), or "mental-mental," when the claimant suffers a "sudden, severe emotional shock traceable to a definite time, place and cause which causes psychological injury or harm...though no physical trauma or injury was sustained" (*Pathfinder Co. v. Indus. Comm'n*, 62 Ill.2d 556, 563, 343 N.E.2d 913 (1976); *Matlock, 321 Ill. App. 3d at 171*). The Arbitrator notes Petitioner filed an Application for Adjustment of Claim alleging a mental-mental injury occurring on July 17, 2015. "Mental-mental" claims are not compensable in Illinois unless there is a sudden, severe emotional stress. *Pathfinder Co. v. Indus. Comm'n*, 62 Ill.2d 556, 343 N.E.2d 913 (1976) (where the petitioner saw a co-worker have a hand amputated, fainted, and later developed a

psychological condition). The Arbitrator notes that in the case at hand, Petitioner is not alleging a sudden, severe emotional stress, nor was any testimony provided of a sudden, severe emotional stress, and as such is distinguishable from the holding in *Pathfinder*.

Two 2013 appellate decisions have helped refine the "mental-mental" area of law: *Chi. Transit Auth. v. Ill. Workers' Comp. Comm'n*, 2013 IL App (1st) 120253WC, and *Diaz v. Ill. Workers' Comp. Comm'n, 2013 IL App (2d) 120294WC*. In *Chicago Transit*, the petitioner was a bus driver and her bus hit a pedestrian who was chasing after it. The petitioner did not witness the actual contact with the pedestrian, but was informed by a passenger that someone had been hit. The petitioner saw the pedestrian laying on the ground in a fetal position with his mouth moving before he was taken away by emergency personnel. The petitioner was notified later at work the same day that the pedestrian had died. The petitioner claimed psychological injuries stemming from a single, traumatic, work-related incident, and sought treatment approximately two months later. The court held that to prevail on a mental-mental claim, the petitioner must present objective evidence supporting inferences of psychological injury, causation and disability. A petitioner is not compelled to prove that the psychological injury resulting from the emotional shock was "immediately apparent." In *Chicago Transit*, the petitioner's claim was found to be compensable because hitting and killing a pedestrian and later developing psychological injury was objectively reasonable and traceable to a definite, sudden emotional event.

In *Diaz*, the petitioner was a police officer and filed a claim for post-traumatic stress disorder after a standoff with a citizen holding what appeared to be a handgun but was later determined to be a BB gun. The petitioner testified that he did not immediately experience anxiety after the incident, but, during the next few days, began to have more nervousness and anxiety when he was responding to calls. The petitioner eventually told the deputy chief supervisor that he did not think he could perform the job of a police officer due to his anxiety he was experiencing. The petitioner was diagnosed with post-traumatic stress disorder. The court held, "whether a worker has suffered the type of emotional shock sufficient to warrant recovery should be determined by an objective, reasonable person standard, rather than a subjective standard that takes into account the claimant's occupation and training." *Id.* In *Diaz*, the police officer was allowed to potentially recover for his post-traumatic stress disorder because he was exposed to a citizen pointing what appeared to be a gun in his direction.

In addition, in *Chicago Bd. of Educ. v. Ill. Workers' Comp. Comm'n*, 169 Ill.App.3d 459, 523 N.E.2d 912 (1988), the petitioner first sought benefits under the Workers' Compensation Act, but then amended his application to allege an injury under the Occupational Diseases Act. The petitioner was a school teacher who was diagnosed with "great psychological debilitation" by his treating counselor due to the gradual deterioration of the petitioner's work environment, chaos in the classroom, lack of support from the administration, physical assault by students, inability to comply with school regulations, unmanageable students, inability to control the classroom and physical isolation in a mobile classroom detached from the main school facility. The petitioner's counselor diagnosed him with reactive depression characterized by feelings of hopelessness, failure and inadequacy. The court held that the petitioner did not suffer an occupational disease within the meaning of the Act due to the conditions allegedly producing the injury being no greater than those any teacher might face in an education setting. It went on to state that mental disorders not resulting from trauma must arise from a situation of greater dimensions than the day-to-day emotional strain and tension which all employees must experience; the conditions producing disability must also, from an objective standpoint, exist in reality; and the employee must establish that the stressful conditions actually exist on the job, and are "the major contributory cause" of the condition. It is not sufficient that the employee believe, although mistakenly, the conditions exist, as there must be an actual risk connected with the employment which produces the injury. The court stated that "to recognize that our occupational disease law would allow compensation for any mental diseases and disorders caused by on-the-job stressful events or conditions would, in the words of one court, open a flood gate for workers who succumb to the everyday pressures of life." *Id.*

In the case at hand, the Arbitrator finds that Petitioner has failed to present evidence of a single, traumatic, work-related incident. Petitioner alleges injury on July 17, 2015 and that on that date he went to the Glen Carbon office of Respondent to discuss his "reasonable accommodation" due to back pain. Petitioner testified that he became "flustered" but there was no evidence of a definite, sudden emotional event. Furthermore, Petitioner did not present any objective medical evidence supporting a psychological injury, causation and disability. That said, the Arbitrator finds that this case is distinguishable from *Chicago Transit.*

Furthermore, the Arbitrator finds that both *Diaz* and *Chicago Board of Education* are also distinguishable from the case at hand as well. First, the Arbitrator notes that Petitioner's claim was filed under the Workers' Compensation Act and not the Occupational Diseases Act. Second, the Arbitrator finds that Petitioner's alleged interactions with his co-workers did not rise to a level greater than day-to-day emotional strain and tension which all employees must experience and that Petitioner has failed to present objective evidence of any psychological condition or disability. In addition, any alleged injury is not the "major contributory factor" of his mental disorder given his admitted pre-existing PTSD condition. Finally, Petitioner presented no evidence at trial of a work-related, psychological condition.

Based upon the foregoing and the record as a whole, the Arbitrator concludes that Petitioner has failed to prove that he sustained accidental injuries that arose out of and in the course of his employment with Respondent on July 17, 2015. All benefits are denied. The remaining issues of average weekly wage, medical bills, temporary total disability, nature and extent, and penalties are moot, and the Arbitrator makes no conclusions as to those issues.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Nicolasa Gaytan,
Petitioner,

vs. NO: 14 WC 41248

Flanders Precisionaire
Respondent.

17IWCC0282

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal relationship to the injury, medical expenses, temporary disability, prospective medical expenses, and penalties and attorney's fees, and being advised of the facts and law, affirms the Decision of the Arbitrator, which is attached hereto and made a part hereof.

In so affirming, the Commission does correct one error in the Arbitrator's Decision. In the first paragraph of the rider, the Arbitrator transposed the dates of loss with the case numbers on their respective Applications for Adjustment of Claim: the November 20, 2014 accident was actually the focus of case number 15 WC 10152, and the December 1, 2014 accident was asserted in 14 WC 41248, rather than vice-versa. The Commission corrects these accordingly.

All other facts, reasoning, and conclusions of the Arbitrator are affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that, other than as stated above, the Decisions of the Arbitrator filed January 7, 2016 are hereby affirmed and adopted.

17IWCC0282

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: MAY 3 - 2017

Joshua D. Luskin

Charles J. DeVriendt

L. Elizabeth Coppoletti

o-04/12/17
jdl-mp
68

# ILLINOIS WORKERS' COMPENSATION COMMISSION
# NOTICE OF 19(b) ARBITRATOR DECISION

**GAYTAN, NICOLASA**
Employee/Petitioner

Case# **14WC041248**
15WC010152

**FLANDERS PRECISIONAIRE**
Employer/Respondent

17IWCC0282

On 1/7/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.50% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1920 BRISKMAN BRISKMAN & GREENBERG
RICHARD VICTOR
351 W HUBBARD ST SUITE 810
CHICAGO, IL 60654

0286 SMITH AMUNDSEN LLC
LESLIE JOHNSON
150 N MICHIGAN AVE SUITE 330
CHICAGO, IL 60602

17IWCC0282

FINDINGS

On the dates of accident, **11/20/14 & 12/1/14**, Respondent *was* operating under and subject to the provisions of the Act.

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

On **11/20/14**, Petitioner *did* sustain an accident that arose out of and in the course of employment.

On **12/1/14**, Petitioner *did not* sustain an accident that arose out of and in the course of employment.

Timely notice of these accidents *was* given to Respondent.

Petitioner's current condition of ill-being *is not* causally related to the 11/20/14 accident.

In the year preceding the injury, Petitioner earned $**18,220.80**; the average weekly wage was $**354.00**.

On the date of accident, Petitioner was **42** years of age, *married* with **3** dependent children.

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

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

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

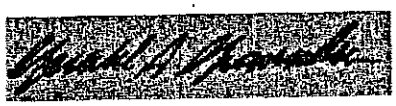
ORDER

Petitioner failed to prove that she sustained an accident arising out of and in the course of her employment on December 1, 2014. Therefore her claim for benefits related to that accident is denied.

Petitioner failed to prove that her current condition of ill-being is related to her November 20, 2014 accident. Therefore her claim for benefits related to that accident is denied.

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

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



Signature of Arbitrator

1/7/16
Date



JAN 7 - 2016

Petitioner arrived 15 to 20 minutes later at the Presence St. Mary Hospital Clinicon November 24, 2014. She walked into the clinic with Sanchez. Sanchez informed Petitioner that the Petitioner would be paid the hours she missed from work for that day only. Sanchez then went with Petitioner to see a doctor in the clinic and translated from Spanish to English the questions and answers between the doctor and the Petitioner. Petitioner testified that she was told by the doctor to make another appointment and Sanchez asked Petitioner if December 1, 2014 at 3:30 pm was ok. Petitioner agreed to this next appointment and then left the clinic to return home. Petitioner was also given restrictions on her return to work. Petitioner was able to return to work through December 1, 2014.

On December 1, 2014, Petitioner went to work and punched in at her usual time. Petitioner testified that she worked that day until she was told by Juana Medina that it was almost time for her appointment. Petitioner testified that she went to an office to meet with Sanchez to tell Sanchez that she was ready to go to her appointment. Sanchez gave Petitioner a ride to Petitioner's car, which was parked further away in the company lot. Petitioner testified that after she got to her car, Petitioner was told by Sanchez to follow her. Petitioner then proceeded to follow Sanchez out onto the road. On route to the Presence St. Mary Clinic, Petitioner's vehicle was struck by a truck.

Petitioner was subsequently taken by ambulance to Riverside Medical Center, where she underwent extensive medical treatment for factures to her legs, her right arm, head injuries and internal organ damage. She underwent multiple surgeries, followed by physical therapy. All of Petitioner's medical treatment was put through her husband's group health insurance. She has not been released to return to work as of the date of the last arbitration hearing and continues to receive medical treatment. Petitioner has complaints of pain, mostly in her right leg and foot, and also has problems with her memory.

On cross examination, Petitioner testified that she did not speak with Amy Hiser of human resources about her left elbow injury. Petitioner denied that Amy Hiser was ever present when Petitioner discussed her left elbow accident with Sanchez. Petitioner further testified that she knew how to get to the Presence St. Mary clinic because she had treated there for a prior eye injury, and that Sanchez was going with her to the appointment because Petitioner did not have anyone else who could translate for her on December 1, 2014.

Nayeli Sanchez testified that on November 20, 2014, she worked for Respondent as a Human Resources Associate. Part of her job involved translating for Spanish speaking employees, translating accident reports and transporting injured employees. On November 24, 2014, Sanchez first spoke with Petitioner about her November 20, 2014 elbow injury. Sanchez would also call medical providers to set up appointments for injured employees, but she did not recall whether she called Presence St. Mary Clinic for Petitioner's visit on November 24, 2014. Sanchez explained that the Respondent's policy regarding where an injured employee can receive medical treatment is to ask the injured employee if there is a medical provider they would like to see. Sanchez confirmed that she did not have the authority to deny an employee's choice of medical provider, nor did she tell employees that they have to go to any particular medical provider. Sanchez indicated as an example that a typical medical provider chosen by Respondent's injured employees is Riverside Medical Center.

Sanchez confirmed that on November 24, 2014, she drove Petitioner in Sanchez's car to her appointment at Presence St. Mary Clinic, where she provided Spanish to English translation between the Petitioner and the clinic's staff. When told by the doctor that Petitioner was to have a follow up appointment,

vehicle accident on her way to a follow-up medical appointment related to her November 20, 2014 work injury, constitutes an accident arising out of and in the course of her employment with the Respondent. The Arbitrator notes that the Illinois Supreme Court addressed this precise issue in the case of Lucious Lee v Industrial Commission (Tootsie Roll), 167 Ill 2nd 77, Supreme Court of Illinois (1995). In that case, the Supreme Court affirmed the denial of a claim made by an employee who was injured while travelling to a follow-up medical appointment. In support of their decision, the Supreme Court concluded that the claimant was not: 1) acting at the direction of his employer in going to an employer-approved clinic; 2) performing an act incidental to an assigned duty of his employment; or 3) acting pursuant to his duty of employment. The Court in Lucious Lee concluded that the claimant's subsequent injuries sustained while attending a follow-up medical appointment did not arise out of and in the course of that claimant's employment.

In the present case, the evidence is clear that the Petitioner was free to choose her medical provider and was not directed to go the employer-approved clinic of Presence St. Mary Hospital. Petitioner's attendance at the follow-up medical visit on December 1, 2014 was also not an act incidental to an assigned duty of her employment with Respondent. Finally, Petitioner was under no duty, statutory or otherwise to attend her follow-up appointment at the Presence St. Mary Clinic on December 1, 2014. The testimony of all of Respondent's witnesses are not rebutted with regard to the fact that the Respondent exerted no control or direction of Petitioner's medical care. The fact that the Respondent provided Petitioner with a translator for her medical appointments do not change the fact that the Petitioner was free to go to any medical provider and was free to attend follow up appointments knowing that she would not be paid to attend those follow up visits. There was no evidence presented that Petitioner was under any obligation or duty to attend her follow medical appointment or that such attendance was incidental to any of her duties with Respondent. In light of this evidence and the governing case law, the Arbitrator concludes that the Petitioner's motor vehicle accident on December 1, 2014 was not an accident arising out of and in the course of Petitioner's employment with Respondent.

2. Regarding the issue of causation, the Arbitrator finds that the Petitioner's current condition of ill being is not causally related to her alleged work related accident. Other than an initial diagnosis of an elbow contusion, there was no further evidence to show the Petitioner continued to suffer any disability to her elbow. Furthermore, having found that the Petitioner's December 1, 2014 incident was not an accident covered under the Act, the Arbitrator further finds that December 1, 2014 incident was an intervening incident, breaking any causation between Petitioner's November 20, 2014 compensable accident and her current condition of ill-being.

3. Based on the Arbitrator's findings with respect to the issues of accident and causation, all other issues are rendered moot.

STATE OF ILLINOIS )
) SS.
COUNTY OF KANKAKEE )

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Nicolasa Gaytan,
Petitioner,

vs. NO: 15 WC 10152

Flanders Precisionaire
Respondent.

**17IWCC0283**

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal relationship to the injury, medical expenses, temporary disability, prospective medical expenses, and penalties and attorney's fees, and being advised of the facts and law, affirms the Decision of the Arbitrator, which is attached hereto and made a part hereof.

In so affirming, the Commission does correct one error in the Arbitrator's Decision. In the first paragraph of the rider, the Arbitrator transposed the dates of loss with the case numbers on their respective Applications for Adjustment of Claim: the November 20, 2014 accident was actually the focus of case number 15 WC 10152, and the December 1, 2014 accident was asserted in 14 WC 41248, rather than vice-versa. The Commission corrects these accordingly.

All other facts, reasoning, and conclusions of the Arbitrator are affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that, other than as stated above, the Decisions of the Arbitrator filed January 7, 2016 are hereby affirmed and adopted.

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: MAY 3 - 2017

Joshua D. Luskin

Charles J. DeVriendt

L. Elizabeth Coppoletti

o-04/12/17
jdl-mp
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# ILLINOIS WORKERS' COMPENSATION COMMISSION
# NOTICE OF 19(b) ARBITRATOR DECISION

**GAYTAN, NICOLASA**
Employee/Petitioner

Case# **15WC010152**

14WC041248

**FLANDERS PRECISIONAIRE**
Employer/Respondent

**17IWCC0283**

On 1/7/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.50% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1920 BRISKMAN BRISKMAN & GREENBERG
RICHARD VICTOR
351 W HUBBARD ST SUITE 810
CHICAGO, IL 60654

0286 SMITH AMUNDSEN LLC
LESLIE JOHNSON
150 N MICHIGAN AVE SUITE 330
CHICAGO, IL 60602

# 17IWCC0283

FINDINGS

On the dates of accident, **11/20/14 & 12/1/14**, Respondent *was* operating under and subject to the provisions of the Act.

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

On **11/20/14**, Petitioner *did* sustain an accident that arose out of and in the course of employment.

On **12/1/14**, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of these accidents *was* given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the 11/20/14 accident.

In the year preceding the injury, Petitioner earned $**18,220.80**; the average weekly wage was $**354.00**.

On the date of accident, Petitioner was **42** years of age, ***married*** with **3** dependent children.

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

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

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

ORDER

Petitioner failed to prove that she sustained an accident arising out of and in the course of her employment on December 1, 2014. Therefore her claim for benefits related to that accident is denied.

Petitioner failed to prove that her current condition of ill-being is related to her November 20, 2014 accident. Therefore her claim for benefits related to that accident is denied.

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

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

Signature of Arbitrator

1/7/16
Date

17IWCC0283

Petitioner arrived 15 to 20 minutes later at the Presence St. Mary Hospital Clinic on November 24, 2014. She walked into the clinic with Sanchez. Sanchez informed Petitioner that the Petitioner would be paid the hours she missed from work for that day only. Sanchez then went with Petitioner to see a doctor in the clinic and translated from Spanish to English the questions and answers between the doctor and the Petitioner. Petitioner testified that she was told by the doctor to make another appointment and Sanchez asked Petitioner if December 1, 2014 at 3:30 pm was ok. Petitioner agreed to this next appointment and then left the clinic to return home. Petitioner was also given restrictions on her return to work. Petitioner was able to return to work through December 1, 2014.

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On cross examination, Petitioner testified that she did not speak with Amy Hiser of human resources about her left elbow injury. Petitioner denied that Amy Hiser was ever present when Petitioner discussed her left elbow accident with Sanchez. Petitioner further testified that she knew how to get to the Presence St. Mary clinic because she had treated there for a prior eye injury, and that Sanchez was going with her to the appointment because Petitioner did not have anyone else who could translate for her on December 1, 2014.

Nayeli Sanchez testified that on November 20, 2014, she worked for Respondent as a Human Resources Associate. Part of her job involved translating for Spanish speaking employees, translating accident reports and transporting injured employees. On November 24, 2014, Sanchez first spoke with Petitioner about her November 20, 2014 elbow injury. Sanchez would also call medical providers to set up appointments for injured employees, but she did not recall whether she called Presence St. Mary Clinic for Petitioner's visit on November 24, 2014. Sanchez explained that the Respondent's policy regarding where an injured employee can receive medical treatment is to ask the injured employee if there is a medical provider they would like to see. Sanchez confirmed that she did not have the authority to deny an employee's choice of medical provider, nor did she tell employees that they have to go to any particular medical provider. Sanchez indicated as an example that a typical medical provider chosen by Respondent's injured employees is Riverside Medical Center.

Sanchez confirmed that on November 24, 2014, she drove Petitioner in Sanchez's car to her appointment at Presence St. Mary Clinic, where she provided Spanish to English translation between the Petitioner and the clinic's staff. When told by the doctor that Petitioner was to have a follow up appointment,

vehicle accident on her way to a follow-up medical appointment related to her November 20, 2014 work injury, constitutes an accident arising out of and in the course of her employment with the Respondent. The Arbitrator notes that the Illinois Supreme Court addressed this precise issue in the case of Lucious Lee v Industrial Commission (Tootsie Roll), 167 Ill 2nd 77, Supreme Court of Illinois (1995). In that case, the Supreme Court affirmed the denial of a claim made by an employee who was injured while travelling to a follow-up medical appointment. In support of their decision, the Supreme Court concluded that the claimant was not: 1) acting at the direction of his employer in going to an employer-approved clinic; 2) performing an act incidental to an assigned duty of his employment; or 3) acting pursuant to his duty of employment. The Court in Lucious Lee concluded that the claimant's subsequent injuries sustained while attending a follow-up medical appointment did not arise out of and in the course of that claimant's employment.

In the present case, the evidence is clear that the Petitioner was free to choose her medical provider and was not directed to go the employer-approved clinic of Presence St. Mary Hospital. Petitioner's attendance at the follow-up medical visit on December 1, 2014 was also not an act incidental to an assigned duty of her employment with Respondent. Finally, Petitioner was under no duty, statutory or otherwise to attend her follow-up appointment at the Presence St. Mary Clinic on December 1, 2014. The testimony of all of Respondent's witnesses are not rebutted with regard to the fact that the Respondent exerted no control or direction of Petitioner's medical care. The fact that the Respondent provided Petitioner with a translator for her medical appointments do not change the fact that the Petitioner was free to go to any medical provider and was free to attend follow up appointments knowing that she would not be paid to attend those follow up visits. There was no evidence presented that Petitioner was under any obligation or duty to attend her follow medical appointment or that such attendance was incidental to any of her duties with Respondent. In light of this evidence and the governing case law, the Arbitrator concludes that the Petitioner's motor vehicle accident on December 1, 2014 was not an accident arising out of and in the course of Petitioner's employment with Respondent.

2. Regarding the issue of causation, the Arbitrator finds that the Petitioner's current condition of ill being is not causally related to her alleged work related accident. Other than an initial diagnosis of an elbow contusion, there was no further evidence to show the Petitioner continued to suffer any disability to her elbow. Furthermore, having found that the Petitioner's December 1, 2014 incident was not an accident covered under the Act, the Arbitrator further finds that December 1, 2014 incident was an intervening incident, breaking any causation between Petitioner's November 20, 2014 compensable accident and her current condition of ill-being.

3. Based on the Arbitrator's findings with respect to the issues of accident and causation, all other issues are rendered moot.

STATE OF ILLINOIS )
) SS.
COUNTY OF COOK )

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

**17IWCC0278**

Timothy Skorepa,
Petitioner,
vs.

NO: 10 WC 36348

Berwyn Park District and
Berwyn Police Department,
Respondents.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 10, 2016, is hereby affirmed and adopted.

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

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

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

DATED: MAY 2 - 2017
o4/27/17
DLS/rm
046

Deborah L. Simpson

Deborah L. Simpson

David L. Gore

David L. Gore

Stephen J. Mathis

Stephen J. Mathis

# ILLINOIS WORKERS' COMPENSATION COMMISSION
## NOTICE OF ARBITRATOR DECISION

**17IWCC0278**

**SKOREPA, TIMOTHY**
Employee/Petitioner

Case# **10WC036348**

**BERWYN PARK DISTRICT AND BERWYN POLICE DEPARTMENT**
Employer/Respondent

On 5/10/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.38% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2356 FOHRMAN, DONALD W & ASSOC
ADAM J SCHOLL
101 W GRAND AVE SUITE 500
CHICAGO, IL 60610

2988 CUDA LAW OFFICES
ANTHONY CUDA
6325 W NORTH AVE SUITE 204
OAK PARK, IL 60302

0075 POWER & CRONIN LTD
RORY McCANN
900 COMMERCE DR SUITE 300
OAKBROOK, IL 60523

17IWCC0278

17IWCC0278

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

**TIMOTHY SKOREPA**
Employee/Petitioner

v.

**BERWYN PARK DISTRICT and Berwyn Police Department**
Employer/Respondent

Case # **10** WC **36348**

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 **2/24/16 and 4/27/16**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

**DISPUTED ISSUES**

A. ☒ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☒ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☐ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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 _____

17IWCC0278

FINDINGS

On **8/21/2010**, Respondent *was* operating under and subject to the provisions of the Act.

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

On this date, Petitioner *did* 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 **$9,100.00**; the average weekly wage was **$175.00**.

On the date of accident, Petitioner was **31** 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 **$0** under Section 8(j) of the Act.

ORDER

***Medical benefits***
Respondent Berwyn Park District shall pay reasonable and necessary medical services of $39,347.30, subject to the medical fee schedule as provided in Sections 8(a) and 8.2 of the Act.

***Temporary Total Disability***
Respondent Berwyn Park District shall pay Petitioner temporary total disability benefits of $175.00/week for 29-1/7 weeks, commencing 8/22/10 through 3/13/11, as provided in Section 8(b) of the Act.

***Permanent Partial Disability: Schedule injury***
Respondent Berwyn Park District shall pay Petitioner permanent partial disability benefits of $175.00/week for 43 weeks, because the injuries sustained caused the 20% 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

May 10, 2016
Date

MAY 10 2016

**Attachment to Arbitrator Decision**

**IWCC# 10 WC 36348**

**FINDINGS OF FACT**

Petitioner was hired in 2001 as an auxiliary police officer with the Berwyn Police Department. His primary duties involved assisting police department in parking, traffic and parades. Petitioner was authorized to carry a weapon, but the weapon was his own and not provided by the police department. He was permitted to stop and detain, but the arrest would normally have to be made by a full time officer. Petitioner usually worked once or twice per month with the department. In January of 2005, he achieved certification as a part-time officer with the State of Illinois. The job provided him some additional authority, but essentially he performed the same job duties.

In 2005, petitioner acquired a second job as a patrolman with the Berwyn Park District. The Park District was aware of petitioner's job with the police department and, in fact, all of the hired patrol officers were on the either Berwyn Auxiliary Police or part-time police officers.(Park Ex.1) Petitioner's job duties involved him patrolling the various Park District sites. The Park District had its own patrol cars that were marked and contained a siren. The patrol car was equipped with a radio that dispatched through the police department and had its separate channel for park district matters. Petitioner wore his police uniform in the performance of his job with the Park District. Petitioner also was equipped with a police radio. As a Park District patrolman, he was considered to be on a detail and could be called in by the police department if it required additional personnel.

On August 21, 2010, petitioner was clocked in with the Berwyn Park District. Close to the end of shift, he was traveling northbound on Oak Park Avenue, headed to Mraz Park. On his police radio, he overheard the radio message of police officer who reported that that a traffic stop had driven off. He then heard the police officer report that it was only a traffic stop and that pursuit was terminated. Moments later while petitioner was at an intersection, the same automobile came into the intersection and spun out in front of him stopping a few feet in front of his vehicle. Petitioner stated that he activated his emergency lights and immediately exited his vehicle. Petitioner stayed behind his vehicle and gave a command to the driver to stop the vehicle and put his hands up. Petitioner was about to draw his weapon, when the vehicle backed up and struck him in his left leg and took off.

Petitioner was transported to by the Berwyn Fire Department to MacNeal Hospital. Petitioner provided a consistent history of the incident and reported left knee pain and minimal discomfort of his right arm. (PX4) Petitioner was referred to Michael Hejna, M.D of Orthopedic Associates of Riverside for follow-up.

Petitioner was seen by Dr. Hejna on August 25, 2010. Dr. Hejna examined petitioner and recommended an MRI of the left knee. He also indicated that petitioner was to remain off of work. The MRI was performed on October 5, 2010. Dr. Hejna reviewed the MRI on October 13, 2010 and determined that the MRI reflected a large contusion and edema in the proximal tibia and a possible small non-displace fracture. He also found a meniscal tear on the lateral side. (PX2) Dr. Hejna recommended physical therapy and surgery. Surgery was performed on November 11, 2010.

Surgery consisted of a partial medial meniscectomy and debridement. (PX2)

Petitioner underwent a post-operative care and as of January 5, 2011, he denied paid of the knee. Dr. Hejna suggested an additional four to six weeks of recuperation and released him from care. Petitioner required no further care thereafter. Dr. Hejna provided petitioner a return to work slip on March 8, 2011 that permitted him to return to work full duty on March 14, 2011. (PX2)

The Park District presented Sgt. Jeff Janda as a witness. Sgt. Janda was the Executive Director of the Park District and was also an Auxiliary Officer with the Berwyn Police Department. Sgt. Janda confirmed his knowledge of petitioner's other job as a police officer. He confirmed that petitioner as a park district patrol officer did not have the power to make an arrest. On the day of injury, Sgt. Janda had no knowledge if the police department paid petitioner's wages for that day and he never made any requests for them to do so.

Sgt. Chris Anisi testified on behalf of the police department. He stated that he was the officer that pulled the driver over. He testified that the car drove off as he approached the vehicle on foot. He began to pursue the vehicle when it started to drive the wrong way down a one-way street. At that time he called off any pursuit on the radio due to public safety. Sgt. Anisi testified that petitioner should not have exited his vehicle after the driver spun out in front him.

## CONCLUSIONS OF LAW

**In support of the Arbitrator's Decision relating to *(B) Was there an employer –employee relationship? and (C) Did an accident occur that arose of out of the course of employment?***

This matter presents a unique issue in which at the time of injury petitioner, an auxiliary police officer with the Berwyn Police Department was working in his second job as a patrol officer with the Berwyn Park District. The testimony reflects that there is a significant cross-over between the two jobs in that the Park District Police force employs exclusively Berwyn Auxiliary Police Officers and part-time officers, the petitioner wears his Berwyn Police Department uniform and carries his police radio while performing his Park District duties.

When the incident occurred that caused injury, petitioner was on the clock in his capacity as Berwyn Park District Police Officer. He was traveling from one park to another in his patrol car. While driving, he heard over the police band of a violator who drove away from a traffic stop. Petitioner did not act on the call, but moments later he was confronted by the violator when he spun out in front of him at an intersection. Petitioner reacted by putting on his lights of vehicle and exited his car.

The Berwyn Park District argues that since the incident did not occur on Park District property and involved an assailant involved in traffic violation, petitioner was not acting in his capacity as Park District Patrolman. The Berwyn Police Department takes the view that petitioner was not on the clock as police officer and was not authorized to make a traffic stop of the violator.

The Arbitrator finds that the petitioner at the time of the incident was acting in the course of his employment as Berwyn Park District Patrol Officer and, thus an employee and employer existed between the two. An employer-employee relationship did not exist between petitioner and the Berwyn Police Department on August 21, 2010.

The Arbitrator further finds that the incident that caused petitioner's injury arose out of the course of employment as Berwyn Park District Patrolman. Petitioner did not intentionally pursue the traffic violator while on patrol. Rather, he unexpectedly was confronted by the violator when he spun out in front of his vehicle at an intersection. As a civil servant in a marked patrol car, petitioner's actions in trying to stop the violator were reasonable in light of the possible danger before him and the general public. Additionally, given that the Berwyn Park District purposely hired Berwyn Police Officers as patrol officers, it is foreseeable that there might be similar situations in which they might have to act in response to a crime or violation that might not necessarily be on Park District property.

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**In support of the Arbitrator's Decision relating to *(J) has respondent paid all appropriate charges for reasonable and necessary medical services?***

Petitioner presented the bills of MacNeal Hospital, Orthopaedic Associates of Riverside and WSA Anesthesia totaling $39,347.30. (PX1) The bills presented correspond to reasonable and necessary medical care to treat the diagnosed partial medial meniscus tear. Consequently, the

Arbitrator awards petitioner the medical bills submitted subject to the Illinois Medical Fee Schedule.

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**In support of the Arbitrator's Decision relating to *(K) what temporary total disability benefits are due?***

Petitioner sustained a significant injury to his left knee from the accident. Petitioner was disabled from his employment of both of his job positions at Berwyn Police Department and Berwyn Park District as of August 22, 2010 through March 13, 2011,the date he was released by the treating physician, Michael Hejna, M.D. (PX2, p.20)

The Arbitrator directs the respondent, Berwyn Park District, to pay petitioner TTD benefits equal to 29-1/7 weeks at the TTD rate of $175.00 per week.

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**In support of the Arbitrator's Decision relating to *(L) what is the nature and extent of the injury?***

Petitioner sustained a partial meniscus tear which was repaired by arthroscopic surgery. He underwent rehabilitative care and was eventually released back to work on March 14, 2011. Since then he has not required any further medical care with regard to his knee. Petitioner testified that he still has some discomfort and stiffness about the knee. Petitioner is currently employed as a full time police officer with the Summit Police Department.

The Arbitrator notes that petitioner's injury occurred prior to the 2011 reforms. Based on petitioner's resulting condition, the Arbitrator awards petitioner 20% loss of use of the left leg and directs the Berwyn Park District to pay petitioner 43 weeks of permanent partial disability benefits at the rate of $175.00 per week.

STATE OF ILLINOIS )
) SS.
COUNTY OF LAKE )

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Ken Olzewski,

Petitioner,

vs. NO: 14 WC 30155

City of Highland Park,

Respondent.

17IWCC0289

DECISION AND OPINION ON REVIEW

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

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

- Petitioner is a 50 year old employee of Respondent, who described his job as Lieutenant paramedic/firefighter. Petitioner had been with Respondent for about 27 years; hired August 19, 1989. He worked for no other departments other than Highland Park during that period. Petitioner had two associate degrees; criminal justice and firefighting. He has numerous certifications as paramedic, hazardous materials tech, and others. He was still employed by Respondent pursuant to a collective bargaining agreement with the union

(current May 1, 2013—December 31, 2015). In his position he is responsible for his station. Typically he is at Station 3. His responsibilities include making sure his team members come in on a daily basis, checking out the apparatus and responding to calls. As a firefighter/paramedic they have daily training on schedule from the battalion chief. There are three stations in Highland. He was typically on Shift C. The ranks in the department are Chief, deputy chief, and three battalion chiefs (1 per shift). Lieutenants are below the battalion chiefs and firefighters below lieutenants. He typically oversaw three members on his crew. His typical work schedule was working a 24 hour shift every third day. He started at 8:00am and went to the apparatus floor to make sure the rigs and equipment were properly placed and in proper working for the day. They would do station duties after or if there was training in the morning, they would attend. They had to clean the apparatus floor, wash and wax the engine, clean the kitchen, maintain the grounds; the time it took depended on the day and type of duties; a couple hours. They had lunch 12:00 to 1:00. He stated the afternoons were directed by either training or doing preplans or emergency calls. They did EMS training, tactical training, and specialty training like extraction. Sometimes they did training at the training tower away from the station. Petitioner testified that once those things were done, between 4:00pm and 5:00pm was their mandatory physical fitness; done at the station. Petitioner stated that was an hour during the contractual work day where they were expected to exercise in some way, shape or form to improve their fitness. Petitioner stated at Station 34 they had the fitness room/gym in the upper loft with treadmill and stair stepper. On the lower level they had a treadmill and elliptical machine as well as free weights, a TRX military strap, medicine balls, dumbbells, and a multi-machine which has a squat rack and bench press. Petitioner stated that they also had an exercise bike and dip bar and chin up station. Petitioner testified that the other station (Ravinia Station – Station 32) was like equipped. He stated the central station had a larger gym and more equipment. Petitioner testified that the equipment was provided via the City through grants.

- Petitioner reported to the battalion chief, Tim Pease as he did July 31, 2014. On the date of accident, July 31, 2014, Petitioner testified that he reported to the battalion chief, Tim Pease. Petitioner stated that he started work at 8:00am and it was a normal day; he did not recall specific calls or specific training for that day other than his accident. He was at the station the entire day. Petitioner testified that at 4:00 to 5:00pm he was doing the mandatory exercising and he sustained an injury. Petitioner stated at the time he was performing incline bench press. He was like in a lean back position and he was lifting the barbell with free weights with both hands pushing upwards over his head. He was pressing 135 pounds at the time. Petitioner stated that during the press up he felt a sharp pop and pain in his left shoulder that made him discontinue the exercise and set the bar. He stated the only other person present was Paul Grzybek, a crew member (also was a certified peer fitness counselor, trainer). Petitioner stated that Paul did not see it happen; he was around the corner (Petitioner indicated Paul heard him yell—stricken). The fitness trainers are co-workers available for assistance with their fitness program. He believed

the fitness trainers' certification program is paid via a grant, now out of the City budget. He indicated the trainers are paid by the City to assist with workouts from 4:00 to 5:00pm; during his shift.

- Petitioner testified that after the injury he noticed a significant amount of pain and he terminated his workout. He stated he went and took some Advil and a shower and he realized that he would not be able to complete his work day the way his shoulder felt. Petitioner stated that he told his crew about it and Paul Grzybek (trainer). Petitioner stated he told them he had injured his shoulder immediately; he stated he said that he thought he had pulled or tore something in his shoulder. Petitioner stated that he also told his battalion chief, Tom Pease, that he was going to have to take the rest of the shift off. Petitioner testified that he filled out a Duty Injury Report (ICE report) stating that he had injured his left shoulder while he was working out. Petitioner testified the workout was mandatory. He stated he had been told that from the former Chief, Pat Tanner. He stated they were told during officer's meetings and they were reminded that they would workout in an effort to reduce back injuries and that it was mandatory. Petitioner stated that they were told that the officers would have their firefighter's workout and that it would be documented in firehouse training under Section 1A at Wellness. He stated that it was documented through firehouse reporting, where they entered all their training, runs, and ambulance runs. Petitioner viewed PX20 and identified it as their training sheet of physical fitness training for an hour; the purpose of it was to document all their training as required by Respondent. Petitioner indicated that the Lieutenants (like him) typically documented that. Petitioner noted the people documented there as himself, Paul Grzybek, Brian McDonald, and Michael Schmidt. He or another Lt. inputted the information; he did that on the exhibit. Petitioner testified that the document was kept in the normal course of business at the fire department. Petitioner testified that he was required to enter the physical fitness training information for his company every shift. Petitioner testified that he inputted the information in PX20. He inputs what he does and the other members for the physical fitness training, as part of his job, every duty day. He agreed the physical fitness training was 4:00-5:00pm every contractual duty day and he was paid compensation during that time. He was not allowed to leave the station during that time. Petitioner testified that if they were in different training or if there were calls or other specific duties they had to finish, they had to continue that; it was okay not to work out. He testified that during that time he was required and expected to work out. Petitioner stated that he was familiar with Respondent's Fire Department Wellness and Fitness Program. He stated that was their fitness program. The book defines all the benefits of working out. He understood the purpose of the workouts was firefighter fitness, job longevity. Petitioner testified that that makes him a better firefighter. Petitioner stated that it certainly provides a benefit to the fire department by being more physically fit, it reduces injuries. Petitioner stated that there was a year while the program was going on that they had no back injuries for an entire year; that allows them better customer service.

- Petitioner viewed PX 1 and identified it as a document that accompanied the physical results from their annual physical from Dr. Fragen dated August 27, 2007 (to Chief Wax from Dr. Fragen). Petitioner testified that as a result of the examination he was allowed to participate in the department's physical fitness program. That document was provided to Chief Wax. Petitioner testified that the document is kept in the normal course of business as it was in his training jacket/file. With the exam results he was allowed to do the fitness program and continue as a firefighter. Petitioner stated that those are very comprehensive physicals. Petitioner stated that lab work and screenings, stress test with strength components, sit-ups and push-up tests for flexibility and grip strength testing are all part of that exam. Petitioner testified that the physical fitness program noted in that letter was Respondent's wellness and fitness program. Petitioner viewed PX 5 and he identified it as Respondent's Wellness and Fitness Program; he stated that he was familiar with the document as it is located at all the fire stations. Petitioner testified that that document was in the fire station July 31, 2014 and it is kept as a normal business record at the fire station. He viewed page 3 of it and read the 'goals' of the program; to insure a physically and mentally healthy work force minimizing occupational injuries, disability requirements and Worker's Compensation costs. While complying with OSHA requirements, the programs focus was educational and rehabilitative rather than punitive. Petitioner indicated that he agreed with the statement and his understanding of the wellness and fitness program. Petitioner stated that the first sentence of the last paragraph read, 'This Wellness and Fitness Program has been developed by the department's Labor Management Subcommittees to ensure proper health and safety support for Fire Department personnel.' Petitioner stated that was a true statement to his understanding. Petitioner testified that he had operated and conducted himself accordingly from the date the program was implemented until July 31, 2014. He further read, 'Public safety personnel involved in fire suppression and emergency medical services work in a notably dangerous conditions and are exposed to a variety of threatening situations. He further read, 'Safe performance of job duties requires these personnel to achieve and maintain peak fitness levels to minimize risk of work associated injuries and illness. The intent of the fitness portion of this program is to provide accessible fitness opportunities for all sworn Fire Department personnel'. Petitioner stated that he agreed with and understood that both statements applied to him as a firefighter/paramedic. Petitioner further read, 'Provision of multiple fitness opportunities for the Fire Department personnel demonstrates in a changeable manner the Department's commitment to ensuring a well-balanced wellness and fitness program and maximizes opportunities for the Highland Park Fire Department to have a more motivated, safer and capable work force....'. Petitioner testified that the intent was there for the fitness program and how it impacts him as a firefighter/paramedic. Petitioner understood Respondent was committed to the wellness program. Petitioner read further, 'Daily fitness training is mandatory for all on duty Emergency Response Department personnel'; he indicated that applied to him. Petitioner read further, 'Time will be provided every day for fitness training. It is expected that activities such as emergency calls or extended training will occasionally

preclude personnel from participating in fitness training. These days should be the exception and not the rule'. He indicated in his experience that was the case from when it was implemented through July 31, 2014. Petitioner read further, 'Fitness training shall be documented in the daily journal and the firehouse software program as training using Category 1A, physical fitness training'. Petitioner stated that is what he testified to in PX20. Petitioner read, 'All Fire Department officers and acting officers are given the responsibility for making daily fitness training a priority activity'; he stated that was his understanding as a paramedic/firefighter for Respondent. Petitioner testified that through July 31, 2014 no one ever communicated to him that the program was voluntary and not mandatory. It was further noted the requirement of wearing workout clothing consistent with Respondent's uniform standards and once workout is completed requirement to change out of the workout clothing. Petitioner indicated the clothing was what he wore 4-5:00 during workouts during his shifts. Petitioner brought a set of the long sleeve tees and shorts for workouts (not admitted into evidence) and he testified those were provided by Respondent, he believed, with part of the original grant money, he knew he did not buy that. He indicated that was the clothing indicated above and he noted the logo for Respondent Station 33.

- Petitioner noted the section on page 17 regarding Respondent's fitness trainers receiving training and certification from a recognized training/fitness trainer course. Petitioner testified the trainers volunteer to participate in that capacity and then they are trained for Respondent. Petitioner noted Paul Grzybek was their fitness trainer and Petitioner understood he was to be re-certified the month of this hearing. Petitioner viewed PX 5 Respondent's Wellness and Fitness Program book (admitted). Petitioner viewed PX12 and noted it as Petitioner's 1A physical fitness training 2/24/08-7/31/14; a compilation of his fitness training, documented for the various dates during that timeframe. Petitioner noted they maintain the training records as Respondent told them to. He noted the training regimen from cardio to strength and conditioning (PX12 admitted). Petitioner viewed PX 6 and he identified it as the Collective Bargaining Agreement between Respondent and their union. (NOTE--Page 65 of the Agreement noted the requirement to participate in the fitness program). Petitioner testified as to the fitness program being established therein and their requirement to participate. Petitioner understood the program had been implemented as noted there. He indicated no one ever told him it had not been implemented.

- Petitioner agreed he first sought treatment for the injury at Northwestern Lake Forest Hospital August 6, 2014. Petitioner testified that he was sent there by Respondent as that is the location of Respondent's occupational health clinic. Petitioner was seen by Dr. Shropshire there at Corporate Health. Petitioner stated he described the accident and the pain he was having at that time. He told her of the pain in his shoulder after lifting the weights. Petitioner stated that the doctor was not familiar with what an incline bench was

but he did describe it. The doctor prescribed an MRI and Petitioner was given lifting restrictions and told not to do any lifting overhead. She did not recommend exercises to strengthen the shoulder but told him to do shoulder exercise twice per day. Petitioner testified that the limited duty and shoulder exercises did not resolve the pain. Petitioner had follow up visits with that doctor but he did not notice any improvement as a result. The MRI was ordered but never approved by WC then. The doctor was seeking approval for the MRI and therapy. Petitioner testified he was referred to Dr. Cham, an orthopedic specialist but he did not see the doctor at that time. Petitioner could not see the doctor as the doctor was not in his network. As WC had denied authorization Petitioner stated that he tried to use his group. Petitioner testified that he went through his HMO and was referred to Dr. Dunlap, an orthopedic specialist at North Shore University Orthopedics. Petitioner first saw Dr. Dunlap October 6, 2014 and he recommended an MRI. Petitioner underwent that left shoulder MRI at North Shore on October 14, 2014. He saw Dr. Dunlap October 20, 2014 to discuss the MRI findings. Dr. Dunlap recommended steroid injections therapy and restrictions. Petitioner had therapy at North Shore beginning November 4, 2014 and attended all scheduled sessions. After therapy Petitioner returned to Dr. Dunlap December 22, 2014. Petitioner indicated he had improvement with the injection and therapy but it was not long lasting and the symptoms returned. The doctor retained the light duty restrictions and gave another injection to the shoulder February 2, 2015. Subsequent to the injection the doctor discussed the possibility of surgery. Petitioner understood he was a surgical candidate. The doctor recommended continued light duty and home exercises. After that Petitioner saw Dr. Chams at Illinois Bone & Joint, June 4, 2015. Petitioner described feeling popping and pain in the shoulder while the doctor manipulated it. Petitioner understood the doctor knew what was wrong and could fix it. Dr. Chams diagnosed a tear in the shoulder from the MRI and recommended arthroscopic surgery to repair it. Petitioner stated that he wanted to have the surgery.

- Petitioner testified that prior to July 31, 2014 he never had any left shoulder treatment and he had no prior similar symptoms of popping in the shoulder. Petitioner stated that he had no new injuries since this accident. Petitioner stated that some of the bills had not been paid and some were paid via group insurance as WC had denied the bills. Petitioner stated that he had paid out of pocket towards some of the bills; he had not been reimbursed. Petitioner paid Dr. Chams $235 for the evaluation. Petitioner was currently on light duty status and he was pending surgery per Dr. Chams. Records and bills in PX 2 (Northwestern Medicine), PX 3 (North Shore), and PX 4 (Dr. Chams), were introduced.

- Petitioner agreed he testified that the workout equipment and clothing were provided to firefighters, for the physical fitness training, by Respondent via a grant. Petitioner was familiar with the grant and documents related to it. Petitioner stated the grant they received was for the fitness equipment and program and he noted the letters authored by the Chief, Alan Wax on Respondent's behalf to Senators Durbin and Obama, and Kirk. Petitioner testified that those letters were maintained in the normal course business (PX13

admitted). Petitioner identified PX14 (admitted) as the grant paperwork to Homeland Security for the Fitness and Wellness Program signed by Tim Pease and kept in the normal course of business. Petitioner read the grant application which indicated the program was mandatory. The grant application noted it 'Requests funding to implement mandatory health and fitness program'. The application further noted that in 1990 an optional wellness program was implemented and the goal was to expand program to be more comprehensive and comply with NFPA 1582 standard on medical requirements for firefighters. The application further noted that the program was to be mandatory for all emergency response personnel and administered on an incentive rather than punitive basis. Petitioner indicated in his experience that was how the department operated since obtaining the equipment purchased under the grant. He read, 'this program will allow the HPFD to effectively address the most dangerous aspect of firefighters' jobs and improve the well-being and fitness level of each member'. Petitioner agreed with the statement. The application read "with the assistance of federal funding, HPFD (the Respondent) would be able to implement this most valuable program." Petitioner testified that the department had received that grant money which was used to purchase the equipment (total cost $42,837) as well as provide training for Peer trainers (total costs $13, 341.90). Petitioner testified that peer trainers are those trainers who volunteer to help people there with their workouts; that money had been provided via the grant. The application further read, 'Our organization is committed to making this program work. It is absolutely vital'. Petitioner understood that was how Respondent viewed the program. He further indicated the request needing the assistance of the federal government for the program. The application further noted that 'within the past three years, the Highland Park Fire Department has also experienced two firefighters being placed on permanent disability due to back injuries' and that 'These injuries could have been avoided if a mandatory physical fitness program were in place.' Petitioner identified PX15 as a letter from Homeland Security Office of Grants and Training to Respondent. (exhibit admitted). Petitioner read the letter regarding the $74,692.00 grant approved for the program to purchase the equipment and provide peer training. Petitioner testified no one ever said the workout each shift was voluntary.

- Petitioner testified there is no ban from them using the equipment when off or on duty. He stated he does cardio in the morning and weight training later. He stated cardio is difficult during the day as they can get a call in the middle and that stops the workout. Petitioner again stated there is nothing to prevent a firefighter from using the equipment at other times. He indicated his immediate family can come there on off days. He can exercise more than an hour per day.

- Mr. Horne testified for Petitioner, he has worked for Respondent Fire Department for 29 years; a lieutenant paramedic/firefighter. He also serves the union in various capacities; he was part of the negotiating team at the time of hearing. He is a company officer so he

works with a crew of 3-5 and they carry out normal duties as firefighters, fire calls, EMS, water calls. He works on gold shift; 24/48 shift, 24 hours on, 48 hours off, on a rotating basis. Respondent has 3 stations. They are assigned to stations by the battalion chief and they rotate through. He ultimately reports to the fire chief and they have a deputy chief and a battalion chief on his shift. He had worked under 5 chiefs in his career; current chief is Dan Pease. Mr. Horne stated that on a typical shift day they start at 8:00am and they do morning checkouts and they check the rig to be ready for calls. He stated the battalion chief provides a daily roster of people assigned to the station and rig. They also assign if they want special training or public education details completed. It is considered a contractual workday. Between 8:00 and 5:00 they respond to emergency calls and they train and at 4:00 they do physical fitness until 5:00. He stated there is workout gear in every station and everyone works out; he believed that was part of their job. He indicated the prior Chief Tanner, had a conversation with him about physical fitness training requirements after he was promoted to lieutenant, about October 2010. He indicated the conversations occurred during officer meetings on more than one occasion; they have scheduled monthly meetings when he is on duty. He indicated management staff is present at the meetings; chiefs, lieutenants. The chief conducted the meetings and those meetings are protocol. Petitioner testified that Chief Tanner, at those meetings, said the physical fitness training was mandatory and they were to instruct all their personnel to participate in the program. He stated they were presented with facts like their goals to reduce back injuries. He indicated they attributed no back injuries during a period to the fitness program. He was told everyone shall participate at their own level and non-participation was only when on calls or other duties or training was going on. Mr. Horne stated he knew that from his experience with the contract meeting with the people to set up the program for individual workout plans. There was no specific workout routine. Mr. Horne stated that everyone was expected to participate at their own fitness level; no one was told not to as to a particular workout. He indicated he understood the peer fitness trainers met with individuals on the shift if they were asked to help them reach personal goals. Mr. Horne testified that the peer trainers had special training and certification classes provided by Respondent. Mr. Horne testified at no time was he ever told the program was voluntary. He stated in the last contract negotiation the city proposed a word change from 'may' to 'shall' and he thought that strengthened it.

- Mr. Horne viewed and identified PX 6 as the collective bargaining agreement in effect from May 1, 2013-December 31, 2015. He noted Section 19.3A provided that the 'The city and fire department peer fitness trainers may establish a wellness program which shall include individuals and departmental goals. While employees shall be required to participate in any such program while on duty'; the word 'shall' was the city proposal; it was 'may' before. Mr. Horne stated the agreement was accepted by the union and changed. He was a signatory on the agreement for the union.

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- As to the fitness equipment, Mr. Horne stated there is a mix of cardio gear and weights and machines; equipment present at all stations. In the union he represents an area of northern Illinois firefighters. He had been president and on the negotiating team before. He is familiar with labor management committee as he had participated in many. He read 19.3A, 'While employees *shall* be required to participate in any such program while on duty, no employee will be disciplined for failure to meet any goals that may be established as long as the employee makes a good faith effort to meet any such goals and is able to meet reasonable minimal job required physical fitness standards as established by the city and for department peer fitness trainers'. He noted the program had to be reviewed and discussed before it was implemented. He had been present at implementation meetings for the program. Mr. Horne stated he understood after the meetings that he participated in with Chief Wax, that the program was implemented. He testified after the program was implemented the workouts started. Mr. Horne testified the 4:00-5:00 workouts started with Chief Wax; Mr. Horne was not a Lt at that time. He testified that the workouts continued after Chief Wax. Mr. Horne stated that Chief Tanner was more direct as to the workouts. He stated they were told the workouts were part of the job duties. At that time he was a Lt and was told to make sure the employees participated. Part of his job as a Lt. was to make sure people worked out and participated in the program to whatever extent. He stated they have some who walk around the station and others who work out more than an hour. He stated he (the Lt's) notes on the daily log the workouts; whether firefighter/paramedics participated; and inputted the hours.

- Mr. Horne viewed and read from PX13 (the grant letters June 2, 2006 to Senator Durbin) as to implementation of the fitness program. He read, "We recognize that the cost of less than maximum health and fitness in our emergency responders is not only monetary but also can be emotionally devastating to the department'. He agreed with Chief Wax statement there. He read further, "By preventing injuries and illness and improving employee health, the department will reduce costs associated with workers' compensation, disability pensions, insurance premiums and overtime". It read further that moral improvement would result in better protection of life and property and benefits the City, community. He agreed with that. Mr. Horne testified that the 4:00-5:00 period was for workout and not for naps or reading; he stated they were not allowed to leave the station during that period; they were expected to exercise then. Mr. Horne stated that he believed that exercising makes you a better firefighter, makes the job safer, allows more efficiency on the job, allows better decisions and provides for your well-being. Mr. Horne felt it allowed him to provide better service to the community.

- Mr. Lindgren testified for Petitioner, he is a lieutenant firefighter/paramedic who has worked for Respondent for 24 years. He was hired initially as firefighter/paramedic and then promoted about 2008. He supervised a station with usually 3 other firefighters. He organizes the day. He stated they do training and duties and manage the calls which could be firefighter or EMS calls. He noted the battalion chief sends out a roster with any other

training. He indicated the typical schedule is 24 hours on with 48 hours off. They start at 8:00am and do roll call and go through the roster and note special duties and training for the day. He stated after they check the rigs which takes about 45 minutes to an hour and after that maybe some training or other duties. He noted about noon they have lunch and after they train, and then at 4:00 they do the wellness workout. Mr. Lindgren indicated the workout could be any kind of physical conditioning you want; running, treadmill, weight lifting, stretching. Mr. Lindgren testified that the workout is mandatory going back quite a few years with Chief Tanner. He noted that they were told on more than one occasion at the meetings with Tanner about the training program. He indicated the first time it was noted as to the wellness program was summer 2008. He indicated unless they were on other training or calls 4:00 was the fitness program. He indicated it was a direct order to work out as he understood. Mr. Lindgren testified that at no time since then were they ever told it was a voluntary program. He noted they have to fill out the training sheet every time they are finished; mandatory 1 hour. He would fill out the sheet for his crew and enter it into the computer that they worked out. He testified that was a regular part of the job duties. He indicated the workouts were standard, not an elective recreational activity for free time. Mr. Lindgren testified the workouts took place during their contractual day. He stated he was told by Tanner they were trying to reduce back injuries, to keep firefighters in better shape. He stated there that there was a big push to reduce back injuries at that time. Mr. Lindgren testified the wellness program helps by working out and reducing back injuries by being in better shape. He recalls a good year with no back injuries and they attributed that to being in better shape from the workouts with the program. Mr. Lindgren testified he thought it was a great program that provided a benefit to the department; in better shape and preventing injury. He thought it was great PR for the city with them being in better shape; 'no one wants to see an out of shape fireman'. He testified it helped him perform his job better. Mr. Lindgren testified that the wellness program was mandatory, not voluntary and was in place on July 31, 2014.

- Mr. Pease testified for Respondent. Mr. Pease testified to being employed by Respondent as fire chief for about a year. He had started with Respondent October 5, 1987. His job is preparing budgets, strategic direction and implementing the vision. He was involved, as a negotiator, with negotiating the contract with the union. Prior to May 1, 2013 he was deputy fire chief and was involved with negotiations then also. Mr. Pease is familiar with Petitioner and aware of the injury July 31, 2014. He agreed injuries are to be reported to direct supervisors (notice is stipulated to), and an accident report is prepared and moves up the chain of command. He viewed RX 5 (admitted) and recognized it as the supervisor report by his brother; he had seen it before; it was signed August 6, 2014. The report is kept in normal business practice; done for every injury claimed. Mr. Pease indicated he was familiar with the general employee policies and rules of the department. Mr. Pease indicated that as of July 31, 2014 there were no physical fitness requirements, city wide for Respondent. He testified the city is under a physical wellness program that the fire union is not part of; he indicated they chose not to accept the city's wellness program, he

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believed per the collective bargaining agreement. He viewed PX 6 and identified it as the agreement between the city and fire union effective May 1, 2013 through December 31, 2015. He testified the agreement was applicable July 31, 2014. Mr. Pease testified that he was familiar with the terms of PX 6 as he was involved with negotiations. He viewed page 65 (fitness examinations) and indicated that the provision on that page concerned the question of physical fitness to return to duty. He indicated that the fire chief makes the determination if there is justifiable concern as to medical fitness for duty. He indicated that prior to July 31, 2014 there was no concern regarding Petitioner's fitness; Petitioner had not been scheduled for any such exams. Mr. Pease was then pointed to the 'Physical fitness program' section and stated that a peer fitness trainer is a person trained in physical fitness activities and certified for the fire department. He testified there were certified trainers July 31, 2014. Mr. Pease testified to being a member of the labor management committee as on July 31, 2014. Mr. Pease indicated that between May 1, 2013 and July 31, 2014 there had been no meeting of the labor management committee regarding the wellness program. He had been present at all meetings and he stated that a wellness program had never been brought up for discussion. There had been meetings since; 3 per year. He stated a wellness program had not been brought up and no such program had been adopted at the meetings. Mr. Pease testified there was no other mechanism besides the collective bargaining agreement to establish a binding agreement on the wellness program. Mr. Pease testified that there presently does not exist, a physical fitness program and there had not been one before May 1, 2013. Mr. Pease testified that no command officers had ever disapproved of physical fitness activities between 4:00 and 5:00pm. He indicated per the agreement they are permitted to do that activity from 4:00 to 5:00pm (provided other duties were done) but it was not required. In his capacity he had been to fire houses between 4:00 and 5:00pm from time to time and had observed employees working out and not working out. He stated he had observed employees cooking, completing reports and watching TV during that time. He testified if he was at a station from 4:00 to 5:00pm and observed someone not working out he would not advise them to work out and there would be no discipline for not working out. He had seen no such reports from any officer. Mr. Pease testified that there was no other program that employees must complete a mandatory workout from 4:00 to 5:00pm. He viewed the Wellness incentive program fitness bonus hours section. He indicated that was earning additional time off performing a physical fitness assessment with a wellness coordinator; he stated that was a voluntary program. He indicated they contract out for a coordinator through HR for that. He indicated that would be performed at a country club; operated by the park district. Mr. Pease testified that on July 31, 2014 Petitioner was not performing that assessment with a wellness coordinator.

Mr. Pease testified that there are legal standards of safety and well-being that apply to firefighters. He viewed RX 6 and indicated it is a medical evaluation of candidate form (minimum standards per State of Illinois). He indicated they are advised to do that but that was not mandatory; Respondent does comply with that. He stated it is an

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examination done once per year. He indicated Petitioner would have been scheduled for that exam fall 2014, but not scheduled as of July 31, 2014. He stated the sole purpose of the exam is to determine if the person is fit for duty. He did not know if there was a specific level of strength of fitness to pass the exam. Mr. Pease testified that employees have varying levels of physical fitness that pass the exam, but he did not know the measurement.

- Mr. Pease was familiar with the location of Petitioner's injury within the station. He indicated they have other facilities at other locations. Mr. Pease testified that they received the equipment per a grant and donations from residents. He indicated there are amenities at the station the firefighters can use other than exercise equipment when they have completed their duties; a day room with TV, recliner chairs, desks, bunks, computers. He testified the employees are not required to use any of those amenities. He indicated people other than firefighters can use the equipment at station 33. Mr. Pease agreed, per the collective bargaining agreement, that Respondent provides certain clothes to the firefighters. He stated they provide standard uniform, tee shirts, shoes, and turnout gear. He stated not fitness/exercise wear. Mr. Pease testified that he was aware of firefighters purchasing their own workout gear. He indicated one firefighter sells things with the logo he had designed for Respondent. He testified if a firefighter purchases those things they are not reimbursed by Respondent. He indicated workout clothing had been provided when they had the original grant (under Chief Wax). Mr. Pease became chief December 2014. He indicated during Chiefs Wax and Tanner's tenure as chiefs there was no formal program to work out. There are policy changes every 2 years that are posted but not in the employee handbook. Mr. Pease testified that there is a formal fitness requirement set in the handbook for non-union employees, not the fire department. He indicated the firefighters did not accept that program. He stated they did not agree to the city's ability to raise insurance premiums based on mere participation in the program. He indicated the union had a disagreement with the wellness program tied to the insurance premiums (with the prior agreement). Mr. Pease testified that there was no formal wellness program with the May 2, 2013 agreement (PX 6). Mr. Pease testified that he as chief had not applied any pressure on officers to engage in workouts and to his knowledge neither did Chief Tanner. He stated they were trying to develop a wellness program but the union rejected it. The agreement had been enacted during Chief Wax' tenure. He had never issued any orders contrary to the agreements. He had been a union member when he was a firefighter.

- Mr. Pease agreed there are people in the department certified as peer fitness trainers. He stated the people pay for their certification every few years; the department does not reimburse them. He stated at the development of the wellness program Respondent did pay to certify peer fitness trainers in anticipation of the union accepting the policy, but they did not and the fitness program went by the wayside. The wellness and fitness guide

was published February 1, 2008 and the program was subject to acceptance by the union and the acceptance was not given, so the City stopped paying for the trainers certifications. Mr. Pease testified that recording of training hours is required by the fire department. Nothing happens if they do not work-out on a given day. He indicated the supervisors/lieutenants (or the firefighters) at each station are instructed to complete those entry hours. No action is taken against a Lieutenant for not logging it. He stated as they do not require it they do not really track it. He stated that all training hours should be recorded but there is no penalty if not recorded properly. He indicated not all firefighters are equal status of physical fitness. Some are overweight; no action is taken for that. To his knowledge no prior chief disciplined for failure to work out.

- On cross examination, Mr. Pease again stated that the peer fitness trainers are not reimbursed by the department; they could have been under prior chiefs but were not under his reign. He stated Chief Wax did as he was the one that certified them as peer fitness trainers. He agreed he was not chief July 31, 2014 (date of accident). He indicated that to his knowledge at that time the peer fitness trainers were not paid for; he did not know. Mr. Pease indicated some of the fitness equipment was purchased from money received elsewhere; some through the grant. He indicated the grant received was from Homeland Security; he was not intimately familiar with that grant. He viewed the grant and indicated it had been prepared by his brother, Lt. Tim Pease. He indicated the intent was to fund a program that was never accepted by the union. He agreed the department received the grant money and he believed it was used to buy the equipment. He indicated that to his knowledge the money was not given for a mandatory health and fitness program ((NOTE-this was contrary to grant language)). He then indicated he was not sure what was communicated by Homeland security about it.

- Mr. Pease testified that the firefighters can go to grocery shopping from 4:00-5:00pm. He testified it was up to the officers' discretion what they did during that hour based on completion of the assigned duties for the day. He agreed the equipment purchased by the city with assistance of the grant money was so that the firefighters would work out; a physically fit firefighter can do better at his job and benefit the fire department, and in turn the community at large. He stated they bought the equipment with the intent of implementing the program as the city would benefit from physically fit firefighters, regardless of whether the program was implemented or not. The City was willing to let them workout during work for that. Mr. Pease indicated they are neither encouraged nor discouraged from working out; it was up to the individual. He agreed he testified the training hours (working out) are required to be recorded. As chief he has not taken any steps to communicate to the firefighters that workouts were not required. He was not aware of prior chiefs communicating if they did not want to work out they did not have to. He testified that the equipment was left in the stations for the guys to use because the

city wanted them to. He did not know if you can correlate equipment use with low back injuries. Mr. Pease indicated they have no measurement of whether back or knee injuries are diminished or increased from a workout. He indicated the wellness program was not to decrease low back injuries but to increase physical fitness. He indicated with awkward positions even a physically fit person can throw their back out. He did not know how much money was received from the grant. He indicated to his knowledge Chief Tanner did not give orders contrary to the collective bargaining agreement (CBA). Mr. Pease had not told anyone not to record training hours. Mr. Pease testified that he does encourage everyone to work out and record physical fitness hours that they do not do at the firehouse. He encourages them to be physically fit; whatever they had to do; a workout could be one of those things to do.

- Ms. Taub, testifying for Respondent, stated that she had been employed by the City of Highland Park for about 5.5 years. Her title has been Human Resources manager for the past 3 years; since January 2013. Ms. Taub handles employee relations, performance management, policy development and compliance, insurance plans and workers' compensation. With regard to policy development she was involved with proposed policies like the wellness program. She agreed policies like that are revised and updated from time to time. Ms. Taub testified that presently there is no minimum level of physical fitness required under Respondent's policies. She testified that there was no such policy July 31, 2014 or prior. She testified in the past there had been performance measures for evaluation for performance of their duties; it changed in 2011. Ms. Taub stated that in 2011 the City completely revamped the performance evaluation process and went looking for personal attributes to job-based competencies; job specific competencies. She testified none of those took assessment level of physical fitness. Ms. Taub testified that when looking at new candidates for positions the City does not take physical fitness into account. She testified that the City does have fitness incentives for employees; to earn extra time off if they meet certain levels. Ms. Taub testified that is described in the employee handbook. She testified the employee is not required to participate in that program and they are not penalized for not doing that. Ms. Taub indicated policies are typically communicated via writing and all employees are asked to acknowledge receipt and they would comply; the policies are in the handbook. Ms. Taub identified RX 1 as the employee handbook; it was forwarded to the attorney for this litigation. She indicated that was in effect July 31, 2014. She indicated access to the handbook is also available on-line for the employees. She testified the handbook applies to all employees, including those covered by a collective bargaining agreement. She indicated policies are not affected by the CBA but if there is a conflict the CBA controls.

- Ms. Taub testified that Respondent has a central workout facility for employees and their families. Ms. Taub testified that employees are not required to use the workout center and

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she stated the City does not track if they do or not. She indicated employees can to self-identify for purposes of a wellness program.

The Commission notes that Petitioner presented PX 1, a Certification of Health dated August 29, 2007 from Dr. Fragen to Chief Wax regarding Petitioner's physical and fitness for duty. The Certification noted Respondent's wellness and fitness program. Petitioner also presented PX 5, the Highland Park Fire Department Wellness & Fitness Program book. It noted the 'Goal' of the program was, to insure wellness and fitness physically and mentally in the workforce and minimize occupational injuries, disability requirements (WC), complying with OSHA requirements and that the focus was education and rehabilitative rather than punitive. Section 5 index indicated the Mandatory fitness training section. It noted the development of the program and noted enhancing health and safety of its most valuable assets—the employees. It noted that the Peer fitness trainers were to upkeep equipment and to monitor programs valuable to boost morale with injured employees. There is also a section on fitness protocols to determine base levels and evaluate progression year after year. Petitioner presented PX 6, the Collective Bargaining Agreement; as per testimony. Page 65 of Agreement noted the fitness program and the requirement to participate in program. Petitioner presented PX10, meeting minutes, July 15, 2013, -priorities- reduction of vehicle accidents; continue success with back injury reduction; ensure proper lifting techniques; possible increase in use of stair chair. Petitioner presented PX13, letters dated June 2, 2006 regarding grant application. The letters noted that the grant would provide for the purchase of equipment for the program which would be of benefit to the community. It further noted it would provide healthier, more productive responders for the department and better aid stricken communities. Petitioner presented PX14, the Grant application (via Department of Homeland Security) as per testimony. The Grant was requested for the Fire Department to purchase exercise equipment and other things for a mandatory fitness wellness program. Petitioner presented PX22, the Affidavit of Frank Nardomarino, a Peer fitness trainer and firefighter/paramedic for Respondent, dated May 18, 2016. He noted he was first certified in 2013 and re-certified November 2015. He noted since November 2015 Respondent has stopped paying costs for training and re-certification for trainers.

The Commission finds that there is clear testimony that Chief Tanner, the prior chief and chief at the time of Petitioner's accident, had indicated that the fitness and wellness program was mandatory. Testimony was presented that Petitioner worked out regularly. Clearly in such a demanding and responsible position, the fitness program (voluntary or mandatory) was a benefit to him and certainly a benefit to Respondent. Clearly, keeping Petitioner in shape and on the job longer decreased turnover and the necessity to train new firefighters. Having healthy veteran firefighters/paramedics certainly benefitted Respondent and its citizens. Px. 5, the Wellness and Fitness Program indicated, 'This Wellness and Fitness Program has been developed by the department's Labor Management Subcommittees to ensure proper health and safety support for Fire Department personnel'. It further noted 'Public safety personnel involved in fire suppression and emergency medical services work in a notably dangerous conditions and are exposed to a variety of threatening situations'. Furthermore, 'Safe performance of job duties requires these personnel to achieve and maintain peak fitness levels to minimize risk of work

associated injuries and illness. The intent of the fitness portion of this program is to provide accessible fitness opportunities for all sworn Fire Department personnel'. Petitioner testified that he understood that both statements applied to him as a firefighter/paramedic. The Federal grant, from the Department of Homeland Security, clearly indicated it was for a mandatory program; if it was not implemented as mandatory Respondent would be in violation of the grant provisions. The Commission notes that there is no question that the 4:00 to 5:00pm time period during Petitioner's shift was designated for wellness and fitness in the facilities in the fire stations as long as they were not on calls or performing other duties for the day. There were no punitive measures for not participating in the hour for fitness and the testimony and the CBA indicated that there was to be no penalty for not participating. The Commission finds that there is clearly issue as to whether or not it was a mandatory program, but the preponderance of credible testimony and evidence indicates it was mandatory at the time of Petitioner's injury. It is clear Petitioner's activities between 4:00 to 5:00pm were during Petitioner's paid shift. Petitioner was required to be on the premises during that time other than if on a call or other mandated activity. The fitness period was an exercise break from regular firefighter/paramedic duties as the time of the accident. The preponderance of evidence makes clear that along with Petitioner's firefighter/paramedic duties and responsibilities around the station, that hour provided for exercise was equally a part of his duties and responsibilities whether mandatory or not. Petitioner working out was not merely a recreational activity for his enjoyment, but rather, and clearly a benefit to Respondent and their community and other communities for which they may need to respond. Clearly a physically fit firefighter/paramedic is an asset and great benefit to the community at large.

The Commission notes a case on point is Elvery v. Village of Lombard, 06 IWCC 1076; 2006 Ill. Wrk. Comp. LEXIS 1261. There a firefighter was on duty and during a break period (from his cooking duties at the firehouse) was playing softball on the premises when he was injured; the Commission reversed the Arbitrator's decision and found accident and remanded the matter back to the Arbitrator for further proceedings. In Campbell v. Taylorville Fire Dept., 13 IWCC 574; 2013 Ill. Wrk. Comp.LEXIS 559., the petitioner was voluntarily playing basketball on a break with a number of other co-workers when he was injured. The Arbitrator found accident there and the Commission affirmed and adopted that finding. In Duran v. Peru Volunteer Ambulance. 15 IWCC 312; 2015 Ill. Wrk. Comp. LEXIS 313, the Commission affirmed the arbitrator's finding of accident. There, Petitioner was a paramedic, also required to remain at the station on an extended shift. While on a break, he was helping a co-worker work on a personal radio and while Petitioner was walking to return tools to his vehicle he fell and was injured. In each of these cases the Commission applied the personal comfort doctrine to find accident arising out of and in the course of employment. Here, Petitioner was not playing ball or walking to his car but rather working out for wellness and fitness which clearly was of benefit to him and Respondent and the communities at large. Furthermore, the evidence on the record indicates the intent of Respondent obtaining the grant from the Department of Homeland Security, to obtain fitness equipment, for a wellness and fitness program for its firefighter/paramedics, whether considered mandatory or not. Petitioner was on a 24 hour shift and he had to be on premises other than for calls or other duties that took him away. Analyzing the evidence pursuant to the personal comfort doctrine

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would also result in a finding for Petitioner as there had to be some downtime for personal comfort seeing that Petitioner had to be present at the station and remained on the clock for the entirety of his 24 hour shift. Again, Petitioner working out is of great benefit to him and Respondent and communities at large, and also considering the Homeland grant (mandatory) intent was for keeping emergency personnel fit as a benefit for all. The preponderance of credible testimony and evidence finds Petitioner met the burden of proving accident that arose out of and in the course of his employment and further a causal relationship to his condition of ill-being. The Commission finds the decision of the Arbitrator as contrary to the weight of the evidence, and, herein, reverses the Arbitrator's decision and finds, by the preponderance of the evidence that Petitioner met the burden of proving accident that arose out of and in the course of employment, and further met the burden of proving a causal relationship between the accident and Petitioner's current condition of ill-being.

The Commission, with the above finding of accident and causal connection, further finds evidence of medical treatment and medical expenses to warrant reversal for an award of medical expenses and 'prospective medical care' and, herein, orders Respondent to pay the reasonable and necessary related medical bills, subject to the fee schedule, and for Respondent to pay for the reasonable and necessary costs related to the surgical procedure recommended by Dr. Chams. Respondent offered no evidence they are not liable for that surgery, other than by way of their denying accident/causal connection. Petitioner has had the surgery since the start of the hearings so the matter is, hereby, remanded to the Arbitrator, to obtain further evidence (again this was result of §19(b) proceedings) to determine the medical expenses and any further treatment and/or temporary total disability (TTD), and/or any permanent partial disability (PPD) benefits. The Commission finds the decision of the Arbitrator as contrary to the weight of the evidence, and, herein, reverses the decision of the Arbitrator, and awards the reasonable and necessary medical expenses, and expenses related to the 'proposed medical care' (surgery and post-operative treatment) and any TTD related to the surgery, and, herein, remands the matter to the Arbitrator for further proceedings consistent with this order.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the due and owing (if any) period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the reasonable and necessary medical expenses and 'prospective' medical care under §8(a) of the Act, subject to the fee schedule.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired

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without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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

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

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.

MAY 4 - 2017

DATED:
o-2/23/17
DLG/jsf
045

David S. Gore

David Gore

Stephen J. Mathis

Stephen Mathis

SPECIAL CONCURRING OPINION

This case was scheduled for Oral Arguments on **2/23/2017** before a three member panel of the Commission including members **David Gore**, **Stephen Mathis** and **Mario Basurto** at which time Oral Arguments were either heard, waived or denied. Subsequent to Oral Arguments and prior to the departure of member **Mario Basurto** on **3/1/2017**, a majority of the panel members had reached agreement as to the results set forth in this decision and opinion, **as evidenced by the internal Decision worksheet initialed by the entire three member panel,** but no formal written decision was signed and issued while former member **Mario Basurto** still held his appointment.

Although I was not a member of the panel in question at the time Oral Arguments were heard, waived or denied, and I did not participate in the agreement reached by the majority in this case, **I have reviewed the Decision worksheet showing how the departing member** voted in this case, as well as the provisions of the Supreme Court in Zeigler v. Industrial Commission, 51 Ill.2d 342, 281 N.E.2d 342 (1972), which authorizes signature of a Decision by a member of the Commission who did not participate in the Decision. Accordingly, I am signing this Decision in order that it may issue.

Deborah L. Simpson

Deborah Simpson

# ILLINOIS WORKERS' COMPENSATION COMMISSION
# NOTICE OF 19(b) ARBITRATOR DECISION

**OLZEWSKI, KEN**
Employee/Petitioner

Case# **14WC030155**

**CITY OF HIGHLAND PARK**
Employer/Respondent

**17IWCC0289**

On 8/8/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.39% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4192 OWENS & LAUGHLIN PC
BRIAN M LAUGHLIN
9 CRYSTAL LAKE RD SUITE 205
LAKE IN THE HILLS, IL 60156

0075 POWER & CRONIN LTD
ADAM RETTBERG
900 COMMERCE DR SUITE 900
OAKBROOK, IL 60523

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STATE OF ILLINOIS )
)SS.
COUNTY OF LAKE )

- ☐ 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)

**KEN OLZEWSKI**
Employee/Petitioner

v.

**CITY OF HIGHLAND PARK**
Employer/Respondent

Case # **14** WC **30155**

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 **George Andros**, Arbitrator of the Commission, in the city of **Waukegan/Chicago**, on **11/18/15, 2/8/16, 4/27/16, and 5/20/16**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

**KENNETH OLZEWSKI V. CITY OF HIGHLAND PARK 14 WC 30155**

## STATEMENT OF FACTS

As a 27 year veteran and now a Lieutenant Paramedic firefighter his job responsibilities include overseeing crew and apparatus, training and responding to calls.

The crew works a 24-hour shift every third day, meaning that they are on duty for 24 hours, then off-duty for 48 hours. Station duties follow or training attendance, if scheduled. Lunch is noon then the afternoon would be dictated by training or preplanned events. All are subject to emergency calls and responses.

Between 4:00 pm and 5:00 pm Petitioner would perform what he described as mandatory physical fitness at the station. Station 34, to which he is assigned, includes a "gym," which Petitioner described as a room containing treadmills, a stair stepper, elliptical, & weightlifting equipment. The other two Highland Park stations have similar equipment, with central station 34 having a much larger gym.

On July 31, 2014 Petitioner reported to work in his ordinary capacity at Station 34 at 8:00 a.m. Between the hours of 4:00 and 5:00 p.m. he was exercising, both because he described it as mandatory and because he enjoyed it. While performing an inclined bench press he felt a sharp pop and pain in his left shoulder. He then discontinued. The only one present was Paul Grzbek, a who did not see the event. Mr. Grzybek is a "peer fitness trainer," an individual trained as part of a wellness program to be available for assistance with fitness. Petitioner believed that Respondent paid for the training and certification of these "peer fitness trainers". Following the injury Petitioner felt significant pain in his left shoulder.

He self-medicated, advised his crew, then called his battalion chief Tim Pease reporting he was going home sick. He completed "ICE Report," which is a duty injury report. Petitioner stated therein he injured his left shoulder while working out.

Petitioner believed his workout was mandatory based on being told by former Fire Chief Pat Tanner during an officer's meeting. No date was established. He testified all training including workouts were reported and documented on an ongoing basis. (Pet. Ex. 20) Such documentation was required by the Department. Petitioner produced a printout of the training log of July 31, 2014, which listed himself, Paul Grzybek, Brian McDonald, and Michael Schmidt. Petitioner compiled the document, inputting the information, and testified that it was part of his job to do so on every shift.

During the hour from 4:00 to 5:00 p.m., Petitioner is paid, and this time is part of his contractual workday. He cannot leave the fire station during this hour. The workout would not be required if training / events over ran into that hour, or other specific duties required completion, an emergency call arose. Otherwise, Petitioner's belief was that he was required to remain in the station and engage in a workout during that hour. Importantly to Petitioner, after they completed workouts, one responsibility was to record in the training logs the number of hours the crew worked out in the gym in station 34. Pet. Ex.12 and Pet Ex.20. This was one of his "duties" along with maintenance of apparatus, EMS and training, and responding to calls.

The Petitioner testified Chief Tanner told him at officers meetings workouts were mandatory; All officers and firefighters work out; Lieutenants were responsible for recording and document in training logs, under the category "1A physical fitness training," the hours each firefighter spent in participating in fitness training.

Petitioner was examined in August 2007 by Dr. Fragen at the City's request. As a result Dr. Fragen determined he was "fit to participate in the department's Physical Fitness program." (Pet. Ex. #1)

Petitioner testified regarding Respondent's "Wellness and Fitness Program". This program encompassed the purchase of exercise equipment, time to work out, plus book on its benefits. The purpose of this program was enhancing fitness and job longevity, reduced injuries overall, and make him a better firefighter. Petitioner produced a letter dated 8/29/07 from Dr. Fragen to Chief Wax, noting that Petitioner had undergone a physical examination and was therefore allowed to participate in the Department's physical fitness program. (See Pet. Ex. 1) He asserted the physical fitness program was the same as Fire Department Wellness and Fitness Program. See testimony infra from the HR director and Chief Pease regarding these programs & CBA.

Petitioner produced a document titled "Highland Park Fire Department Wellness and Fitness Program." (See Pet. Ex. 5) This document included a "Goals" section that stated:

"The Highland Park Fire Department operates a wellness and fitness program to ensure a physical and mentally healthy work force, thus minimizing occupational injuries, disability requirements and Workers' Compensation costs. While complying with occupational health and safety regulatory requirements, this program's focus will be educational and rehabilitative, not punitive. "Petitioner testified that this was consistent with his understanding and belief that the Fire Department was committed to this wellness program as of July 31, 2014.

He underscored Page 15 of the Highland Park Fire Department Wellness and Fitness Program binder Petitioner Exhibit number 5, also stated:

"Daily fitness training is mandatory for all on-duty emergency response department personnel. Time will be provided every day for fitness training. ...Fitness training shall be documented in the Daily Journal in the Firehouse

Software Programs contain "training" using the category "1A-Physical Fitness Training." All Fire Department Officers and acting officers are given the responsibility for making daily fitness training a priority activity." It is expected that activities such as emergency calls or extended training will occasionally preclude personnel from participating in fitness training. These days should be the exception and not the rule."

Petitioner testified that at no point from the time when he was so qualified through July 31, 2014 did anyone from the Department or the City communicate to him that the program was optional, voluntary and not mandatory. The City provided workout clothing; he believed this was in conjunction with an original grant used to purchase equipment.

This grant was discussed further (See Pet. Ex. 13); documents were produced showing former Chief Alan Wax issued letters requesting a grant from the federal government in early June 2006. This grant application indicated participation in the proposed wellness program would be mandatory, and that the purpose was to ensure better job performance through better physical fitness. The department did subsequently receive a grant using it to purchase exercise equipment. (See also Pet. Ex. 15)

Petitioner admitted "Collective Bargaining Agreement." (See Pet. Ex. 6) Section 19.3A of this document is subtitled "Physical Fitness Program." Petitioner read the following passage from this section during direct examination:

"The City and Fire Department peer fitness trainers may establish a wellness program which shall include individualized and departmental goals. While employees shall be required to participate in such a program while on duty, no employee will be disciplined for failure to meet any goals that may be established as long as the employee makes a good-faith effort to meet any such goals and is able to meet reasonable minimum job-required physical fitness standards as established by the City and the Fire Department peer fitness trainers. Before any such program is implemented, the City shall review and discuss the program at a meeting of the Labor Management Committee..."

Petitioner's understanding was this referred to the City's wellness program noted in Pet. Ex. 5. He testified the Department had established a wellness program. He asserted forthrightly no one ever told him it was not implemented. He conducted himself as though the program described in this section of the Collective Bargaining Agreement had been implemented as described.

The Petitioner and Lt. Horne testified that the Respondent provided training and certification for peer fitness trainers who would assist firefighters with setting up a plan for physical fitness goals. Respondent paid for training and certification, as well as re-training and re-certification of peer fitness trainers from November 2007 through November 2015. Pet.Ex 22)

Chief Pease testified he became Chief after the date of the accident at bar. He testified since he became chief, the Respondent no longer pays for the re-training and certification of peer fitness trainers. All agreed the workouts took place during their contractual work day.

The Petitioner, Lt. Horne and Lt. Lindgren all testified they were never advised by Respondent that workouts during their shift or participation in the fitness program were optional or voluntary. Chief Pease testified he was not aware of any communication by Respondent to its firefighters before he became chief that workouts did not have to be done during their shift. Moreover, since becoming chief he has not taken any steps to communicate workouts are not required.

Petitioner, Lt. Horne and Lt. Lindgren all testified the equipment provided and the workouts required by Respondent allowed them to be better firefighters plus helped the department to reduce on the job injuries , especially back injuries.

Testimony by Lt. Horne and Lt. Lindren regarding the mandatory nature of the of fitness training , recording of firefighter workout hours in the training logs by Lieutenants and statements by Chief Tanner, were similar to and consistent with Petitioner's testimony. Chief Dan Pease, the current fire chief and longtime employee of the City department testified that exercise equipment were for firefighters use; training hours spent working out were required to be logged.

Respondent's grant application to United States Dept of Homeland Security (Px. 14) requested funding to purchase exercise equipment for the department costing $42,837.00. The grant application represented the total cost for the wellness and fitness program was $82,988.00. City of Highland Park represented therein funding was requested in order to "implement a mandatory health and fitness program."

The executed, submitted grant application states that "Wellness and fitness programs are a basic component of any injury and illness prevention initiative. The cost of firefighters with poor health and fitness levels is not only monetary; it is also emotionally devastating to firefighters, their families, and the citizens that the firefighters are expected to help." Pet.Ex.14)

Petitioner and Lt. Horne asserted the grant was approved for $74,692.00 (Pet. Ex.15)

Following his injury, he was sent on August 6, 2014 to Northwestern Lake Forest Hospital occupational health service. Dr. Angela Shropshire issued restrictions, ordered MRI, therapy and eventually sent him to Dr. Chams, an orthopedic specialist. Petitioner used his private group health insurance to see an orthopedic specialist named Dr. Dunlap at North Shore University Orthopaedics, as Dr. Chams was not in his network. On October 6 he concurred for an MRI eventually performed on October 14, 2014. A shot and PT ensued. On December 22 he noted transient improvement but no lasting relief. After another shot on February 2, 2015 Dr. Dunlap discussed surgery ; he was a surgical candidate.

Petitioner then saw Dr. Chams with Illinois Bone & Joint Institute on June 4, 2015. Petitioner's understanding was Dr. Chams noted a tear within the shoulder, and agreed with the surgical recommendation for repair. Surgery ensued January 2016 followed by PT.; he was not released from treatment by Dr. Chams at hearing time.

On cross-examination he confirmed he thoroughly read the City of Highland Park's Employee Handbook, and that he was "probably" familiar with its contents. (R. Ex. 1)

Petitioner agreed this document also stated for any City employees also covered by a collective bargaining agreement, in the event of a conflict between that agreement and any of the City policies and procedures described in the Handbook, the collective bargaining agreement would control.

Petitioner admitted with respect to the "meeting of the Labor Management Committee" required under Section 19.3A of the Collective Bargaining Agreement, he was not aware of when such a meeting might have taken place, had not been present for such a meeting, and simply assumed that it had occurred.

Petitioner agreed the workout he was performing was not one intended to earn additional paid time off pursuant to the relevant section of the Handbook; further, no person purporting to be "the City's wellness coordinator" was present at the time. He did not know identity of City's wellness coordinator.

He agreed that on his "Employee's Statement of Injury" (R. Ex. 4), he stated:

"While performing my usual exercise, I felt a strong, sharp pain in my left shoulder. When the pain did not subside after Advil, it was reported to my supervisor."

Petitioner testified that it was his understanding that all employees on duty were required by Department policy to engage in workout activity between the hours of 4:00 and 5:00 p.m., barring the three excepted circumstances discussed previously.

Lieutenant Stephen Horne worked for Respondent for just over 29 years. He was past President of the union, now part of the union negotiating team. In negotiator role , he was involved in negotiations of new contracts when the time arose. He served under five Fire Chiefs during his service including Al Schneider, David Campagne, Alan Wax, Pat Tanner, and Dan Pease.

Lt. Horne testified typically physical fitness was performed between 4:00 and 5:00 p.m. His belief was this was part of his job, rather than a voluntary activity. He believed individuals could participate at their own levels, the only time they would not participate was when they were on emergency calls, if other training was occurring, or if duties existed yet completed. Based upon his knowledge of CBA it allowed for individuals to meet with peer fitness trainers to establish an individual workout plan. The HPFD paid for certification of peer fitness trainers.

He testified the physical fitness training was never communicated to him as voluntary and/or non-mandatory. He believed that in the negotiations for the last union contract the City had proposed language strengthening the requirement, changing the word "may" to "shall" in Section 19.3A of that contract. Lt. Horne was a signatory to the contract on behalf of the union.

The language in section 19.3A of the collective bargaining agreement requiring review and discussion of a proposed fitness program, prior to implementation, at a meeting of the Labor Management Committee was noted by lt. Horne. He testified that he had been present at such a meeting, plus his understanding was in fact the program had thereafter been implemented. He did not provide a date or an estimate as to when this meeting might have occurred. Between the hours of 4:00 and 5:00 p.m. the firefighters were not allowed to choose what to do with their time. They would not be allowed to nap, listen to music, read a book instead of working out. They would not be allowed to leave the station to eat.

The expectation was to exercise at ability level. Lt. Horne believed exercising made the firefighters better able to perform their jobs.

On cross-examination, he testified t any notes or records of the meetings he recalled having with Chief Tanner in approximately October 2010 would have been subsequently destroyed. No minutes were taken of these meetings; he was unable to place a more precise date or series of dates on which they had allegedly occurred.

He agreed that Petitioner's alleged injury on July 31, 2014 had taken place within the period of time controlled by the collective bargaining agreement. He agreed the language of Section 19.3A of that agreement said the City and Fire Department "may" establish a wellness program, but they were not required to do so. He agreed language of that section did require the City to discuss any proposed wellness program at a meeting of the Labor Management Committee prior to implementing any such program, and therefore if no such meeting were held, no such program could be implemented. He assumed that if a meeting had been held during the operation of a prior collective bargaining agreement, it would automatically carry over to subsequent agreements. He assumed such meetings had taken place. He did not recall when the meeting might have occurred. Lt. Horne testified under cross-examination that in his capacity as a lieutenant with crew members reporting to him he had never taken any disciplinary action against a member of his crew for not utilizing the workout equipment.

He agreed that the language of Section 19.3A of the collective bargaining agreement stating "employees shall be permitted to engage in physical fitness activities" indicated that employees had the choice of whether to participate, and in fact they could not be prevented from using the equipment if they had chosen to do so.

He agreed this section did not require employees to use the exercise equipment and did not require them to use it between the hours of 4:00 and 5:00 p.m. He agreed that this section contained no mechanism by which an employee choosing not to use the exercise equipment could be reprimanded or punished. This is important to the Arbitrator. He had received the City's Employee Handbook reviewed its contents, and certified that he had done so. He understood that the collective bargaining agreement controlled in the event of any conflict between its terms and the policies expressed within the Handbook.

On redirect examination, Lt. Horne reviewed documents indicating meetings had occurred on July 15, 2013, January 27, 2014, and April 21, 2014. (See Pet. Ex. 8, 9, 10) He recalled that at these meetings there was discussion of reduction of back injuries, which he attributed to the physical fitness program. On re-cross-examination, he agreed that none of them contained any reference to either an existing fitness program or establishment of a new fitness program.

Lt. Lindgren testified that he was a Lieutenant fire paramedic with Respondent and had been for 24 years. On a typical day at 4:00 pm would be a mandatory wellness workout. This would be any kind of physical conditioning that the individual wanted. His belief that the workout was mandatory went back "quite a few years when Pat Tanner was chief." (TX 2/8/16, p. 80)

He recalled being at an officers' meeting sometime in summer 2008 when Chief Tanner had said the workouts at 4:00 p.m. were mandatory barring training, other duties, or emergency calls. No one had ever told him since that the workouts weren't mandatory. The workouts would be logged on the training sheet, and he filled the sheet entering the computer. He believed the reason for the workouts was to reduce back injuries and make the department look better. He believed the workouts were of benefit to the department for these reasons.

On cross-examination, Mr. Lindgren received and reviewed employee handbook. He was familiar with the operative collective bargaining agreement but that he did not know its exact language well enough to say one way or the other that it made workouts mandatory. He agreed that he never took action against anyone for failure to work out at 4:00 p.m.; He could not recall whether anyone on his crew had failed to complete a workout.

Daniel Pease has been the Fire Chief at the Department since December 2014, and worked for HPFD since October 5, 1987. He was involved on City's behalf in union CBA negotiations.

He was a city negotiator/ deputy Chief for the CBA effective on the date of Petitioner's injury.

Chief Pease noted on accident date his direct supervisor had been Tim Pease, his brother. RX 5.

Chief Pease is familiar with the general employee policies of the City not specific to the FD. City policies in effect on July 31, 2014 did not include any physical fitness requirements. They did contain a wellness program that the fire union Local 822 was not part of, because that bargaining unit had chosen not to accept the city's wellness program pursuant to a collective bargaining agreement.

Chief Pease is familiar with CBA in effect on July 31, 2014. ( Pet. Ex. 6) Section 19.2 of that CBA ( Pet. Ex. 6, p. 65) is titled "Fitness Examination." Chief Pease testified this spoke to a situation wherein there was a justifiable concern about an employee's medical fitness for duty, and it indicated that the City may require the employee to submit to an examination by a qualified and licensed physician or appropriate professional. The decision whether a justifiable concern existed was made by the Fire Chief; prior to July 31, 2014, there existed no such concern about the Petitioner.

As of accident date Petitioner was not scheduled for an exam contemplated by this section.

Section 19.3A of the collective bargaining agreement is titled "Physical fitness program." Chief Pease noted as of July 31, 2014 certified as peer fitness trainers existed but not Petitioner. Chief Pease was a member of the Labor Management Committee named in Section 19.3A of the agreement, had been so prior to July 31, 2014, and had been in attendance at the meetings of that Committee through July 31, 2014. He testified that at no point from the onset of effectiveness of the collective bargaining agreement through July 31, 2014 was a meeting of the Labor Management Committee as contemplated under Section 19.3A of the agreement held during which any proposed wellness program was reviewed and discussed.

At none of these meetings was any vote taken regarding establishing such a program. At each meeting there would be three members of the union and two representatives of the City. These meetings occur at a frequency of approximately three per year, and are scheduled as events warrant. Chief Pease testified he had been present at additional such meetings after July 31, 2014; at none of those meetings had there been any review or discussion of a proposed wellness program. No such program had been adopted at any of these meetings.

Chief Pease testified there was no other mechanism within the CBA by which a wellness program could be established that bound union members. Accordingly, there was no such program in effect during the lifetime of this collective bargaining agreement. Chief Pease testified prior to this agreement there had been no such wellness program in effect prior to the CBA in question, supra.

The language of Section 19.3A states in relevant part:

"While (not) in service for emergency response, employees shall be permitted to engage in physical fitness activities (unless any such activity is disapproved) after 1600 hours on weekdays and before 1700 hours on weekends and holidays...provided that all assigned duties and training for that shift day have been completed as determined by the company officer"

Chief Pease testified that, consistent with this language, he never issued an order disapproving of that activity, and that to his knowledge, neither had any of the other command officers under him. Therefore, provided that an employee had completed all of his other duties for the shift and was not engaged in training activity or an emergency call, that employee would be permitted to engage in a workout. No employee was required to do so pursuant to this section of the collective bargaining agreement.

Chief Pease further testified during this period of time each shift, an employee who had completed his or her assigned duties and training responsibilities would be allowed to engage in activities other than physical fitness. Chief Pease had been present at some of the stations during these hours and observed employees performing activities other than physical fitness, including completing written reports, cooking, or watching TV. He did not advise any such employee that they needed to be using the exercise equipment, had never taken any disciplinary action against such an employee; he knew of no other officer under his command who did so. He never received any written report from any officer under his command regarding disciplining of an employee who did not engage in workout activity between 4:00 and 5:00 p.m. on a given day.

An additional section of the collective bargaining agreement numbered 19.3B is titled "Wellness Incentive Program Fitness Bonus Hours." This section describes how an employee is able to earn additional paid time off by performing a formal physical fitness assessment with a wellness coordinator. This is a voluntary program, and no employee has been disciplined for declining to take part. The City contracts out to a third party to be the wellness coordinator for this program, so no City employee has the title of "wellness coordinator" in either the formal or informal context. Examinations pursuant to this section would take place at the Highland Park Country Club, a facility owned by the Fire Department but leased to the Park District. On July 31, 2014, Petitioner was not engaged in such an examination.

An agency called the National Fire Protection Agency establishes minimum qualifications to be fit for duty in the State of Illinois as a firefighter. The Department chooses to ensure that its members are in compliance, although it is not mandatory. Medical fitness for duty is certified via examination by a medical professional once per year. The sole purpose of the examination is to determine if the individual is fit for duty. Employees of varying levels of physical fitness pass the examination, and results are not forwarded to Chief Pease. The only thing he receives is notice of whether the overall exam was passed or not, and he does not have knowledge of any strength component in this examination. On 7/31/14 Petitioner was not examined.

Chief Pease testified equipment in each station comes from a combination of grant money, donations from citizens, and donation from the Highland Park Country Club. Other amenities are present within the stations that the firefighters can choose to use, including a dayroom with a TV, recliner chairs, desks for personal studies, and computers to use for online activity.

Employees are not required to use these items. Only at Station 33, the site of the Wellness Center, can non- firefighters access the workout equipment.

Under the collective bargaining agreement, the City and Fire Department are responsible for providing firefighters with certain items of clothing. These include the standard-issue uniform components as well as protective gear used in hazardous fire situations. No workout or fitness wear is provided. Chief Pease is aware that employees purchase their own workout wear, some of which has a Department patch designed by an employee who sells this workout wear. Any clothing a firefighter purchases from Mr. Roche is not paid for by the City or the Department, and no reimbursement is made. Workout clothing was purchased by the City on one occasion, when the Foreign Fire Fund workout equipment was purchased sometime between May 2004 and October 2010 (the time when Alan Wax had served as Fire Chief).

When Chief Wax retired in October 2010 and Chief Tanner began to serve in that position, he did keep in place some policies Chief Wax had implemented, but there was no formal wellness program in place for him to sustain. Since then, the City of Highland Park has issued changes, revisions, and amendments to its general policies from time to time. This is done roughly every two years. Any changes are posted in the fire stations for employees to see.

Formal fitness requirements set forth in the City's Employee Handbook were binding on nonunionized employees. The police union had accepted the City's wellness program, and the fire union had not. Chief Pease has never applied any pressure to his employees to engage in workouts, and to his knowledge never had Chief Tanner before him. Prior to Chief Tanner, Chief Wax had attempted to develop a wellness program, but this had been rejected by the union and never implemented in a collective bargaining agreement.

Chief Pease has never issued an order in contravention of a term of the applicable collective bargaining agreement, and neither had Chief Tanner. Prior to joining the command section of the Department, Chief Pease was a member of the firefighters' union himself, and during that time he never experienced a fire chief issuing orders or setting policies that were contrary to provisions of the applicable collective bargaining agreement. If that had occurred, he would have petitioned the union to react. During all of these periods, no such reaction by the union to a violation of the applicable collective bargaining agreement has occurred.

With regard to "peer fitness trainers," Chief Pease was familiar with the concept. There are individuals in the Department who have been certified as peer fitness trainers. These individuals pay the costs of recertification themselves and are not reimbursed by the Department. When the wellness program (see Pet. Ex. 5) was first proposed to the union in 2008, the Department paid to certify peer fitness trainers in anticipation of the union accepting the policy. As it was rejected, this has not occurred again.

Chief Pease testified that training hours should be recorded by lieutenants, although individuals can also record their training hours, but that no penalizing action is taken if someone fails to do so. Within the Department there are employees of varying physical fitness levels, including employees who are overweight. No action is taken against an employee who is overweight or is perceived as having a lack of physical fitness. Chief Pease has never issued any reprimand or taken any disciplinary action against an employee for lack of physical fitness, and is not aware of any prior Chief having done so either.

Under cross-examination, Chief Pease testified that peer fitness trainers might have been reimbursed for the cost of certification under prior chiefs. With regard to federal grant money that had been received for an intended mandatory physical fitness program, the program was never implemented although the funds were received, because the union never accepted the program. He testified that firefighters are able to leave the department between 4:00 and 5:00 p.m. to go grocery shopping or engage in other activities at their officers' discretion once their daily duties are completed. Chief Pease agreed that the Department and City benefit from firefighters who are in better states of physical fitness; however individual firefighters were neither encouraged nor discouraged to or from working out.

Emily Taub has been employed by Respondent for approximately 5.5 years. For the past two years her job title has been Human Resources Manager. She handles employee relations, performance management, policy development and compliance, insurance plans, and workers' compensation matters. She is involved in drafting or revision to proposed or ongoing City policies, including those pertaining to health and wellness.

At all times pertinent, there has been no City policy requiring City employees to be at or above a minimum level of physical fitness. Prior to January of 2011, there was a City policy incorporating an employee's state of physical fitness into their performance evaluation, but in 2001 the City completely revamped its performance evaluation process, changing it from looking at personal attributes to job-based competencies. There are core competencies required of all employees in addition to job-specific competencies. None of these take any assessment of the employee's level of physical fitness. When evaluating new candidates for hire, the City does not take physical fitness into account in any way.

The City does have a fitness incentive for employees, allowing employees to earn additional time off by meeting certain levels of physical fitness. This is the program described in the Employee Handbook. No employee is required to participate, and no employee is admonished or penalized for choosing not to take part. City policies are communicated to employees via the Employee Handbook, and all employees have to acknowledge that they have received the Handbook (via print or electronic copy) and will read and comply with its policies. There are also meetings held to go over the policies with employees.

Employees subject to a collective bargaining agreement are still subject to the City policies, but in the event of a conflict between something stated in the Employee Handbook and the relevant collective bargaining agreement, the collective bargaining agreement would control.

The City has a central fitness facility available to employees. This facility is open to the families of the employees as well. No employee is required to use this fitness facility, and employee use of the facility is not tracked. However, employees are able to self-identify at the facility for purposes of any wellness program in which they may be participating.

Under cross-examination, Ms. Taub noted that prior to January of 2013, her job title had been Human Resources Coordinator, but that her title change to Human Resources Manager had been in name only – her duties were unchanged. She has heard the term "peer fitness coordinator" and knows that the Fire Department had looked into that, but wasn't involved with the process, as the Fire Department does not participate in the City's wellness program. She is also aware that firefighters are required to take physical examinations on an annual basis, but is not involved with that process and only knows that it occurs.

## CONCLUSIONS OF LAW

**Regarding Issue C: did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds as follows:**

Petitioner alleges that he sustained an accidental injury that arose out of and in the course of his employment by Respondent on July 31, 2014 when he injured his shoulder while exercising at his assigned fire station. Petitioner claims that he was participating in this exercise because it was a mandatory condition of his employment. Respondent claims that Petitioner's injuries did not arise out of and in the course of his employment because the injury took place while Petitioner was engaging in a voluntary activity.

Section 11 of the Act provides, in relevant part:

"Accidental injuries incurred while participating in voluntary recreational programs including but not limited to athletic events, parties, and picnics do not arise out of and in the course of the employment even though the employer pays some or all of the cost thereof. This exclusion shall not apply in the event that the injured employee was ordered or assigned by his employer to participate in the program."

Therefore, if Petitioner's workout activity was purely voluntary and he was not ordered or assigned by his employer to participate, his injury would not arise out of and in the course of his employment.

The Arbitrator has reviewed both the testimony plus the documentary evidence in great detail. The Arbitrator has contemplated this matter in great depth over the days of testimony plus in deliberations in writing the Award. At all possible points in time this Arbitrator encouraged both parties in front of me to strongly consider a compromise settlement for the betterment of the FD and City.

All witnesses were presented in stellar, organized fashion with great credit to counsel on both sides. That alone kept the case on an even keel so to speak- until presentation of the last fire department witness, namely Chief Daniel Pease, the commanding officer of the HPFD.

All witnesses manifested credibility in presentation by counsel, content of testimony, demeanor, professionalism and extremely articulate manifestation of their beliefs of the "facts" and inferences to be drawn- both for and against compensability under the intent and language of section 11 of the Act. It was a professional honor to have presided over such a matter involving such dedicated, sincere first responders.

The challenge in deciding the case by a preponderance of the evidence is that both sides presented very compelling testimony/evidence whether this program was "required "or not for the firefighters.

As to the approach by the Petitioner, part of his theory was the program was in fact "implemented or constructively implemented" as quoted from his counsel's closing argument. Inter alia, Petitioner emphasized the language of the Homeland Grant application as intent to be "required." The argument is very compelling.

On the other hand , Respondent presented the testimony of Chief Pease noted above in part who gave a detailed explanation of the history and reasoning of the content of the evidence as well as the relationships between the CBA and the Wellness Program. Thus, the case is deemed in the vernacular as a "close call". Ultimately, the Commission may find a different result.

In conclusion, the Arbitrator in balancing the weight of the evidence, by the time proofs were closed adopts as most probative of the key issue at bar, is the testimony of Chief Daniel Pease.

The Arbitrator finds Chief Daniel Pease's testimony most probative and persuasive on all factual points and reasonable inferences therefrom.

Thus, based upon the totality of the evidence, the Arbitrator finds the case at bar is not compensable i.e. no compensable accident occurred under section 11 of the Workers Compensation Act, as amended.

All remaining issues are therefore moot.

STATE OF ILLINOIS )
) SS.
COUNTY OF COOK )

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Vernell Dixon,
Petitioner,
vs.
Chicago Transit Authority,
Respondent,

NO: 14 WC 35831

**17IWCC0329**

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 13, 2016 is hereby affirmed and adopted.

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

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

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

DATED: MAY 26 2017

L. Elizabeth Coppoletti

LEC/mas
o5/17/17
43

L. Elizabeth Coppoletti

Michael J. Brennan

Charles J. DeVriendt

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# ILLINOIS WORKERS' COMPENSATION COMMISSION
# NOTICE OF ARBITRATOR DECISION

**DIXON, VERNELL**
Employee/Petitioner

Case# **14WC035831**

**17IWCC0329**

**CHICAGO TRANSIT AUTHORITY**
Employer/Respondent

On 9/13/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.54% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

5327 MICHAEL HIGGINS
6204 W 63RD ST
CHICAGO, IL 60638

0515 CHICAGO TRANSIT AUTHORITY
ARGY KOUTSIKOS
567 W LAKE ST 6TH FL
CHICAGO, IL 60661

# 17IWCC0329

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

**Vernell Dixon**
Employee/Petitioner

v.

**Chicago Transit Authority**
Employer/Respondent

Case # **14** WC **35831**

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 **Lynette Thompson-Smith**, Arbitrator of the Commission, in the city of **Chicago** , on **June 23, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

**DISPUTED ISSUES**

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

**Vernell Dixon**
**14 WC 35831**

**17IWCC0329**

**FINDINGS**

On **6-23-16**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**66,300.00**; the average weekly wage was $**1,275.00**.

On the date of accident, Petitioner was **44** years of age, ***married*** with **2** dependent children.

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

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

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

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

**ORDER**

The Petitioner has not proven, by a preponderance of the evidence, that an accident occurred which arose out of and in the course of his employment by Respondent therefore, no benefits are awarded pursuant to 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.

17IWCC0329

**FINDINGS OF FACT**

The disputed issues in this matter are 1) accident; 2) causal connection; 3) medical bills; 4) temporary total disability; and 5) the nature and extent of Petitioner's injury. *See,* AX1.

***Petitioner's testimony***

Vernell Dixon ("Petitioner"), is a 45 year old bus operator, employed by the Chicago Transit Authority ("Respondent") as of 2004. On October 9, 2014, the petitioner was assigned to the 79th Street route, which starts at Wentworth (Lake Front) and goes to Ford City. Petitioner testified that on said date, he made his relief stop at 79th and Wentworth at approximately 1:00 to 1:30 p.m., starting on the second-half of his work day, and proceeded in route to the Red Line stop. (T. 46-47) As he approached the Red Line stop, a young lady and man boarded the bus. The woman used her CTA card to pay her fare and tapped the card again to pay for her male companion. The fare for the male companion did not register and petitioner advised the couple of that fact. (T. 13-14, 17)

The woman disputed that her CTA card did not have sufficient funds to cover her male companion's fare. Petitioner testified if a customer fails to pay the fare, he is to ask that the fare be paid; if the fare is not paid upon the first request he is to request payment for a second time. If the passenger does not pay the fare upon second request then the bus operator is to continue in service with that customer still on board; the bus operator is not to engage in any physical contact with the customer to secure the fare nor is the operator to attempt to physically eject the customer from the bus. (T. 49-51)

Petitioner testified that after he advised the couple of the unpaid fare, the women walked away but the man threatened him. The man stayed on the bus, then got off the bus, then re-boarded the bus. Petitioner then closed the bus doors as he was getting ready to pull away from the service stop. (T. 18-19)

Petitioner testified after the man re-boarded the bus ... "He spit on me"...(T. 19) Petitioner testified when he was spit on, the male passenger was standing by the closed front door and facing him. (T. 56) Petitioner had his seat belt on and the safety shield engaged; the top of the shield extended approximately five inches above petitioner's head when seated and came down to approximately mid-thigh level-its width went up to behind the fare box. (T. 58-61)

Petitioner testified that after the man spit on him, he... "was feeling for his safety... because as he was spitting, he made a gesture of coming towards me... so I went and tried to protect myself". (T. 21) Petitioner testified that he went ahead and initiated a physical altercation with the male passenger because he was ... " fearing not knowing what he was going—capable of what he was going to do". (T. 21)

Petitioner stated that he was not struck nor was there any physical contact made onto his person by the male passenger before petitioner unfastened his seat belt, opened the shield door and got out of his seat. (T. 62-63). After the man re-boarded the bus, Petitioner left his seat and continued to stare at the man. Petitioner testified that during that time, the man never turned away from him and

towards the door, nor did the man try to push the door open in order to exit. (T. 63-64). The front door of the bus was closed during the altercation. (T. 25)

After Petitioner initiated physical contact, the male passenger fought back and his female companion came up behind Petitioner, put her arm around his neck and put petitioner in a choke hold. (T. 23) Petitioner testified as he was in the chokehold the male passenger was punching him in the face then he was pulled back and fell to the floor. The woman released him from the chokehold and both of the aforesaid passengers got off the bus as Petitioner lay on the floor. (T. 24-25, 66-67) After the couple left the bus, Petitioner got up from the floor, called the CTA control center and CPD, who responded to the scene.

Petitioner was transported to St. Bernard Hospital where he stated that he felt neck pain and was shaken by the event. (T. 28) Petitioner was seen at Concentra the following day and thereafter sought treatment at Illinois Orthopedic Network, for neck pain. (T. 28-29) He was referred to H and M Medical for physical therapy, where he noticed that his neck was tense and he had pain, particularly when sleeping in a certain position. (T. 31, 75-76) Petitioner also sought treatment with Dr. Kelley in order to feel safe again at work. (T. 33, 39-40). He gave a history to all the health providers of where he was struck when physical contact was made upon his person. (T. 66) Petitioner testified that he gave a history to Dr. Kelley of what occurred and what threatening comments were made by the male passenger. (T. 64-65) Petitioner testified that he had no other injuries as a result of the incident in question. (T. 32).

While under doctor's care, he was kept off work until December 11, 2014, when he was release to modified duty for approximately one week before he returned to full duty as a bus operator. (T. 40-41). After he returned to driving a bus he noticed that he was more on edge and more aware of his surroundings. (T. 41) Petitioner testified at present he feels physically drained as he has to put a lot of energy into not having any altercations with anyone. He has neck cramps on the right side and headaches in the forehead area, that happen out of the blue. (T. 42-43, 65-66).

***Video Footage***

Respondent's exhibit 2 was introduced into evidence and the parties stipulated that the video footage depicts the petitioner and the incident in question. The first video's run time is from 13:43:24 to 14:00:21 and in relevant part, depicts the incident as follows: at 13:49:42, Petitioner boards the bus to make his relief; at 13:50:57 the petitioner closes the safety shield around the driver's area; at 13:55:14 Petitioner opens the front door at the service stop for the Red Line and multiple passengers are on the sidewalk awaiting to board.

At 13:56:40 a female, wearing a black leather jacket, boards the bus and stands by the driver's area when her male companion, wearing a white jacket with a backpack on his back, boards the bus with a baby in a stroller at 13:57:18 and stands by the fare box. At 13:57:56, the man and woman walk to the

first bench seat on the curb side of the bus, secure the stroller and return to the area directly in front of the safety shield by 13:58:43; appearing to be conversing with the petitioner without any excitement or abrupt gestures. At 13:59:16 to 13:59:19, the male exits and re-boards the bus: at 13:59:20 the male walks closer to the driver's area as Petitioner closes the front door by 13:59:22, at which time the male walks backwards to the edge of the step, by the closed door. At 13:59:23.212 the male closes his mouth and ejects spit towards the driver's seat area at 13:59:23.218;[1] thereafter the man turns to his left slightly, then proceeds to push the closed front door with his shoulder. The man continues to attempt to open the front door while the front of his body is facing flush against the door, without success at 13:59:24.727.

From 13:59:24.885 to 13:59:27.388, the man looks back at the driver's area, turns his body with the left shoulder against the door and puts up both hands to deflect blows from the petitioner. At 13:59:24.304, the safety shield swings open. From 13:59:27.388 to 13:59:27.815, the petitioner is viewed repeatedly striking the man; a physical altercation ensues and continues until the front doors are opened by a young man standing on the sidewalk outside the bus at 13:59:37, when the male passenger disengages from the altercation and runs off the bus at 13:59:41.

During the altercation, at approximately 13:59:32, the female appears behind Petitioner with her arm around his neck, pulling him away from her companion. By 13:59:45, the female appears to put her hand up slightly as if to protect herself from any physical contact from petitioner; at 14:00:17 the female exits the front door with the stroller. The second portion of the video footage runs from 14:00:17 to 14:13:23 and depicts Petitioner after the incident: he sits in the front passenger seat and uses the phone, talks to a few passengers that boarded; and at that time, appears excited agitated and angry as he appears to be discussing the event.

***Medical Records***

Petitioner was initially interviewed about any resulting injuries when the Chicago Fire Department ambulance arrived at the scene. He reported a history of being... "*thrown to the ground and hit in the face and spit on. Upon assessment pt c/o shoulder pain. Denies any LOC or neck or back pain.*" (P. Ex. 5) Petitioner was transported to St. Bernard Hospital where he complained of right sided neck soreness and pain after... "*A BUS PASSENGER GRABBED ME ON MY NECK & HE SPIT ON MY FACE.*"(P. Ex. 1). Petitioner rated his neck pain at 4; no edema was noted on his person, his emotional status was recorded as "calm/relaxed" with the medical determination that he did not need a mental status exam. Petitioner was diagnosed with a cervical sprain, exposure to bodily fluid.

The next day petitioner was seen at Concentra where he complained of right posterior neck stiffness that radiates down to the bilateral paraspinal muscles; no numbness, tingling or weakness. Petitioner was to remain off work for the rest of his shift and back to regular duty next shift. (R. Ex. 1).

[1] It is uncertain as to what if anything the ejected spit made contact with as the shield was engaged and petitioner did not testify that the spit actually made contact with any portion of his person.

Also on October 10, 2014, Petitioner sought treatment with Dr. Sajjad Murtaza, Illinois Orthopedic Network. Petitioner gave a history of being put in a chokehold from behind and having his neck extended backwards, resulting in neck and mid-back (thoracic) pain; and denying any radiation of the pain. On physical examination petitioner was noted to be in no acute distress, mood and affect normal, tenderness along the paracervical musculature with hypertonicity and spasms and tenderness along the thoracic muscles. Petitioner was diagnosed with a cervical and thoracic strain, prescribed physical therapy and taken off work.[2] (P. Ex. 2).

On October 23, 2014, Petitioner followed-up with Dr. Murtaza where he complained of pain level 5/10; no significant amount of weakness in the distal cervical areas, but difficulty twisting and turning his neck and rotational pain to the right and left with tight trapezius and rhomboids. An MRI of the cervical spine was ordered and completed on January 5, 2015, with findings consistent with degenerative disc disease,[3] predominantly at C5-6 and C6-7. Petitioner remained under Dr. Murtaza's care through December 11, 2014, when it was noted that he had no cervical spine or neck pain, with the treatment rendered. Petitioner was released to return to work.

Petitioner was initially evaluated by Dr. Daniel Kelley on October 13, 2014, where he presented with the history of a fare dispute. Petitioner relayed that the male passenger verbally threatened him stating... "stop hollering at my girl or you're going to be eating out of a straw. I should spit on you.", then spit in his face, and then initiated a physical assault. [4] Petitioner further gave a history that he... "got up to protect myself because he was over the protective shield. I thought he was going to attack me. That's when we got into a physical altercation." (R. Ex. 4).

Petitioner stated that since the incident he had sleep disturbance, sweats, agitation, fatigue, anxiety, dysphoria, hyperarousal and headaches. Petitioner denied a past psychiatric history; he endorsed aggressive/assertive tendencies which may compromise interpersonal and behavioral functioning; he endorsed a response set critical item suggesting thoughts or fantasies of hurting someone. Dr. Kelley diagnosed the petitioner as having adjustment disorder with mixed anxiety and depressed mood. As of December 1, 2014, Dr. Kelley terminated services and released the petitioner to return to work in a full duty capacity.

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[2] Physical therapy services rendered at H and M Medical included treatment to the lower back and left leg. Those areas were never complained of as resulting from the incident nor does it coincide with petitioner's testimony that his physical injuries were limited to his neck and headaches. (P. Ex. 3)

[3] The MRI imaging establishes disc dehydration at C5-6 and C6-7 consistent with a degenerative disc disease and not an acute condition.

[4] From the video evidence it is clear that petitioner initiated the physical assault and the history given to Dr. Kelley is not accurate.

Vernell Dixon
14 WC 35831

17IWCC0329

**CONCLUSIONS OF LAW**

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

The burden is on the petitioner seeking an award to prove by a preponderance of credible evidence all the elements of his claim, including the requirement that the injury complained of arose out of and in the course of his or her employment. *Martin v. Industrial Commission*, 91, Ill.2d 288, 63 Ill. Dec. 1, 437 N.E.2d 650 (1982). The mere existence of testimony does not require its acceptance. *Smith v Industrial Commission*, 98 Ill.2d 20, 455 N.E.2d 86 (1983). To argue to the contrary would require that an award be entered or affirmed whenever a claimant testified to an injury no matter how much his testimony might be contradicted by the evidence, or how evident it might be that his story is a fabricated afterthought. *U.S. Steel v. Industrial Commission*, 8 Ill.2d 407, 134 N.E.2d 307(1956). It is not enough that the petitioner is working when an injury is realized. The petitioner must show that the injury was due to some cause connected with the employment. *Board of Trustees of the University of Illinois v. Industrial Commission*, 44 Ill.2d.207, 214, 254 N.E.2d 522 (1969); see also *Hansel & Gretel Day Care Center v Industrial Commission*, 215 Ill.App.3d 284, 574 N.E.2d 1244 (1991).

The Illinois Supreme Court has held that a claimant's testimony standing alone may be accepted for the purposes of determining whether an accident occurred. However, that testimony must be proved credible. *Caterpillar Tractor v. Industrial Commission*, 83 Ill.2d 213, 413 N.E.2d 740 (1980). In addition, a claimant's testimony must be considered with all facts and circumstances that might not justify an award. *Neal v. Industrial Commission*, 141 Ill.App3d 289, 490 N.E.2d 124 (1986). Uncorroborated testimony will support an award for benefits only if consideration of all facts and circumstanced support the decision. *See generally, Gallentine v Industrial Commission*, 147 Ill.Dec 353, 559 N.E.2d 526, 201 Ill.App.3d 880 (2nd Dist. 1990), see also *Seiber v Industrial Commission*, 82 Ill.2d 87, 411 N.E.2d 249 (9180), Caterpillar *v Industrial Commission*, 73 Ill.2d 311,383 N.E. 2d 220 (9178). It is the function of the Commission to judge the credibility of the witnesses and to resolve conflicts in the medical evidence, and assign weight to the witness' testimony. *O'Dette v. Industrial Commission*, 79 Ill.2d 249, 253 403 N.E.2d 221, 223 (1980); *Hosteny v Workers' Compensation Commission*, 397 Ill.App. 3d 665, 674 (2009).

Petitioner bears the burden of establishing that an accident "arose out of" and "in the course" of his employment. Courts generally consider traveling employees differently from other employees when

considering whether an injury arose out of and in the course of employment. *Hoffman v. Industrial Comm'n*, 109 Ill. 2d 194, 486 N.E. 2d 889, 93 Ill. Dec. 356 (1985). The courts have defined a "traveling employee" as one who is required to travel away from his employer's premises in order to perform his job. *Wright v. Industrial Comm'n*, 62 Ill. 2d 65, 338 N.E. 2d 379(1975). However, a finding that a particular employee is a traveling employee does not relieve him from the burden of proving that his injury arose out of and is in the course of his employment. *Jensen v. Industrial Comm'n*, 305 Ill. App. 3d 274, 711 N.E. 2d 1129, 238 Ill. Dec. 468(1st Dist., 1999).

Petitioner's injury is not compensable unless it "arises out of" and is "in the course of" his employment. *Paganelis v. Industrial Comm'n*, 132 Ill. 2d 468, 548 N.E. 2d 1033, 139 Ill. Dec. 477 (1989). An injury "arises out of" petitioner's employment when there is a causal connection between the employment and the injury; the origin or cause of the injury must be some risk connected with, or incidental to, the employment. *Brady v. Louis Ruffolo & Sons Construction Co.*, 143 Ill. 2d 542, 578 N.E. 2d 921, 161 Ill. Dec. 275 (1991). Injuries sustained on an employer's premises, or at a place where the employee might reasonably have been performing his duties, and while the employee is at work, are generally deemed to have been received in the course of the employment. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 57, 133 Ill. Dec. 454, 541 N.E.2d 665 (1989).

Risks to employees fall into three categories: 1) risks distinctly associated with the employment, i.e., a risk common to the general public but to a greater degree or the risk of injury must be a risk peculiar to the work; 2) risks personal to the employee; and 3) neutral risks that have no particular employment or personal characteristic- injury results from hazard to which employee would have been equally exposed to apart from his employment). *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 109 Ill. Dec. 166, 509 N.E. 2d 1005 (1987);*Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 133 Ill. Dec. 454, 541N.E.2d 665(1989); *Potenzo v. Illinois Workers' Compensation Comm'n*, 378 Ill. App. 3d 113, 881 N.E. 2d 523, 317 Ill. Dec. 355 (1st Dist., 2007).

Typically, an injury "arises out of" one's employment if, at the time of the occurrence, the employee was performing acts the employer instructed him to perform, acts which he might reasonably be expected to perform incidental to his assigned duties, or acts which he had a common law or statutory duty to perform. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 58, 541 N.E. 2d 665, 133 Ill. Dec. 454 (1989). The phrase "in the course of" refers to the time, place and circumstances under which the accident occurred. *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 509 N.E. 2d 1005, 109 Ill. Dec. 166 (1987). An injury is received "in the course of" one's employment when it occurs within the period of employment, at a place the employee may be reasonably in the performance of his duties, and while he is fulfilling those duties or engaged in something incidental thereto. *Scheffler Greenhouses, Inc. v. Industrial Comm'n*, 66 Ill. 2d 361, 362 N.E. 2d 325, 5 Ill. Dec. 854 (1977).

In the instant case, there is no dispute that Petitioner was acting in the course of his employment at the time he picked up the unknown female/male couple at the Red Line stop. After the passengers

boarded, Petitioner requested twice that the fare be paid, as was standard operating procedure. When the passenger did not pay the fare, the petitioner closed the front door and was about to proceed in pulling out and continuing his route while the couple stood by the driver's area. The male passenger at that time stood by the front door step facing the driver's seat and spat toward the petitioner. It is difficult to determine from the hard drive whether any of the spit actually made contact with the petitioner as the safety shield was engaged; given the dimensions of the shield the spit could only make contact with petitioner's exposed pant leg. Petitioner never testified if the spit made contact with any exposed skin.5 Nonetheless, after the man spit towards Petitioner from the front door area, the man turned to face the front door in an attempt to push it open and leave, thus no longer interacting with the petitioner.

Once the male passenger turned his back to Petitioner and attempted to exit the bus, the petitioner's subsequent actions cannot be deemed to have been in furtherance of his employment. What transpired thereafter were not actions by the petitioner in the performance of his work duties, but an act of exacting retribution or punishment onto the passenger, a deviation from his employment. What transpired after Petitioner performed his duty was a personal risk undertaken by the petitioner. When Petitioner left his seat to go after the passenger; when he attempted to hit the passenger while he stood by the door; when he started the physical altercation that caused the injury to his neck, his injury was no longer arising out of or in the course of his employment.

After the passenger spat towards Petitioner, who was seated and behind the safety shield, the hard drive footage establishes the events as they unfolded: Petitioner took his seat belt off, open the safety shield door and came out swinging at the passenger, who was protecting his face from being struck and trying to get out of the door. It is at that time the hard drive footage depicts the first physical contact between Petitioner and the passenger. At that time, the petitioner makes the first physical contact with the male passenger that evolved into the woman passenger trying to pull Petitioner off her companion; and when Petitioner testified he sustained injuries to his neck.

Alternatively, the "aggressor defense" is applicable to this claim and bars Petitioner from recovering any benefits under the Act. The "aggressor defense" provides that injuries suffered by the aggressor in a fight related to the employer's work are not compensable under the Act as it breaks the causal connect between the employment and the injury. *Franklin v. Industrial Comm'n,* 211 Ill. 2d 272, 811 N.E.2d 684, 285 Ill. Dec. 197 (2004).The rationale for the "aggressor defense" is that the claimant's "own rashness" negates the causal connection between employment and the injury so that the work is neither the proximate nor a contributing cause of the injury. *Bassgar v. Industrial Comm'n,* 394 Ill. App. 3d 1079, 917 N.E.2d 579, 334 Ill. Dec. 753 (3rd Dist., 2009). Who made the first physical contact, while important in identifying the aggressor, is not decisive. Rather, the parties' conduct must be

5 There are several different versions of where and when petitioner was spit on, from the CFD EMS report that states it was after the altercation started compared to Dr. Kelley's history of being spit on in the face while the man was situated over the protective shield, which caused petitioner to feel he had to protect himself and thus the physical altercation ensued..

examined in light of the totality of circumstances. *Ford Motor Co. v. Industrial Comm'n,* 78 Ill 2d. 260, 399 N.E. 2d 1280, 35 Ill. Dec. 752 (1980)

In *Bassgar,* the Appellate Court found that there were two separate acts of aggression when it examined the parties' conduct in light of the totality of circumstances. The first act of aggression was when claimant's supervisor tackled the claimant, forcing him against a table, where his left arm wedged between the table and his body resulting in a fracture to the arm. After that occurred claimant's supervisor walked away, decided to retreat from the physical contact; withdraw from the fight, thus any danger to the claimant passed. Yet rather than leave the supervisor alone, claimant decided to follow him and more mayhem ensued. The Court deemed a second act of aggression began when claimant pursued his supervisor after the latter had retreated.[6]

As in *Bassgar*, the events that occurred on October 9, 2014, involved two separate acts of aggressions. Arguably the first act of aggression occurred when the passenger spat toward the petitioner while standing at the front door. The second act of aggression occurred when Petitioner chose to pursue the passenger, who had retreated and was trying to exit the front door; not in self-defense but to exact punishment or to retaliate. Petitioner's actions are consistent with Dr. Kelley's assessment of Petitioner's endorsed aggressive/assertive tendencies; which may compromise interpersonal and behavioral functioning.

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

The Arbitrator concludes that Petitioner has not proven, by a preponderance of the evidence, that an accident occurred, which arose out of and in the course of his employment. He failed to prove that he suffered compensable accidental injuries, as said injury occurred during the second, separate act of aggression/altercation that Petitioner.

Specifically, once the male passenger spat towards Petitioner and retreated, the reason for the first dispute ended as did any threat and altercation directed towards petitioner. Petitioner's reasons for leaving his seat and attacking the male passenger were not work- related. Petitioner claimed the physical altercation occurred, after he was spat on and in defense of his person however, there are no facts in evidence to support any ongoing threat to the petitioner or any of the passengers on board the bus. Accordingly Petitioner's injuries are not compensable under the Act.

As the petitioner has not proven that an accident occurred that arose out of and in the course of his employment by Respondent, the other disputed issues are moot and will not be addressed.

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[6] *Bassgar* cites: *People v. Shappert,* 34 Ill. App. 3d 683, 340 N.E.2d 282 (1975) finding that the right to defend oneself does not permit the pursuit and injuring of an aggressor after the aggressor has abandoned the quarrel.
*People v. Armstrong,* 273 Ill. App. 3d 531, 653 N.E. 2d 17, 210 Ill. Dec. 430 (1995) stating that where the initial aggressor completely withdraws from an altercation, the victim's subsequent actions constitute a separate aggression.

17IWCC0329

**ILLINOIS WORKERS' COMPENSATION COMMISSION**
**ARBITRATION DECISION**
**14WC35831**
**SIGNATURE PAGE**

Signature of Arbitrator

September 8, 2016
Date of Decision



SEP 13 2016

STATE OF ILLINOIS )
) SS.
COUNTY OF ADAMS )

| | |
|---|---|
| ☐ 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

Richard Powell,

Petitioner,

vs.

NO: 15 WC 29725

17IWCC0205

Manchester Tank & Equipment Co.,

Respondent.

DECISION AND OPINION ON REVIEW

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

For the reasons set forth below, the Commission modifies the time period that the Petitioner was entitled to temporary total disability. The issue of the Petitioner's wage calculation was conceded by the Respondent at the February 6, 2017 oral argument.

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

17IWCC0205

The Petitioner testified on cross examination that after his work-related accident, specifically from April 2016 to the date of hearing, he was performing activities at home that went beyond his restrictions, including mowing the yard and working in the vegetable garden. The Petitioner also testified to periods of prolonged sitting at home including sitting on a lawn mower and sitting on a 4-wheeler, which aggravated his work-related back condition. He further testified on re-cross examination that when he was offered a light duty position in April 2016 with the Respondent, he declined the position due to issues with sitting. (Tr. 46-50, 66)

The Commission finds that the Petitioner is not entitled to temporary total disability from April 1, 2016 through the date of the Arbitration hearing due to the Petitioner's refusal to work in a light duty capacity for the Respondent. The Petitioner admitted during his testimony that he exceeded his work restriction of prolonged sitting while at home, yet refused to work light duty for the Respondent due to prolonged sitting. However, since Petitioner did not testify as to a specific date in April when he began participating in activities beyond his restrictions, the Commission chooses to terminate TTD as of the first day of that month. Accordingly, the Petitioner is precluded from an entitlement to temporary total disability after April 1, 2016.

Therefore, based upon the totality of the evidence and the factual findings above, the Commission modifies the Petitioner's entitlement to temporary total disability. The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision, filed on July 19, 2016, is hereby modified.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act, as follows: $35.00 to Quincy medical group, $245.00 to Hannibal Regional Medical Center, $51.00 to Clinical Radiologists, $5,575.62 to Blessing Hospital, and $2,868.43 to Unity Point Health.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize the treatment proposed by Dr. Mark Gold for Petitioner's work-related lumbar condition.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner temporary total disability of $408.92 per week for 16 and 2/7 weeks, as provided in Section 8(b) of the Act, for the time periods that follows: September 9, 2015, October 2, 2015 through January 18, 2016, January 28, 2016 through January 29, 2016, and February 17, 2016 through February 18, 2016.

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.

17IWCC0205

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $65,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 5 - 2017

O: 2/6/2017
TJT/gaf
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

# ILLINOIS WORKERS' COMPENSATION COMMISSION
# NOTICE OF 19(b) ARBITRATOR DECISION

**POWELL, RICHARD**
Employee/Petitioner

Case# **15WC029725**

**MANCHESTER TANK & EQUIPMENT CO**
Employer/Respondent

**17IWCC0205**

On 7/19/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.43% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2028 RIDGE & DOWNES PC
JOHN E MITCHELL
415 N E JEFFERSON AVE
PEORIA, IL 61603

1337 KNELL LAW LLC
STEPHEN P KELLY
2710 N KNOXVILLE AVE
PEORIA, IL 61604

17IWCC0205

STATE OF ILLINOIS )
)SS.
COUNTY OF ADAMS )

- ☐ 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)

Richard Powell
Employee/Petitioner

v.

Manchester Tank & Equipment Co.
Employer/Respondent

Case # 15WC 29725

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 **McCarthy**, Arbitrator of the Commission, in the city of **Quincy**, on **6/1/2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

**DISPUTED ISSUES**

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

# 17IWCC0205

**FINDINGS**

On the date of accident, 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 $**$31,896**; the average weekly wage was $**$613.38**.

On the date of accident, Petitioner was **45** years of age, ***married*** with **2** children under 18.

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

Respondent shall be given a credit of $**$8,798.50** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**$8,798.50**.

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

**ORDER**

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $35 to Quincy Medical Group, $$245 to Hannibal Regional Medical Center, and $51 to Clinical Radiologists, $5,575.62 to Blessing Hospital , $2,868.43 to Unity Point Health, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit 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 authorize the treatment proposed by Dr. Gold, as explained in the attached findings of fact and conclusions of law.

Respondent shall pay Petitioner temporary total disability benefits of $408.92/week for 14.4/7 weeks, commencing on September 9, 2015 (One Day); October 2, 2015through January 18, 2016; January 28, 2016 through January 29, 2016; Feburary 17, 2016 through Feburary 18, 2016: and May 29, 2016 through June 1, 2016, as provided in Section 8(b) of the Act.

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

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

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

17IWCC0205

D. Dylan McGarity

7/14/2016

Signature of Arbitrator

Date

JUL 19 2016

ICArbDec19(b)

17IWCC0205

STATE OF ILLINOIS )
) SS
COUNTY OF ADAMS )

**BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION**

| | | |
|---|---|---|
| RICHARD POWELL, | ) | |
| Petitioner, | ) | |
| v | ) | IWCC: 15WC 29725 |
| MANCHESTER TANK & EQUIPMENT CO, | ) | |
| Respondent. | ) | |

## FINDINGS OF FACTS APPLICABLE TO ALL ISSUES

Richard Powell, age 47 at the time of his accident, obtained his GED and spent one year at John Wood Community College and two years at Cardinal Area Career Center in Springfield. (T9-10) His training was that of an electrician but he is not licensed as one. (T10) He does not do electrical work. (T56)

Petitioner stated he had no back problems prior to April 2015 and saw no doctor for back problems. (T32) Prior to April 2015, Petitioner does not recall ever seeing a physician for his back. (T61) He did acknowledge that he had occasional back aches when he over exerted himself. (T61) When that happened prior to the accident of 2015, he would take Tylenol. (T62) But, his history to Dr. Bernardi indicated some chiropractic care years ago. (RE 10)

Petitioner began working for the Respondent on February 28, 2011. He had various jobs with the Respondent. He went from working prefab as a welder or breaking out parts or running a robot, whatever they needed. (T10-11)

Petitioner believes his current hourly rate of pay is $16.30. He generally worked 8 hours a day unless a supervisor or lead hand asked him to work overtime. He can refuse overtime but if he does, they won't ask him to work overtime any more. (T31) His normal work week is 5 days. (T31)

In April 2015 he was performing hand welding of top plate and base ring. (T11) As a welder, he lifts top plates, base rings and he may end up breaking out parts before you can build a part. They come off the Amada machine. (T11) They are stacked in trays and you use a pry bar and slide underneath them and beat them with a hammer. (T11-12) The parts he breaks, he lifts himself. The parts coming out of the Amada machine are on big tables and they are picked up with a forklift. (T12) Petitioner himself lifts up to 90 pound plates. (T12) He bends his back all day long at times, depending on the job he is doing. (T12)

On April 8, 2015 Petitioner assisted in opening the drawer underneath the Amada machine that cuts out the parts. He was asked to help by another worker. (T13) The other employer was trying to pry the door open with a shovel but it didn't open because it was heavy. (T13) The drawer is 4 feet wide and 6 to 8 feet deep, it is about 4 inches off the ground. (T14)

While the other employee was trying to pry the door open with a shovel, Petitioner was on his knees trying to pull on the front handle and when it finally came open when suddenly something popped in his back. (T14) The door was full of scrap steel, extras like slugs or cut outs from the top plate. (T14) After his back popped, it started hurting and it got worse as the day went by. (T15) At that time his pain was limited to the low back. (T15) He reported the incident to his supervisor. (T15) He filled out accident forms. (T15) Petitioner stated that he had only one accident working at Manchester on April 8, 2015. (T36)

He was sent to Dr. Henry by his employer. (T16) Dr. Henry checked him out, never did any x-rays the first day and told him to come back in 2 weeks. (T16-17) He did not take him off work. (T17) Petitioner did not know of any problems with his back occurring off and on prior to the April 8, 2015 accident. (T35) When he returned to Dr. Henry, the pain still hadn't gone away. (T17) Petitioner was put on light duty at the second visit. (T17) X-rays were performed. Dr. Henry released him to return to work. (T35) Petitioner disagrees with the doctor's statement that he had off and on back problems. (T35)

Petitioner saw Dr. Basho two or three times. An MRI was reviewed and x-rays were taken. (T17) Dr. Basho released him to return to work. (T37)

Around June 2015 physical therapy was recommended by Dr. Basho. (T37) After seeing Dr. Basho, he was referred to Dr. DeDes, a pain management doctor, who gave Petitioner an epidural injection at L5/S1 on June 23, 2015.

Petitioner stated that he went all through the physical therapy and disagrees that he stopped voluntarily coming to physical therapy. (T37) He was not aware that he was discharged from First Choice Physical Therapy on August 6, 2015 because of non-compliance. (T38)

Petitioner sought no medical care between August 16 and August 31, 2015 until he entered the Blessing Walk In Clinic giving them a history of trimming horse hooves. (T38-39) He gave a history feeling immediate pain while he was doing and that he had an aggravation of pain. (T39) He told them that his pain had increased. (T39-40)

On September 17, 2015 Petitioner called Dr. Basho telling him that he rolled a bail of hay over. (T40) Dr. Basho wouldn't see him so he went to the emergency room. (T40-41)

On September 17, 2015, Petitioner sought care at Blessing Hospital's ER. Petitioner gave a history of moving a bale of hay. (T23-24) He rolled a square bale of hay over, the bale weighing about 30 pounds. Petitioner moved it from edge to flat. (T23-24) As he did so, he went numb. (T24) Prior to rolling the bale his pain had never gone away since the accident. (T24) Petitioner stated there was the same injury, he just aggravated it again. (T40) At the time he was working with the hay he gave a history he had a pop in his back as well as numbness in his legs. (T41) At that time it was suggested he see a neurosurgeon. (T42) The injection that was given at the emergency room when Dr. DeDes was absent, the day that he rolled the bale, the injection to the numbness away for a period of time but it came back to the same level as before. (T33)

Petitioner worked from September 10 until October 2 in light duty capacity. (T 43) Petitioner was taken off work for the period of October 2, 2015 to January 11, 2016. From January 2016 to April 2016 he was provided light duty work and was receiving medical care. (T43-44) His complaints to the doctor during that period were problems with bending and sitting. (T44)

Finally, in October 2015 Petitioner saw Dr. Taylor Moore of Quincy Medical Group. Dr. Moore referred him to Dr. Gold. (T19) Dr. Moore gave him pain medication and took x-rays. (T20)

Dr. Gold scheduled him for a fusion at L4, L5 and S1 (on May 4, 2016). (T20) He didn't get the surgery because worker's comp refused it and he couldn't afford to pay the deductible for his insurance. (T20-21) Before surgery, Dr. Gold wanted him to get fitted for a back brace. (T21) Petitioner has not seen Dr. Gold since April but did see his nurse two days before his surgery had been scheduled to occur. (T21-22)

At work, he lifts items that are heavier than those he lifts on the farm. (T27) He spends more time doing lifting activities at work than he does on his property. (T27)

Petitioner was willing to accept the surgery suggested by Dr. Gold. (T32)

The Petitioner original complaint was that of his back and left side. (T24) He had pain in the middle of his back, cross his hips, and both legs would go numb. (T24) Petitioner told Respondent he couldn't perform sitting and didn't think he could do sitting activities. (T45, 60) Any activity that he does that requires sitting does that. (T60) When Petitioner is on his feet, it doesn't bother him as bad because whatever is getting pinched in his back isn't pinching his back when he is on his feet. (T61) His feet and legs do not bother him as bad when he is on his feet. (T61)

Previously they gave him light duty work. (T64) The Petitioner has not been offered light duty work since April 2016. (T64) Petitioner calls his employer on the phone once a month. (T64) Petitioner stated his legs are numb now from sitting. (T45) It makes sense that you would avoid sitting, avoid bending, doing activities that cause problems to your back around April to present. (T45-46) Petitioner didn't want to take a light duty job because of problems sitting. (T51-52) But he does do activities at home sitting that aggravate his back. (T52)

Petitioner lives on about 2 ½ acres of land which they garden, have horses, chickens, turkeys and ducks. (T23) He does not use the animals or corps for sale, just personal use. (T23) Petitioner stated he hasn't done any heavy lifting around the house. (T51)

The bale of hay, which is rectangular, is stacked in his barn. (T62) It is stacked up in a stack, the bale was sitting on the edge of the board, he needed to roll it over into

a two wheel so that is what he did, bent over and rolled it over. (T62-63) It was one bale high, 14 or 16 inches. (T63) He used the hay to feed he horses. (T63) He rolled it over on to a two-wheel dolly across the yard, cut the bale string with a pocket knife and picked up pieces of it and threw it over the fence to the horses. (T63) He did not carry the bale at any time. (T63)

He has a vegetable garden is about 20 feet by 20 feet and requires him to bend down, weed, plant, etc., to which he took exception. (T49, 46-47) He uses the hoe to weed and a planter to plant. He agreed that type of activity could aggravate his back pain. (T47) The average time he spends hoeing is 10 to 15 minutes. (T57) The hoe is fiberglass handle and has a flat blade of steel (58). You cut off weeds with it, stick in the ground and pull it back to you. (T58) The hoe weighs about 2 ½ pounds (T58)

The Petitioner grows green beans and picks them by leaning over the row and picking them. (T24-25) You can pick a row of green beans in 20 minutes. (T25) He was picking them most of the time by standing and bending over. (T25)

The Petitioner's children ran the tiller 99% of the time but he did touch the tiller this season. (T47-48) When asked if that exceeded his restrictions, he indicated that the tiller is self-propelled, he didn't pick it up or do anything of that nature. (T48) Running a tiller sometimes can be hard work, sometimes it gets stuck and sometimes it can aggravate your back pain. (T48-49)

Petitioner has used a hoe in his garden once this year. (T58) His plant uses a push type planter, all aluminum, you put ½ pound of seed and push it across the garden, like a fertilizer two-wheel bucket. (T58) The whole thing weighs about 7 or 8 pounds and he pushes it. (T59) Before using the hoe, the planter, etc., he noticed constant (pain) all the time. (T59-60) The pain gets worse and then it goes back to its normal level. (T60)

Petitioner uses a riding lawn mower once a week, it takes about 30 minutes to do his yard. (T57) Sitting on the lawn mower can aggravate his back at times. (T50) Riding a four wheeler can aggravate his back. (T50-51) When he is on the job for his employer, he doesn't work 30 minutes and then stop. (T57)

He has three horses which require feed and he tried to trim one hoof this year which aggravated his back. (T55) He stated he tried to ride a horse but he couldn't do

it. (T52) His son saddled the horse. (T52) He would agree that riding a horse aggravates his complaints. (T52-53) He has tried not to do that since September 2015. (T53) He also cut hooves on horses by putting the hoof between his knees and trimming it with nippers. (T25) The nippers are like a large fingernail clipper. (T25-26) After the incident of trimming hooves, picking green beans or tipping a bale of hay, his pain does reduce after a period of time if he quits doing what he was doing and just lay on the floor it will relax. (T27-28)

In working on his brakes, it took him an hour and a half or two hours which would have normally taken him about 30 minutes to set the brakes. (T59) It took Petitioner about 2 ½ hours to do both sides. (T59)

Petitioner agreed that he was performing some activities that were probably beyond his restrictions. (T46) Certain activities at home exceeded his restrictions. that he exceeded his restrictions in mowing the lawn and working in the garden. (T46)

When asked if he reinjured his back in any of those activities, he stated no. (T26) He stated his back pain has never gone away, it has different degrees of pain with some days he can deal with it and some days he wants to cry because it hurts so bad. (T26) The back just doesn't get better. (T27) He stated that if he is sitting around doing nothing, he can deal with it, it is just a dull constant pain. However, if he is working, bending over, twisting it could make him cry on some days. (T27) He does bend and twist at work. (T27)

Medical records of the Petitioner's care were introduced into evidence. Petitioner was seen by Dr. Henry. He obtained a history of low back pain of an acute nature with an onset suddenly due to an incident at work on April 8, 2015 and has been occurring in a persistent pattern for a week, gradually worsening. He had low back pain described a mild to moderate dull aching, shooting, burning and electrical and tingling. Pain radiates from his lower back down to the left thigh and left foot. He received no relief from the pain.

On April 14, 2015 Dr. Henry noted that this was a work related injury.

Dr. Henry noted tenderness to palpation at the left buttock and over the sacroiliac joint on the left. Straight leg raising was negative on the right and left.

X-rays were taken. On that date, Petitioner was found able to work without any restrictions.

Petitioner returned to Dr. Henry on April 22, 2015 with the same complaints. The doctor felt that he had a low back strain and a lumbar disc displacement. In his notes for April 22 he suggested modified duties of lifting 15 pounds with no bending and suggested an MRI. However, in contradiction to his notes, his report to the employer indicated that Petitioner was able to work with no limitations. He was to return on the 5th of May, 2015. Dr. Henry marked the form indicating it was a work related injury.

At Dr. Henry's direction, an MRI was performed on April 30, 2015. It was performed at Hannibal Regional Hospital and the reviewing doctor was Emad Hamid.

After the MRI was taken, Dr. Gregory gave the Petitioner restrictions noting that he had to work with limitations. He could lift 20 pounds and needs to limit his bending. He, on that note, indicated that this was a work related injury.

On April 30, 2015 Dr. Henry again saw the Petitioner. On his examination, he found the left lower extremity to have 40 degrees with posterior and thigh calf pain. The doctor's assessment is that of low back strain and lumbar disc displacement. He confirmed the Petitioner should be lifting no more than 20 pounds and have limited bending. He is suggesting referral to a back surgeon..

Petitioner was referred to Dr. Basho, an orthopedic surgeon, by Dr. Henry with complaints of low back and numbness and tingling down the left leg. (PX 2)

The initial examination on May 26, 2015 showed the Petitioner's motor strength to be normal in the upper extremities, the hip, the knee, the tibialis anterior, AHL, and GSC sensation was intact in the cervical and lumbar regions. Reflexes in the Achilles and patellar tendons were 2+ and symmetric.

Review of x-rays and MRI taken previously, resulted in the opinion of a Grade I spondylolisthesis at L5-S1 on x-ray. The MRI showed a broad based disc bulge with slight caudal migration at L4-5 segment, severe foraminal stenosis is noted at L5-S1.

Dr. Basho's assessment was that of lumbar radiculopathy, Grade I spondylolisthesis at L5-S1 and L4-5 disc herniation.

The doctor stated that he wasn't sure if the Petitioner's pain emanated from L4-5 or L5-S1. He suggested a left side L5-S1 transforaminal injection. If that injection is

inefficacious, then he will be sent for an L4-5 translaminar epidural steroid injection. He was also t be placed in physical therapy. He could return to work with a 20-pound restriction. He is to return on June 13, 2015. Doctor's notes indicate that this was a work related injury.

Petitioner returned to Dr. Basho on July 21 in follow up to the L5-S1 injection stating that he gave him no significant or lasting relief. The doctor's assessment remained the same. The physical examination Petitioner remained unchanged. Dr. Basho noted that the injections have not enough of any diagnostic value and have given him no relief. Therefore, he concluded surgical intervention was not what he believed to be the answer. He suggested continued conservative treatment of oral medication and therapy. He is to be referred to the pain clinic.

Dr. Basho prepared a report to the employer indicating that Petitioner would return to work on July 21, 2015, that he is able to work with restrictions of lifting 20 pounds. The doctor again noted that this was a work related injury/illness.

On September 17, 2015 Petitioner called Dr. Basho's office speaking to a nurse, Ashley Kelle LPN, he explained he was rolling the bale of hay and experienced numbness in both arms and legs, his extremities are still tingling and he would like to see Dr. Basho. The nurse stated she would have to figure out how they could go about seeing him due to a previous worker's comp injury and she would have to talk to someone else about scheduling. She suggested that if was concerned and thought he needed immediate care, he could return to the walk in clinic he previously visited for pain control or call his PCP. The note goes on to indicate that the nurse talked to Dr. Basho who stated he didn't need to see the patient because he had released him from care and needed to seek treatment with pain management.

On referral from Dr. Basho, Petitioner was referred to Frist Choice Physical Therapy.

Petitioner tolerated the exercise at therapy as well as at home without any significant problems or increased pain. He continues to have symptoms after performing his work duties at a current 20-pound restriction. Patient described an incident where he bent over at work on 7/14/15 and felt a pop in his back causing

increased symptoms at that time to a level of 6/10. His thoracal lumbar junction back pain index score is 52%.

As to spine range of motion, flexion caused pain, was at 35 degrees. Extension was 20 degrees with lower lumbar and lower thoracic pain. SVR was 38 degrees, SVL, 37 degrees. Range of motion on right for internal rotation was 14 degrees and on the left 20 degrees. External rotation of the hip was 40 degrees on the right and 30 degrees on the left. Thoracic spine range of motion was extension of 23 degrees, right and left rotation was 30 degrees. Lower extremities strength myotomes were 5/5, gluteals 4/5, upper abs 4-/5, lower abs 4-/5 and oblique's 4/5.

The assessment is that he is improving with his lumbar and thoracic spine motion as well as his hips showing improvement. He tolerates exercises without increase in symptoms but continues to have pain that is relatively constant in the thoracal lumbar region. His pain will worsen after lifting activities including activities at work or household chores.

First Choice made no comments with regard to causal relationship but noted a work injury.

Rodney Brumley, PT, authored a discharge summary from physical therapy after Petitioner was seen for 8 visits for the period of June 16, 2015 through July 16, 2015. A progress note was completed on his last visit for follow up with his referring physician. A phone message left with the Petitioner did not result in contact. At that time, physical therapy was discontinued.

The therapist noted that the Petitioner met all of his short term goals with the exception of improved ability to sleep up to 4 hours as he continues to awake every 2 to 3 hours due to low back pain or not getting comfortable because of pain. The physiatrist plan was to send a progress note for follow up with physician continuing per physician recommendation.

Respondent suggests the Petitioner just quit physical therapy on his own which Petitioner denied. In a therapy note of July 16, 2015, the therapist, Rodney Brumley in the PN section of his notes, seemed to indicate he was awaiting the physician's recommendation and checking on Petitioner's status. In his note of July

21, 2015, Dr. Basho merely indicated that Petitioner was to return as necessary and makes no comment about continuing physical therapy.

The Petitioner was admitted to Blessing Hospital on August 31, 2015 with a history of his accident, and he has now and then sharp pain that comes in his lower back stating that yesterday he was trimming the feet of his horses, he bent over and the pain came back and (?) his lower back. His pain is 4/10 with intensity worse with bending side to side or turning side to side. He stated he had a previous steroid shot which decreased his pain. The practitioner Daanish Shaikh assessed him as having lower muscle spasms for which he was given shot of steroid and morphine and was sent home. The physician wrote a note excusing Petitioner form work and physical activities beginning on August 31, 2015 and allowing him to return to work on September 2, 2015.

On September 17, 2015 Petitioner was seen at Blessing Hospital Emergency Room with back pain. It was noted he had an open worker's compensation claim. He stated he moved a bale of hay and felt a pop in his back stating now he is numb and tingling all over his body. A review of symptoms seems to be normal. It was noted that on August 3, 2015 he was seen for back pain by Dr. Shaika. Clinical impression appeared to be paresthesia.

Petitioner submitted to an independent medical examination at Respondent's request on December 15, 2015. Petitioner gave the doctor history of both his accident, his subsequent occurrence regarding his back and mentions a chiropractor visit 15 years prior to the accident. Dr. Bernardi reviewed the medical records available to him covering up to October 19, 2015.

In his physical examination, he found no signs of symptom magnification nor any Waddell's signs. His positive findings were that of flexion and extension rotation of the right hip produced complaints of right lateral buttock pain. Flexion and external rotation of the left hip produced complaints of left lateral buttock pain. He notes deep tendon reflexes of 1+/4 at the knees, 1/4 on the left ankle reflex and 0/4 on the right ankle reflex. The plantar response was down going. Thereafter he reviewed the MRI performed on April 30, 2015.

Dr. Bernardi noted that he did not believe it was possible to determine whether his symptoms were due to an acute central disc protrusion at L4-5, an aggravation of a pre-existing L4-5 disc disease/stenosis, an aggravation of his L5-S1 isthmic spondylolisthesis or a blending of all of them. He notes that the waxing and waning of symptoms is normal, that is how most episodes of back/leg pain behave.

The doctor notes that it is extraordinarily unlikely that having been present for approximately 3 ½ years, the main symptoms completely subside following his appointment with Dr. Moore on July 27, 2015 only to recur again on August 30, 2015.

The doctor stated that "**were it not for his occupational accident I can see no reason to believe that this man's activities at home in late August or mid-September 2015 would have produced any type of back complaints**". He does not believe that the Petitioner has yet reached maximum medical improvement. He felt it would be reasonable to have a second and third epidural steroid injection.

Later, when queried by defense counsel, Dr. Bernardi checked on a form indicating that the activities Petitioner provided outside of Manchester Tank were types of activities that could aggravate the condition of ill being. On May 26, 2016 in response to defense counsel's fill in the blank letter, Dr. Bernardi agreed that if an individual is performing activities beyond his restrictions, those activities could be aggravating his condition of ill being. Nowhere was it mentioned that those aggravations were permanent in nature.

Petitioner was seen by Dr. Howard DeDes, a pain specialist, on June 19, 2015 with a chief complaint of low back and left leg pain, describing the accident that he sustained and noting that he was referred to them by Dr. Basho. He reviewed the imaging performed noting, among other things, that there were posterior disc bulges with degenerative changes and a right paracentral component at L4-5 producing moderate central stenosis and foraminal stenosis, left greater than right. There was also a L5-S1 bilateral foraminal stenosis. The doctor believed that the foraminal stenosis at L4-5 and L5-S1 is consistent with the lumbar radiculopathy.

On June 23, 2015 Petitioner was seen by Dr. DeDes who performed a transforaminal epidural steroid injection procedure at the left L5-S1 neuroforamen. Petitioner was given restrictions of no repetitive shoveling, no lifting over 40 pounds no

pushing or pulling over 40 pounds of force and no work requiring repetitive bending. In reviewing medical necessity, he noted that Petitioner's symptoms were consistent with the radiographic findings.

On September 14, 2015 he was again seen by Dr. DeDes who had requested Petitioner return for evaluation. His plan was to start pain management for brachial pain with Tramadol 3 times daily. For diagnostic and therapeutic options, they will provide transforaminal epidural steroid injections at L4-5 and L5-S1 on the left side. Depending upon the efficacy of those injections they will consider repeat injections within a month for a series of three. If pain does not improve, he will go back to Dr. Basho.

On September 17, 2015 Petitioner called the office at 3:17 p.m. stating that he went out to feed his horses and went to roll over a small bale of hay from the edge of the flat side. He states as he did so, something moved in his back and his whole body began tingling. The office told Petitioner that Petitioner was referred to Dr. DeDes so he needs to call that office. Dr. DeDes indicated that obviously he should go to the emergency room. A CMA called and spoke to his wife about coming to the emergency room.

September 18, 2015 Kayla Berhorst, RN spoke with Petitioner who indicated that he had a disc pushing on the nerve causing his tingling. He needed weight restrictions from Dr. DeDes as he is the attending physician. The nurse wasn't sure the doctor would comply and told the Petitioner ask that he could be referred to someone else if Dr. DeDes isn't going to give him restrictions. Dr. DeDes apparently replied indicating that he can have weight restrictions until he sees him again next scheduled visit.

Petitioner called on September 21 notified of restrictions and will move up for an objection getting approved. Petitioner came to the office about noon to pick up the restrictions.

Ultimately Petitioner stated he wanted to keep the appointment of October 27 for the injection.

On October 2, 2015 Petitioner saw Dr. Taylor Moore. Petitioner is here to establish care in his clinic and receive general health history/physical. Physical examination appears to be normal.

Assessment and orders indicate that a general medical examination was held. In addition, he has midline low back pain with sciatica, sciatica laterally unspecified.

They will get his FMLA papers. They are going to try to get him to a neurosurgeon sooner than December with his work comp will approve the visit. They were going to get flexion and extension views of his back and discuss chronic pain medications. He will follow in one month or as needed.

September 2, 2015 x-rays were taken of the lumbar spine and interpreted by Dr. Willet Pang on October 2, 2015. The x-rays compare with the earlier one of April 14, 2015. Bilateral pars defects at L5 segment with 15% anterolisthesis L5 upon S1. No added displacement with flexion or extension. No compression fracture. Disc spaces are preserved. The doctor's impression was that of bilateral pars defects. Fifteen percent anterolisthesis without instability demonstrated.

On October 7, 2015 a letter was written to Petitioner by Deborah King, RN/Dr. Taylor Moore. After reviewing the x-rays, it was stated that the pars deficit was noted. The back is more unstable. I think this is likely what happened when you were pulling on that heavy object. The 15% anterior was noted. It is not unstable however, not slipping back and forth. He would like him to be evaluated by a neurosurgeon. He conferred with their occupational medicine team and they agreed. They are going to send over a referral to neurosurgery.

On July 27, 2015 Dr. Taylor Moore gave Petitioner an excuse from work from July 27 to July 28, 2015.

On September 18, 2015 Petitioner was given a note from a doctor whose signature is not clear. He is to return to work on 9/21/15 he is to do no repetitive shoveling, no lifting overhead more than 40 pounds, no pushing or pulling over 40 pounds of force, no work requiring repetitive bending of the spine or lower back and he will be followed up for a physician's appointment on October 21.

On October 19, 2015 Petitioner was seen by Mark Gold who recited the Petitioner's history of accident which gave him severe back pain. He still has had persistent complaints of low back pain as well as pain radiating down the right hip into the leg and also has pain in the left leg but not as severe. He has the sense of his legs going numb, tingling much of the time. He does feel that his right leg is weaker than his

left. Sitting or bending make the back worse. He has undergone an epidural steroid injection without relief.

Dr. Gold indicated he reviewed the MRI and the lumbar radiographs with flexion and extension views. The MRI reveals a Grade I spondylolisthesis (anterolisthesis) at L5-S1. There are probable bilateral L5 pars defects. There is a disc degenerative change and a disc bulging/protrusion centrally at the L4-5 and L5-S1 levels with moderate severity stenosis at both of those levels. In addition, he has a disc bulge or protrusion/extrusion at L4-5 level and disc bulge centrally at L5-S1 level producing neuroforaminal stenosis bilaterally. **I do believe that it is more likely than not that the patient's injury that he describes occurring at work aggravated or exacerbated his underlying conditions, and may have produced additional disc protrusion or herniation at L4-5 level.** He does now have intractable lower back pain as well as bilateral lower extremity pain which is likely related to a combination of stenosis and mildly unstable degenerative spondylolisthesis.
He believes surgery is a reasonable alternative. His plan is to attempt surgery if and when it is approved. The proposed procedure would be L4-5 and L5-S1 360 fusion.

On Febarury17, 2016 Dr. Moore gave the Petitioner an excuse from work for the 17th through the 18th of February.

Dr. Taylor Moore saw Petitioner on return to clinic for continued management of his chronic low back pain his chronic low back pain. He has been evaluated now by two separate surgeons about his back both of them apparently recommending surgery. Worker's compensation has denied surgery thus far. His examination indicated positive for musculoskeletal tenderness to palpation over the mid line and paravertebral musculature to the lumbar spine with no step-offs noted. Diagnosis is that of midline low back pain with sciatica, sciatica laterally unspecified; displacement of lumbar intervertebral disc without myelopathy; and acquired spondylolisthesis. The doctors suggested Petitioner restart Cymbalta and take Baclofen for muscle relaxants. He would recommend work restrictions per his visit with the last surgeon.

On February 27, 2016 Petitioner was seen by Dr. Moore again. He has increasingly lower back extremity and weakness symptoms. He had increasing sciatica symptoms with shock pain going down his lower extremities and emanating from his low

back. His low back pain is still there as it has been since the original injury. He is unable to work because of increasing symptoms of weakness and numbness down his legs. Musculoskeletal examination shows strength currently bilaterally in lower extremities decreased deep tendon reflexes in the patellar tendon on the right side. He has slightly reduced sensation on the right side of the lower extremity. Assessment is the same as previously. The doctor notes that two neurosurgeons have recommended surgery and the doctor also feels it is appropriate.

On March 17, 2016 Petitioner returned to Dr. Moore for management of his chronic low back pain with sciatica symptoms. He denies any side effects from the medication and his sciatic symptoms are about 80% improved as far as the pain goes. The medical findings are still the same as are the assessment. The doctor noted Petitioner is doing well with Gabapentin. He recommended follow up with the surgeon.

Petitioner returned to Dr. Moore on April 4, 2016. Petitioner's complaints were that of bilateral numbness, weakness and tingling in the lower extremity that began in April. He suffered a back injury a year ago and is complaining of his lower back now. Petitioner appeared there with frustration with his back injury and problems with his employer. Petitioner complained to the doctor that the employer expected him to do things beyond his restrictions and then would write him up for working outside of his restrictions. It was noted that he would be seeing Dr. Gold again on the 11th. They gave him another letter for work with the same restrictions that he had previously.

The Petitioner was then seen by Dr. Gold again on April 11, 2016. Petitioner advised the doctor that he returned to work in January 2016 with the same symptoms and with some increase in back pain and feeling that his legs were going to give way while at work. After a particularly long day, spent bending over and welding, his condition worsened. Wherever he has to lift or bend frequently he experiences increased pain and feels his leg go numb. Recently his leg did give way causing him to fall face forward.

Physical examination shows tenderness across the lower lumbar spine but otherwise relatively normal. Straight leg raising and cross straight leg raising were performed and were painful bilaterally producing lower lumbosacral pain.

The doctor's assessment remained the same as previously. He felt that Petitioner has not changed and believes that he has a tractable lower back pain as well as paresthesia since the industrial injury of April 2015.

**In support of Arbitrator's decision relating to __F__, the Arbitrator finds the following facts:**

It is undisputed that Petitioner sustained an accidental injury arising out of and in the course of his employment on April 8, 2015. Causation is being questioned. Review of the medical records establish that most all of the practitioners found that there was causal relationship between his accident and his current condition.

Respondent argues the intervening incidents, particularly the one on September 17, 2015 when the Petitioner rolled the 35 pound bale of hay and had increased symptoms, broke the chain of causation related to the accident. The Arbitrator does not find the Respondent's argument persuasive.

The case of Vogel v. The Illinois Workers Compensation Commission is helpful in this analysis. In Vogel,a petitioner suffered a work related accident to her lower back. She later had several auto accidents which the respondent argued broke the causal chain. The Court first cited the oft cited earlier opinion in Sisbro, explaining that an accident need not be the sole or principal cause of injury so long as it was a cause. They found that the evidence supported causation because the claimant's condition had been weakened by the work accident to the point where the auto accidents, while aggravating, were not sufficient to break the causal chain. Vogel v. The Illinois Workers Compensation Commission, 354 Il. App. 3d 780, 813, ( 2005).

Here the evidence shows that the Petitioner had severe bilateral foraminal narrowing at L5-S1, along with severe left foraminal narrowing at L4-5, as shown by the MRI of April 30, 2015, long before any of the alleged intervening events. His symptoms noted in the medical treatment records from the Hannibal Clinic through Dr. DeDes note of September 14, 2015 are consistent with the above pathology. While the Quincy Medical Group records of September 17 and 18th show that moving the bale of hay did increase the Petitioner's radiculopathy, the subsequent records of Dr. Moore on October 2, 2015 point to the conclusion that the aggravation was in large part temporary. At that

time, the Petitioner primarily complained of back pain. While he did report that his feet and legs were asleep daily, he had neither shooting pain nor weakness down either leg. Nonetheless, Dr. Moore reiterated his earlier belief that the Petitioner needed to see a neurosurgeon based on the MRI findings referenced above. (PX 6) Also, Dr. Gold's surgical recommendation was made in large part by his review of said MRI.

Respondent also argues that surgery was not recommended until after the hay bale event. While this is true, it was not recommended because of any new symptoms. In fact, Dr. Basho's notes from May and July indicate that he was considering surgery. He did not ultimately recommend it due to his belief that the epidural steroid injection did not reduce the Petitioner's leg pain sufficiently. He did, however, continue to note the Petitioner's ongoing diagnosis of lumbar radiculopathy, spondylolisthesis and a disc herniation. (PX 2; 7/21/15 o.v.) Also, the history the Petitioner provided to Dr. DeDes on September 14, 2015 shows that the injection did, in fact, help with some of his left leg symptoms. Finally, as stated above, Dr. Gold's surgical recommendation was based in large part on the Petitioner's ongoing symptoms and the April MRI findings.

The Arbitrator finds the above evidence shows that the various instances where the Petitioner noticed increased symptoms with activities were aggravations of the underlying condition and did not break the causal chain from the work accident forward.

Dr. Taylor Moore, in his note of October 7, 2015 when commenting upon the lesion in his back being more unstable, the doctor thought it was likely something happened when he was pulling on the heavy object. Dr. Gold, a neurosurgeon to whom Petitioner was referred also found the Petitioner's condition was related to the accident of April 8, 2015.

Petitioner was examined at Respondent's request by Dr. Bernardi. Dr. Bernardi noted that Mr. Powell struck him as a credible historian and did not detect any Wadell's signs. Dr. Bernardi stated that he thinks Petitioner's symptoms are best considered work related. Petitioner volunteered that he raises animals and this requires physical exertion. Dr. Bernardi stated that it is not as if Petitioner was claiming to be disabled when he experienced flare ups in late August and mid-September. Instead, Petitioner worked from the date of accident until he was taken off in October. Dr. Bernardi noted that the waxing and waning of symptoms was normal. He couches his opinion with

regard pathology could be based upon a second MRI to be had. He further notes that **"were it not for his occupational accident I can see no reason to believe that this man's activities at home in late August or mid-September 2015 would have produced any type of back complaints".**

Letters were sent to Dr. Bernardi by Respondent's counsel months after the IME and apparently without additional medical records. Dr. Bernardi responded to supplemental inquiries about bailing hay, performing farm activities and working with horses, two of which were originally addressed in this original narrative. The most he could say was that those incidents could aggravate his complaint, he did not alter his original causation opinion. Additionally, Petitioner wasn't baling hay, he doesn't have a farm, just a large garden. Petitioner did work with horses and did have an incident but Petitioner testified that his level of pain subsided to the normal level after a short period of time after these "aggravations". Dr. Bernardi also commented in an inquiry from defense counsel, that if he was performing duties beyond his restrictions, those could aggravate Petitioner's condition. Again, he did not specifically alter his original causation position.

In addition, Petitioner received physical therapy at First Choice. They made no comments with regard to causal relationship but noted a work injury. Respondent suggests the Petitioner just quit physical therapy on his own which Petitioner denied. In addition therapy in the note of June 16, 2015, the therapist, Rodney Brumley in the PAN section of his notes, seemed to indicate he was awaiting the physician's recommendation. In his note of July 21, 2015, Dr. Basho merely indicated that Petitioner was to return as necessary and makes no comment about continuing physical therapy. It would seem clear that the Petitioner's incidents subsequent to the accident of April 8, 2015. Petitioner's unrebutted and credible testimony indicates that his condition returned to the status quo after each of the incidents discussed on both direct and cross examination.

The Arbitrator therefore finds Petitioner's condition of ill being is causally related to the accident occurring on April 8, 2015.

**In support of Arbitrator's decision relating to __G__, the Arbitrator finds the following facts:**

Respondent submitted into evidence a wage statement covering the period of April 10, 2014 through April 2, 2015. The exhibit lists the number of hours Petitioner worked but not the days worked consistent with those hours. There is no explanation in the statement why there are multiple listings of "regular" earning in the same week.

As directed in Section 10 of the Workers' Compensation Act, if an employee loses five (5) or more days of work, then the remainder of the 52 weeks will be divided by the number of weeks and parts thereof to determine the average weekly wage.

In this instance, the wage statement does not offer the number of days for which the total earnings were made. One cannot divide the earnings by the number of weeks or parts thereof given the wage statement offered as RX #8. The Respondent's exhibit # purports to be the Petitioner's earnings. What is clear is that the Petitioner earned $14.70/hour on April 10, 2014 and his wage was increased to $15.70/hour on and after August 14, 2014. There were 14 weeks paid at the hourly wage of $14.70. There were 18 weeks paid at the $15.70 hourly wage. The payroll records disclose Petitioner worked regularly. Not knowing how many days or parts thereof in all of the weeks, using a full week for each would be equitable.

Therefore, the yearly wage would be $31,896.00 and the average weekly wage would be $613.38. As such, the total temporary benefit rate would be $408.92.

**Other issues**

Respondent contested the issue of TTD and medical, past and future, based upon its arguments on causation. Having found the Petitioner's condition to be causally related to the accident, the Arbitrator awards the TTD and medical requested. The Request for Hearing requests benefits for a period of 14 4/7 weeks,

including 9/9/15; 10/2/15 to 1/4/16; 1/12/16 to 1/18/16; 1/28/16 to 1/29/16; 2/17/16 to 2/18/16 and 5/29/16 through the date of hearing 6/1/16. The Respondent has paid $8,798.05 to which they are entitled to credit.

As to Petitioner having lumbar surgery, Dr. Basho was of the opinion that the Petitioner did not need surgery. Dr. Bernardi, Respondent's evaluating physician, did not exclude it but did not recommend it either. Dr. Gold, the neurosurgeon, and Dr. Moore the family physician, agreed that surgery was necessary. Petitioner is willing to undergo surgery. Surgery appears to be a reasonable treatment option based upon the medical opinions espoused.

With regard to medical bills, Petitioner has submitted those as follows:

| | |
|---|---|
| Quincy Medical Group 10/19/15 | $ 35.00 |
| Hannibal Regional Medical Center 4/14-4/30/15 | $ 245.00 |
| Clinical Radiologists 9/17/15 | $ 51.00 |
| Blessing Hospital 9/7/15 | $2,772.21 |
| Blessing Hospital 9/17/15 | $2,235.53 |
| Blessing Hospital 9/17/15 | $ 536.68 |
| Blessing Hospital 9/17/15 | $ 31.20 |
| Unity Point Health 6/18-10/19/15 | $2,868.43 |

Some of the medical bills have been paid by group. Respondent shall hold Petitioner harmless for any request for reimbursement for those related to the accident and paid by Respondent's group carrier.

STATE OF ILLINOIS )
) SS.
COUNTY OF COOK )

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

**BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION**

IOANNIS AVDIS, WIDOWER OF
SOFIA AVDIS, DECEASED

Petitioner,

**17IWCC0290**

vs.

NO: 09 WC 36001

NORTH PARK UNIVERSITY,

Respondent.

## DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by both the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, permanent partial disability, nature and extent of decedent's permanent disability, and whether the surviving spouse can collect on Decedent's permanent partial disability award, and being avdised 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 & Conclusions of Law***

1. Petitioner, Ionannis Avdis, testified through an interpreter that on February 6, 2009 he was married to Sofia, and had been since 1966. They remained married until her death on November 28, 2011. She was "so-so" with command of English. She went through 6th grade of grammar school, which is the final year of grammar school in Greece. She worked for Respondent cleaning the rooms of students. She injured her back on February 6, 2009 when she fell at work. The next day she went to her principal care provider, Dr. Christopoulos. After an MRI, Dr. Chistopoulos moved out of the area and she was referred to his partner, Dr. Karabelas, who prescribed medication and physical therapy. He referred Petitioner to Dr. Bergin, a specialist.

2. Sofia had surgery on her back on April 26, 2010 and had physical therapy thereafter. She continued to have pain and had a second surgery on September 13, 2010. Even after the second surgery, Petitioner continued to have pain in her back and left leg. Respondent sent her for a Section 12 medical examination with Dr. Singh. He recommended additional testing. However, Petitioner did not want additional surgery and last saw Dr. Bergin on April 15, 2011. She still took aspirin but had no additional treatment for her back thereafter.

3. Petitioner also testified that Sofia had pain in her back and one leg was a little smaller than the other. "She would limp a little." She had no trouble walking prior to her accident. After Sofia last saw Dr. Bergin Petitioner "did everything" around the house and he had to "pull her up" to get her out of bed. Sofia died on November 28, 2011, but Petitioner did not know how; he was not at home. She was found at the bottom of a stairwell; "she fell downstairs in the basement." After an off-the-record discussion, Petitioner stipulated that Sofia's death was not related to the work injury. Sofia's death certificate, which indicated the cause of death was "accident," was submitted into evidence.

4. On cross examination, Petitioner testified his wife's pain was limited to her low back. She did not see any doctor between March of 2011 and her death and she was not taking narcotic medication during that time frame. Sofia did some gardening, but only rarely. Sofia did not contact Respondent for work from March 2011 to the time of her death. Petitioner worked for 25 years as a "presser" and "would make electrical things."

5. On redirect examination, Petitioner testified that besides her back, Sofia also had pain in a leg.

6. The medical records reveal that on February 7, 2009, Sofia presented to Dr. Chistopoulos for back pain. She injured her back while lifting old books lying around in the dormitory. He prescribed what appears to be Ibuprofen and Flexeril (the treatment note is handwritten). He also prescribed physical therapy and ordered an MRI.

7. The MRI was taken on February 18, 2009 and showed diffuse lumbosacral spondylosis with degenerative disc disease, a small disc protrusion at L4-5 with mild spinal stenosis and a tiny protrusion at L5-S1. There was also bilateral foraminal stenosis due to hypertrophic facets.

8. On May 21, 2009, Sofia presented to Dr. Karabelas for follow up. She reported on February 6, 2009 she lifted a bag of books at work and developed burning low back pain. The pain later began radiating into the left buttock and leg. She had medications and an MRI done and started physical therapy with minimal improvement. The pain was particularly bad going up stairs. Dr. Karabelas diagnosed low back pain with left-sided radiculopathy. It seems that he also prescribed medication including Flexeril. He took Petitioner off work until further notice.

9. On June 23, 2009, Sofia presented to Dr. Bergin complaining of low back pain radiating into the left leg. Her condition had worsened significantly over the past couple of weeks prompting her visit. He diagnosed disc herniations at L4-5 and L5-S1 and recommended epidural steroid injections.

10. On July 20, 2009, Dr. Chung performed left L4-5 and L5-S1 transforaminal epidural steroid injections for back pain with radiculopathy, spinal stenosis, diffuse lumbar spondylosis, facet arthropathy, and degenerative disc disease.

11. On July 27, 2009, Sofia returned to Dr. Bergin for follow up evaluation of low back and left leg pain. She had a history of disc herniations at L4-5 and L5-S1. Her radicular symptom began after a work-related injury on February 6, 2009 lifting a trash bag full of heavy books. She had her first set of epidural steroid injections from Dr. Chung which provided good relief for a day or two. Currently, she complained of worsening left foot pain and leg weakness. Dr. Bergin recommended another set of epidural steroid injections.

12. A month later, Dr. Chung performed another set of left L4-5 and L5-S1 transforaminal epidural steroid injections for back pain with radiculopathy, spinal stenosis, and diffuse lumbar spondylosis, facet arthropathy, and degenerative disc disease.

13. After the second set of epidural steroid injections, Dr. Bergin concluded that Sofia's symptoms emanated from the L4-5 disc and recommended a microdiscectomy at that level. Petitioner wanted to proceed. He ordered an MRI in anticipation of surgery.

14. An MRI taken on February 23, 2010, showed mild degenerative disc disease and facet arthritis at most levels of the lumbar spine, mild disc bulging at L3-4 without stenosis, left paracentral and foraminal disc protrusion at L4-5 causing mild narrowing of the left lateral recess, and a small central disc protrusion at L5-S1 with mild bilateral foraminal stenosis.

15. On April 26, 2010, Dr. Bergin performed left laminectomy/discectomy at L4-5 for herniated disc.

16. Sofia began physical therapy about three weeks after surgery. She reported that physical therapy was aggravating her symptoms. She began complaining of numbness and tingling in the toes bilaterally and increased left leg pain. Dr. Bergin wanted a repeat MRI to ensure there was not recurrent disc herniation.

17. The repeat MRI taken on August 9, 2010, showed a 6 mm left L4-5 "hypoenhancing structure along the paracentral disc" suggesting recurrent or residual disc protrusion. About a week later Dr. Bergin noted that the new MRI showed a large recurrent disc herniation at L4-5 and recommended a repeat microdiscectomy. Petitioner reported the sciatica was unbearable and wanted to proceed.

18. While the operative report does not appear to be in the record before us, the rest of the record establishes that on or about September 13, 2010, Dr. Bergin performed a repeat microdiscectomy/laminectomy at L4-5 for recurrent disc herniation.

19. Sofia progressed after the second surgery in physical therapy. By January 10, 2011, after about 13 physical therapy sessions Petitioner reported some functional gains but still reported 5-7/10 pain. This appears to be the final physical therapy note. Although additional therapy was recommended by the therapist, on February 1, 2011, physical therapy was terminated because no additional sessions were approved by insurance.

20. On February 15, 2011, Sofia returned to Dr. Bergin and reported some recurrence of pain, but x-rays showed no obvious instability. He indicated that she would be at maximum medical improvement unless she wanted a fusion. Dr. Bergin recommended a functional capacity evaluation ("FCE").

21. Sofia had an FCE on March 2, 2011, which was considered valid due to "good effort." She showed 2/5 Waddell signs and 1/21 Korbon criteria. Sofia reported 5/10 pain at the beginning and 6-7/10 pain during the evaluation. Sofia was able to function at the sedentary physical demand level and could not return to work at her heavy physical demand job of housekeeper.

22. At Respondent's request, on February 21, 2011 Sofia presented to Dr. Singh for a medical examination pursuant to Section 12 of the Act. She had surgery on April 26, 2010, but a repeat MRI showed a large recurrent left-sided disc herniation at L4-5, which he noted included severe foraminal stenosis. Dr. Singh also noted that Dr. Bergin performed revision surgery on September 13, 2010. Currently, Sofia reported 7/10 low back pain radiating to the dorsum of the left leg. Dr. Bergin had recommended an FCE. Dr. Singh opined that Petitioner's current condition was related to her work accident and her recurrent herniation was properly treated with revision. He recommended a new MRI prior to an FCE.

23. On March 15, 2011, Sofia returned to Dr. Begin and reported she still had persistent low back and left leg pain. However, Dr. Bergin indicated she was "actually doing quite well" after recurrent disc surgery at L4-5. He also noted that Dr. Singh had recommended a repeat MRI, but Petitioner was adamant about not having additional surgery as the pain was tolerable with limited activity. She had an FCE on March 2, 2011 which restricted her to sedentary duty with a 10-lb limit. Dr. Bergin did not believe the new MRI would be of any benefit because she was adamant about not having more surgery. Dr. Bergin declared her at maximum medical improvement, made permanent the restrictions specified in the FCE, and basically released her from treatment.

The Arbitrator awarded 129 weeks of permanent partial disability, representing loss of 60% of the left leg. In so doing she noted the medical records consistently documented radicular left-leg symptoms, as well as Petitioner's testimony about decedent's limp, her use of a cane, and leg atrophy.

The Arbitrator cited *Divittorio v. IIC*, 299 Ill. App. 3d 662 (1st Dist. 1999) as authority for her conversion of an 8(d)2 (person-as-a-whole) award to an 8(e) (loss of the left leg) award. In *Divittorio*, decedent suffered a hip injury requiring two hip surgeries. He died before his claim was arbitrated and alleged beneficiaries were substituted as claimants. The Arbitrator awarded a permanent partial disability award of loss of 16% of the person as a whole under 8(d)2 and held that the claimants could recover the award under Section 8(e)19. On review the Commission converted the permanent partial disability award to a specific loss of 40% of the left leg. The Commission also found that one of the claimants could recover the permanent partial disability award under Section 8(e)19. The Appellate Court affirmed the Decision of the Commission.

The Commission finds the Arbitrator's reliance on *Divittorio* as authority to convert the back injury from a person-as-a-whole award to an award for partial loss of the use of the left leg misplaced. A back injury, as a head injury, is an injury to the person-as-a-whole and any resulting permanent partial disability is based on the loss of the person-as-a-whole. Just because a claimant experiences symptoms to other parts of the body does not convert such an injury to an injury to the body part associated with such symptoms. In this instance Sofia's radicular symptoms and antalgic gait do not convert the back injury into an injury to a leg. In *Divittorio*, the Commission appropriately converted a hip injury from a person-as-a-whole award to a loss of use of a leg award. Hip injuries are considered loss of the leg and not of the person-as-a-whole. That conversion was affirmed by the Appellate Court.

The Commission notes that there are instances in which the Commission may convert an award for a specific body part to an award for the person-as-a-whole because the partial loss of the use of that body part resulted in the loss of the claimant's ability to engage in his/her normal occupation. However, we have not seen an instance in which a person-as-a-whole injury was converted into an award for loss of a specific body part. Therefore, the Commission finds that the Arbitrator erred in awarding the loss of the use of 60% of the left leg.

While the Commission finds that it was inappropriate for the Arbitrator to convert a spinal injury, representing an injury to the person-as-a-whole, to the specific loss of the use of the left leg, we do not necessarily dispute the Arbitrator's determination regarding Sofia's resultant disability. Petitioner suffered an injury which required two spinal surgeries. Dr. Singh obviously believed her symptoms after the second surgery were sufficiently severe to warrant another repeat MRI to determine ongoing pathology. Sofia had an FCE which placed her in the sedentary physical demand level. Thereafter, Dr. Bergin placed permanent restrictions of sedentary work with a 10-pound lifting limit. Clearly, she would not have been able to return to her heavy demand level job of housekeeper and her employment opportunities would be extremely limited due to her age and education. When Dr. Bergin placed her at maximum medical improvement, she still reported 5-7/10 pain.

In converting the Arbitrator's award from partial loss of use of the left leg to loss of use of the person-as-a-whole, we find an award of the loss of 27.5% of the person-as-a-whole is appropriate in this case and modify the Decision of the Arbitrator accordingly. The Commission must now address the question of whether Sofia's surviving spouse is still entitled to take on her permanent partial disability award after we have converted it from the specific loss of loss of the use of a leg to a person-as-a-whole award.

Section 8(e)19 of the Act provides:

> "In a case of specific loss and the subsequent death of such injured employee from other causes than such injury leaving a widow, widower, or dependents surviving before payment or payment in full for such injury, then the amount due for such injury is payable to the widow or widower and, if there be no widow or widower, then to such dependents, in the proportion which such dependency bears to total dependency."

Section 8(h) of the Act provides

> "In case death occurs from any cause before the total compensation to which the employee would have been entitled has been paid, then in case the employee leaves any widow, widower, child, parent (or any grandchild, grandparent or other lineal heir or any collateral heir dependent at the time of the accident upon the earnings of the employee to the extent of 50% or more of total dependency) such compensation shall be paid to the beneficiaries of the deceased employee and distributed as provided in paragraph (g) of Section 7."

In *Electro-Motive Division, General Motors Corp. v. Industrial Commission,* 250 Ill. App. 3d 432 (1st Dist. 1993), the court affirmed the imposition of 19(k) penalties and attorney fees against the employer imposed by the Commission. Respondent had not paid awarded benefits arguing its obligation to pay anything terminated upon the death of the injured employee. Specifically, it argued that the permanent partial disability award, 30% of the person-as-a-whole under Section 8(d)2, terminated because the employee's death resulted in the termination of his disability. The employer cited Section 19(h) as authority.

In rejecting the employer's argument the *Electro-Motive* court reasoned: "Decedent would have been entitled to the remaining weeks of PPD had he not died, assuming that nothing else occurred to change the status of the disability. Electro-Motive offered no evidence to suggest that but for his untimely death, decedent's disability would not have continued for the entire 150 weeks of the award. Thus, Electro-Motive's argument that section 19(h) applies because decedent was not entitled because his disability ended with his death is erroneous." 250 Ill. App. 3d 432, 438. Therefore, the *Electro-Motive* court made clear that the permanent partial disability award remains operative even after the death of the injured employee and by not paying that award the Respondent was subject to the imposition of penalties and fees.

It appears that the Arbitrator converted the normally person-as-a-whole back injury into a specific award for the left leg in order to allow Petitioner to collect the unpaid permanent partial disability award under Section 8(e)19. However, the Commission concludes that such maneuver was unnecessary. According to our interpretation of the decision of the Appellate Court in *Electro-Motive*, any unpaid permanent partial disability award for loss of the person-as-a-whole survives the death of the injured employee here, Sofia Advis. In addition, according to our interpretation of Section 8(h) of the Act, as surviving spouse of the inured employee, Petitioner here is entitled to receive any remaining unpaid person-as-a-whole permanent partial disability benefits awarded.

17IWCC0290

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $310.73 per week for a period of 71&1/7 weeks, from July 8, 2009 through December 2, 2009 and from March 11, 2010 through March 15, 2011 that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $310.73 per week for a period of 36&6/7 weeks, from March 16, 2015 through November 27, 2011 for maintenance under provided in §8(a) of the Act,

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay Petitioner $279.65 for 137.5 weeks for the reason that the injuries sustained caused the loss of 27.5% of the person-as-a-whole under §8(d)2 of the Act

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

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

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

DATED: MAY 4 - 2017

Deborah L. Simpson

Deborah L. Simpson

David L. Gore

David L. Gore

Stephen J. Mathis

Stephen J. Mathis

DLS/dw
O-4/27/17
46

# ILLINOIS WORKERS' COMPENSATION COMMISSION
## NOTICE OF ARBITRATOR DECISION

**17IWCC0290**

**AVDIS, IOANNIS WIDOWER OF AVDIS, SOPHIA DECEASED**
Employee/Petitioner

Case# **09WC036001**

**NORTH PARK UNIVERSITY**
Employer/Respondent

On 3/29/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.47% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0208 GALLIANNI DOELL & COZZI LTD
ROBERT J COZZI
20 N CLARK ST SUITE 825
CHICAGO, IL 60602

1752 LAW OFFICES OF RAYMOND L ASHER
LISA AZOORY
200 W JACKSON BLVD SUITE 1050
CHICAGO, IL 60606

17IWCC0290

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

**Ioannis Avdis, Widower of Sofia Avdis, deceased**
Employee/Petitioner

v.

**North Park University**
Employer/Respondent

Case # **09** WC **36001**

Consolidated cases: ----

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Molly Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **February 19, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

**DISPUTED ISSUES**

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

17IWCC0290

**FINDINGS**

On **2/6/09**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between the decedent, Sofia Avdis, and Respondent.

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

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

Petitioner established a causal relationship between the accident and the decedent's condition of ill-being. The parties agree that the decedent's death was unrelated to that condition.

In the year preceding the injury, the decedent earned **$24,236.68**; the average weekly wage was **$466.09.**

On the date of accident, the decedent was **60** years of age, ***married*** with **0** dependent children.

The decedent ***has*** received all reasonable and necessary medical services.

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

Respondent shall be given a credit of $39,248.00 for TTD and maintenance, and $ **0** for other benefits, for a total credit of $ **39,248.00.**

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

**ORDER**

- Respondent shall pay Petitioner temporary total disability benefits of $310.73/week for 71 1/7 weeks, commencing 7/8/09 thru 12/2/09 and 3/11/10 thru 3/15/11 as provided under Section 8(b) of the Act.
- Respondent shall pay Petitioner maintenance benefits of $310.73 per week for 36 6/7 weeks, commencing 3/16/11 through 11/27/11, as provided in Section 8(a) of the Act.
- Respondent shall pay Petitioner permanent partial disability benefits of $279.65/week for 129 weeks because the injuires caused the 60% loss of use of the left leg as provided under 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.

Molly C Mason

Signature of Arbitrator

3/29/16
Date



MAR 29 2016

Ioannis Avdis, widower of Sofia Avdis,
deceased, v. North Park University
09 WC 36001

**Summary of Disputed Issues**

The parties agree that Sofia Avdis (hereafter "the decedent") sustained an accident on February 6, 2009, while working as a housekeeper for Respondent. They also agree that the decedent was temporarily totally disabled from July 28, 2009 through December 2, 2009 and from March 11, 2010 through March 15, 2011, a period of 71 1/7 weeks. They further agree that the decedent was entitled to weekly benefits from March 16, 2011 through November 27, 2011, although they disagree as to whether those benefits should be guised as temporary total or maintenance. Finally, they agree that the decedent died of causes unrelated to the work accident on November 28, 2011 and that Respondent continued paying weekly benefits for a period following November 28, 2011. Petitioner stipulated that Respondent paid $39,248.00 in weekly benefits prior to the hearing. Arb Exh 1.

The primary disputed issue is nature and extent, with Respondent arguing that the decedent's injury was not a "specific loss" under Section 8(e) and that Petitioner is not entitled to benefits under either Section 8(e)19 or Section 8(h).

**Summary of Petitioner's Testimony**

Petitioner, Ioannis Avdis, was the only witness who testified before the Arbitrator. He testified through an interpreter.

Petitioner testified he married the decedent, Sofia Avdis, in 1966 and remained married to her until her death on November 28, 2011. Petitioner testified that the decedent attended six years of grammar school in Greece. He described the decedent's ability to read English as "so-so."

Petitioner testified that the decedent performed cleaning and other work for Respondent. The decedent injured her lower back while working for Respondent on February 6, 2009. She went to her own physician, Dr. Christopoulos, the following day, and then underwent an MRI. She later saw Dr. Karabelas, who eventually referred her to Dr. Bergin. Dr. Bergin operated on her lower back in April 2010. She underwent physical therapy after this operation. Dr. Bergin performed a second operation on September 13, 2010.

Petitioner testified that the decedent continued experiencing lower back and left leg pain after the second operation.

Petitioner testified that the decedent saw Dr. Singh for a Section 12 examination on February 21, 2011. Dr. Singh recommended more testing. The decedent returned to Dr. Bergin on March 15, 2011 and indicated she did not want to undergo any more surgery. She did not

see any other doctors for her work injury between March 15, 2011 and her death. She did not return to any kind of work during that period. She took aspirin for her symptoms during that period.

Petitioner testified that the decedent had no difficulty walking before the accident but that, afterward, he had to take care of all of the housework, including grocery shopping and laundry. In the morning, he had to pull the decedent out of bed. Between March 2011 and the decedent's death on November 28, 2011, he observed that one of the decedent's legs was smaller than the other, that she had low back pain and that she limped. During this period, the decedent relied on a cane and walked slowly.

Petitioner testified that, to his knowledge, Respondent never offered the decedent light duty. At some point in 2011, the decedent met with a person to discuss looking for work.

Petitioner testified that the decedent died on November 28, 2011, secondary to a fall that occurred in the basement of their home. He was not present when the fall occurred. The decedent was found dead at the bottom of a flight of stairs.

**Under cross-examination,** Petitioner testified that the decedent's pain was confined to her lower back. The decedent did not see doctors or take pain medication between March 2011 and her death. The decedent did some yard work on rare occasions during this interval. She would water the garden "a little bit" but did not do much bending. The decedent did not call Respondent and request work between March 2011 and her death.

Petitioner testified he worked for 25 years at a Chicago factory that made electric presses.

**On redirect,** Petitioner testified that the decedent's back and leg hurt between March 2011 and her death.

**Summary of Medical Records**

On February 7, 2009, Dr. Christopoulos, the decedent's internist, noted a complaint of back pain secondary to lifting books at work. The doctor diagnosed acute low back syndrome. He prescribed Vicoprofen and Flexeril. PX 1.

On February 14, 2009, Dr. Christopoulos prescribed a lumbar spine MRI and a bone density study. The MRI, performed on February 18, 2009, demonstrated diffuse lumbosacral spondylosis with disc degeneration, a small left central protrusion at L4-L5 resulting in mild spinal stenosis and a tiny central disc protrusion at L5-S1 with bilateral foraminal stenosis. PX 1.

On February 21, 2009, Dr. Christopoulos reviewed the MRI results with the decedent and imposed a 25-pound lifting restriction. PX 1.

The decedent saw another internist, Dr. Karabelas, on May 19, 2009. The doctor noted that the decedent reported lifting a bag full of books at work on February 6, 2009. He also noted that initially she experienced "fire like" pain in her low back and that this pain later began radiating into her left buttock and down her left leg. He diagnosed low back pain with radiculopathy. He took the decedent off work and prescribed a Medrol Dosepak, Flexeril and physical therapy. The decedent attended five therapy sessions thereafter, with the therapist noting persistent pain and recommending a pain clinic evaluation. PX 2.

The decedent first saw Dr. Bergin, a spine surgeon, on June 23, 2009. The doctor recorded a consistent history of the work accident and subsequent care. He noted that the decedent had been off work since April 27, 2009 and was complaining of worsening pain over the previous couple of weeks. He described the decedent's gait as antalgic, noting she spent less time on her left leg. He also noted positive straight leg raising on the left at about 50 degrees, producing pain in the posterior thigh and calf. He reviewed the MRI and obtained lumbar spine X-rays. He referred the decedent to Dr. Chang for a course of epidural injections and directed her to continue therapy and stay off work. PX 3.

Dr. Chang administered a left L4-L5 and L5-S1 transforaminal epidural steroid injection on July 20, 2009. In his note of that date, the doctor indicated that straight leg raising was positive on the left all the way up to 60 degrees. He prescribed Cymbalta, a Flector patch and Ultracet. PX 3.

On July 28, 2009, Dr. Bergin noted that the decedent reported deriving little improvement from the injection. He also noted complaints of "worsening left foot pain as well as lateral thigh radiculopathy and left calf cramps."

Dr. Bergin described the decedent's gait as antalgic. He noted positive straight leg raising on the left at approximately 70 degrees. After reviewing the MRI, he recommended a second epidural injection and anti-inflammatories. PX 3.

Dr. Chang administered a second injection on August 27, 2009. PX 3.

The decedent returned to Dr. Bergin on September 1, 2009. The doctor's examination findings were unchanged. He recommended a microdiscectomy at L4-L5. He directed the decedent to remain off work pending this surgery. PX 3.

The decedent saw Dr. Bergin again on March 2, 2010, having undergone another MRI in the interim. The doctor indicated that the repeat MRI showed a herniated disc at L4-L5 on the left side. He again recommended a microdiscectomy at L4-L5 on the left. He continued to keep the decedent off work. PX 3.

At Respondent's request, the decedent saw Dr. Kern Singh on March 11, 2010, for purposes of a Section 12 examination. The doctor's report concerning this examination is not in evidence.

On March 30, 2010, Dr. Bergin wrote to the decedent's counsel, outlining the treatment to date and indicating that two epidurals failed to provide lasting relief. He noted that the decedent had seen Dr. Singh and that this doctor had agreed with his surgical recommendation. He also noted he was awaiting authorization of the surgery. PX 3.

Dr. Bergin performed a microdiscectomy at L4-L5 on April 26, 2010. At the doctor's recommendation, the decedent underwent physical therapy postoperatively. On June 8, 2010, the doctor noted a therapy-related aggravation. He placed therapy on hold and continued to keep the decedent off work. At the next visit, on June 22, 2010, he noted complaints of numbness and tingling in the toes as well as cramping in the left foot and "worsening pain into the left lower extremity." He suspected a recurrent herniation and prescribed an MRI, to be performed with and without contrast. This MRI, performed on August 9, 2010, showed a "large, recurrent disc herniation at L4-L5" which Dr. Bergin characterized as consistent with the decedent's persistent left leg pain. On August 17, 2010, the doctor reviewed the MRI results with the decedent and recommended a repeat microdiscectomy at L4-L5. He performed this surgery on September 13, 2010. PX 3.

Following the repeat microdiscectomy, the decedent underwent land and aquatic therapy through February 1, 2011, at which point she was discharged "secondary to insurance denying further visits."

On February 15, 2011, Dr. Bergin met with the decedent and noted persistent pain and cane usage. He obtained new X-rays and interpreted them as showing no instability or facet fractures. He found the decedent to be at maximum medical improvement "unless she wants to consider a fusion at L4-L5 which she does not at this point." He recommended a functional capacity evaluation "with the potential for getting back to work with permanent restrictions." PX 3.

At Respondent's request, Dr. Singh re-examined the decedent on February 21, 2011. In his report of that date, he noted he had previously examined the decedent and diagnosed her with a left-sided herniation at L4-L5. He also noted that Dr. Bergin was now recommending a functional capacity evaluation "versus possible re-exploration of the surgical levels."

Dr. Singh noted that the decedent complained of back and left leg pain, rated 7/10. He described the left leg pain as "unchanged" and "radiating into the dorsum of [the] foot." He noted 5/5 negative Waddell findings.

Dr. Singh diagnosed "status post revision L4-L5 laminectomy and discectomy" and "possible L4-L5 recurrent disc herniation." He found a causal relationship between the work accident and the decedent's current symptoms. He recommended that the decedent stay off work and, before undergoing a functional capacity evaluation or more surgery, undergo another lumbar spine MRI, to be performed with and without contrast, "to evaluate whether she has a second-time recurrent disc herniation." RX 1.

The decedent underwent a functional capacity evaluation on March 2, 2011. The evaluator noted "good effort and valid results." On examination, he noted an abnormal gait pattern, decreased sensation in the left L4 dermatome and an increased left patella reflex. He found the decedent physically incapable of resuming her housekeeper job, noting that this job fell into the heavy physical demand level according to the Dictionary of Occupational Titles. He found the decedent capable of functioning at a sedentary to light physical demand level. He described the decedent's reported limiting factors as "stiffness and pain in her low back and down her left lower extremity." PX 3.

The decedent returned to Dr. Bergin on March 15, 2011. [See the parties' post-arbitration stipulation to supplement the record with the doctor's note of this date.] Dr. Bergin noted Dr. Singh's recommendation and indicated that the decedent was "absolutely" not interested in undergoing any additional surgery. He placed the decedent at maximum medical improvement. After reviewing the functional capacity evaluation, the doctor imposed permanent restrictions of no lifting over 10 pounds, limited bending and twisting and changes of position every 30 to 45 minutes. PX 3.

On April 29, 2011, the decedent's counsel sent Respondent's counsel a letter indicating that the decedent had brought Dr. Singh's most recent report to Dr. Bergin and that Dr. Bergin disagreed with the recommendation of a repeat MRI. Referencing the functional capacity evaluation, the decedent's counsel requested that Respondent either provide restricted duty or vocational rehabilitation. The decedent's counsel also requested that Respondent restart the payment of weekly benefits, noting Dr. Singh's "off work" recommendation and the fact that Dr. Bergin did not release the decedent to full duty. PX 4.

Petitioner offered into evidence two progress reports from Kelly Benge, MS, CRC, a vocational rehabilitation consultant affiliated with Triune. The Arbitrator sustained Respondent's foundational objection to these reports and rejected the exhibit. PX 5.

PX 6 is a certification of death record reflecting that the decedent died on November 28, 2011 due to an accident at home. PX 6 reflects that no autopsy was performed. PX 6.

No witnesses testified on behalf of Respondent. Respondent offered one exhibit, i.e., Dr. Singh's re-examination report of February 21, 2011. RX 1.

**Arbitrator's Credibility Assessment**

The Arbitrator found credible Petitioner's testimony as to what he observed about the decedent, his late wife, between March 2011 and November 28, 2011.

**Arbitrator's Conclusions of Law**

Did Petitioner establish a causal connection between the undisputed work accident and the decedent's condition of ill-being?

The Arbitrator finds in Petitioner's favor on the issue of causation. In so finding, the Arbitrator relies on the following: 1) Petitioner's credible testimony that, before the accident, the decedent worked as a housekeeper for Respondent and had no difficulty walking; 2) the treatment records, which reflect that the decedent consistently reported a lifting-related event followed by the abrupt onset of low back and radicular left leg pain; 3) the causation opinion rendered by Respondent's Section 12 examiner, Dr. Singh; and 4) Petitioner's credible testimony concerning his observations of the decedent between March 15, 2011 and her death on November 28, 2011.

Is Petitioner entitled to a permanency award?

Petitioner maintains he is entitled to a permanency award by virtue of Section 8(h). That section provides, in relevant part, that if "death occurs from any cause before the total compensation to which the employee would have been entitled has been paid, then in case the employee leaves any widow, widower, child, parent . . . . such compensation shall be paid to the beneficiaries of the deceased employee and distributed as provided in paragraph (g) of Section 7."

Respondent maintains Petitioner is not entitled to a permanency award. Respondent argues that the decedent's injury falls into the "person as a whole" category, set forth in Section 8(d)2 of the Act, and that Petitioner could only recover permanency if the injury could be classified as a "specific loss" under Section 8(e). Respondent notes that Section 8(e)19 of the Act references cases involving "specific loss" and "subsequent death from other causes than" the injury giving rise to the loss.

The Arbitrator, having considered the medical records, which consistently document radicular left leg symptoms and a gait disturbance, along with Petitioner's credible testimony as to the limp, leg atrophy and cane usage he observed between March 2011 and the decedent's death, views the undisputed accident as having resulted in a specific, scheduled loss of use of 60% of the left leg, equivalent to 129 weeks, under Section 8(e) of the Act. The Arbitrator acknowledges that the decedent underwent back and not leg surgery following the accident. The Arbitrator does not view this circumstance as barring an 8(e) award. The Arbitrator notes that, in DiVittorio v. Industrial Commission, 299 Ill.App.3d 662 (1st Dist. 1998), a case that also involved a subsequent unrelated death, the Appellate Court upheld the Commission's conversion of the Arbitrator's Section 8(d)2 award to an award of loss of use of a leg under Section 8(e) even though the decedent fractured his hip and underwent hip surgery. The Court found there was sufficient evidence in the record to support the leg award, citing the decedent's mother's testimony that she observed a "bad limp" after the decedent's second surgery.

What type of weekly benefits was the decedent entitled to from March 16, 2011 through November 27, 2011? Is Respondent entitled to credit?

The parties agree to two intervals of temporary total disability totaling 71 1/7 weeks. They also agree the decedent was entitled to weekly benefits from March 16, 2011 (the day after the decedent's last visit to Dr. Bergin) through November 27, 2011 (the day before the decedent's death), a period of 36 6/7 weeks. They disagree, however, as to whether the decedent was entitled to temporary total disability benefits or maintenance during that period. In reliance on Dr. Bergin's finding of maximum medical improvement on March 15, 2011, the Arbitrator finds that the decedent was entitled to maintenance rather than temporary total disability benefits from March 16, 2011 through November 27, 2011. The Arbitrator views the decedent's condition of ill-being as stabilizing as of March 15, 2011, the date on which Dr. Bergin noted she did not want to undergo additional surgery and imposed permanent restrictions per the functional capacity evaluation. Interstate Scaffolding v. IWCC, 236 Ill.2d 132 (2010). There is no evidence suggesting the decedent sought out more treatment for her condition prior to her death.

The total TTD/maintenance award equals 108 weeks. 108 multiplied by $310.74 (the TTD/maintenance rate, based on the stipulated wage) equals $33,559.92. Petitioner stipulated that Respondent paid an amount in excess of this figure, i.e., $39,248.00. Arb Exh 1.

STATE OF ILLINOIS )
) SS.
COUNTY OF COOK )

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Timothy E. Simmons,
Petitioner,

vs.

NO: 15 WC 14703

17IWCC0336

Cintas Fire Protection ,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection and the nature and extent of the injury, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The underlying facts of this claim were well laid out in the Arbitrator's Decision, which is incorporated herein, and the Arbitrator's findings of fact are adopted. The Arbitrator's determination as to causal connection between the original injury and the injuries sustained is likewise adopted. With regard to the nature and extent of the injury, however, the Commission reviews and weighs the facts somewhat differently than did the Arbitrator.

First, the Arbitrator reviewed and weighed the five factors delineated in Section 8.1b of the Act in making his determination. The Act specifies these factors are intended to be considered specifically in the context of permanent partial disability; in other words, in cases involving a determination of benefits under Sections 8(d) or 8(e). In cases involving awards under Section 8(c) for disfigurement, any benefits under Sections 8(d), 8(e), and 8(f) are statutorily foreclosed per Section 8(c). Accordingly, the five-factors analysis as performed by the Arbitrator is given no weight in making our determination for purposes of 8(c) benefits.

17IWCC0336



The Commission has seen the extent of the claimant's injuries and resultant disfigurement. The claimant has scarring on his left foot, ankle, calf, and shin. The scars are discolored and rough-hewn as compared to both the surrounding skin and to his opposite foot and leg. Noticeable skin dryness and flakiness over the scar site is readily apparent. His calf appears slightly atrophied compared to the right side. The areas are sensitive to touch and the scarring cannot be exposed to sunlight for any significant length of time. The claimant uses lotions to address persistent dryness and tightness of the skin, which alleviates but does not wholly relieve the symptoms.

The Commission notes the extent and persistence of the scarring, and upon consideration of the totality of the evidence concludes that an award of 100 weeks disfigurement pursuant to Section 8(c) of the Act is appropriate.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,005.71 per week for a period of 17-5/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $735.37 per week for a period of 100 weeks, as provided in §8(c) of the Act, for the reason that the injuries sustained caused permanent disfigurement to the claimant.

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

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

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

DATED: MAY 31 2017

Joshua D. Luskin

o-05/17/17
jdl/ac
68

Charles J DeVriendt

17IWCC0336

DISSENT

I believe the arbitrator was correct in his use of the five factor analysis as outlined by Section 8.1b of the Act as disability benefits should be awarded pursuant to Section 8(e) of the Act. Accordingly, I respectfully dissent.

Petitioner testified he is employed as an SSR/fire technician whose job duties required climbing and standing on ladders as well as crawling and squatting. T. 10-11. Petitioner testified since his injury he experiences difficulty with extended periods of standing; an inability to run; and difficulty with ladder climbing. T. 19-20; 24. Petitioner further testified to feeling tightness, fatigue, and burning in his leg as well as numbness in his leg. T. 19-20. The medical records evidence Petitioner suffered from 2nd and 3rd degree burns requiring an Epifix Graft as well as a chronic left ankle ulcer with necrosis of the muscle. PX4.

Dr. Vora who evaluated Petitioner pursuant to Section 12 of the Act testified Petitioner suffered from sural neuritis as well as neuritis along the calf and leg which he described as localized nerve damage. RX1, p.12. Dr. Vora further testified when performing an AMA impairment rating from a burn or scar with corresponding nerve dysfunction, the skin impairment rating is combined with a lower extremity impairment rating. RX1, p.48-49. In viewing Petitioner's left leg on May 17, 2017, some atrophy of the calf was noted. As such disability should be determined pursuant to Section 8(e) of the Act.

As such I weigh the following five factors accordingly:

1) AMA Impairment Rating- Dr. Vora after examining Petitioner and reviewing the medical records and utilizing the AMA Guide arrived at and impairment rating of 5% of a whole person. Dr. Vora conceded during his testimony if a burn or scar exists along with nerve dysfunction, the skin impairment rating should be added to the lower extremity impairment rating. Such combined rating was not performed by Dr. Vora. As such I assign lesser weight to this factor.

2) Occupation of Petitioner- Petitioner testified he is SSR/fire technician whose job duties required climbing and standing on ladders as well as crawling and squatting. T. 10-11. Petitioner testified to some difficulty with ladders but was able to perform his full duty work and had been doing so since his release to full duty since August of 2015. T. 24; 28. As such I assign lesser weight to this factor given his ongoing abilities to perform his job.

3) Age of Petitioner- The Stipulation Sheet memorializes Petitioner was 41 years of age at the time of the accident. As such Petitioner has a significant work life expectancy which will require him to manage the effects of his injury for a greater period of time. As such I assign greater weight to this factor.

4) Petitioner's Future Earning Capacity- Petitioner testified since returning to work, he has not suffered any wage loss. T. 38. As such I assign lesser weight to this factor.

5) Evidence of Disability/Treating Records- Petitioner testified to ongoing difficulties with his leg specifically tightness, fatigue, burning, and numbness in his leg. T. 19-20. Petitioner testified to utilizing over the counter medications for pain treatment as well as a lotion and compression stockings. T. 21; 34; 38. Petitioner's treatment records with Dr. Pacaccio corroborate his testimony. As such I assign greater weight to this factor.

Based upon the above numerated factors as well as the record taken as a whole, I would award Petitioner permanent partial disability benefits of $735.37/week for the period of 64.5 weeks, because the injuries sustained caused the loss of use of 30% of the left leg, as provided by Section 8(e) of the Act. Accordingly, I dissent.

L. Elizabeth Coppoletti

L. Elizabeth Coppoletti

# ILLINOIS WORKERS' COMPENSATION COMMISSION
# NOTICE OF ARBITRATOR DECISION

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*www.qdex.com*

**SIMMONS, TIMOTHY E**
Employee/Petitioner

Case# **15WC014703**

**CINTAS FIRE PROTECTION**
Employer/Respondent

**17IWCC0336**

On 11/10/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.53% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0147 CULLEN HASKINS NICHOLSON ET AL
CHARLES G HASKINS JR
10 S LASALLE ST SUITE 1250
CHICAGO, IL 60603

0075 POWER & CRONIN LTD
DANIEL ARTMAN
900 COMMERCE DR SUITE 900
OAK BROOK, IL 60523

STATE OF ILLINOIS )
)SS.
COUNTY OF Cook )

Q-Dex On-Line www.qdex.com

- ☐ 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

Timothy E. Simmons
Employee/Petitioner

Case # 15WC014703

v.

17IWCC0336

Cintas Fire Protection
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **David Kane**, Arbitrator of the Commission, in the city of **Chicago**, on **October 27, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **03/03/2015**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**78,445.64**; the average weekly wage was $**1,508.57**.

On the date of accident, Petitioner was **41** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**17,815.44** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**17,815.44**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $1,005.71/week for 17 5/7 weeks, commencing 03/04/2015 through 07/05/2015, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $735.37/week for 120 weeks, because the injuries sustained caused the disfigurement of the left leg, as provided in Section 8(c) 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

**November 10, 2016**
Date



NOV 10 2016

## Attachment to Arbitration Decision

Timothy E. Simmons
Employee/Petitioner

Case No. 15WC014703

v.

17IWCC0336

Cintas Fire Protection
Employer/Respondent

**In support of the Arbitrator's decision relating to all issues, the Arbitrator finds the following facts:**

1) On March 3, 2015 Petitioner was employed as a Sales Service Representative (SSR)/Fire Technician for Respondent. He had been so employed since October of 2003. He installs and inspects fire suppression systems, fire extinguishers and emergency lighting. He is required to be on his feet, climb ladders, walk, squat and crawl. He typically is required to carry approximately 25 lbs. but could lift up to 170 lbs. He typically starts early in the morning and will work into the evening depending upon the job.
2) Prior to March 3, 2015 he had never injured nor had scarring to his left lower leg.
3) On that date his left leg was injured when he was servicing the fire suppression system at an Olive Garden Restaurant. At 7 a.m. in the morning his foot slipped into a deep fryer filled with oil. The oil was hot as the fryer was on. He was taken by ambulance to Christ Hospital in Oak Lawn (PX1). He received emergency room treatment and diagnosis was first, second and third degree burns. He was given pain medication, fluids and his wounds were

dressed. It was recommended that he follow up with his primary care physician (PX1).

4) Later that evening his pain was increasing and his wound was looking worse so he went to the local emergency room at Valley West Community Hospital. He was given additional medication and new dressing was applied. It was recommended that he follow up with his primary care physician, Dr. Englehart (PX2). Petitioner contacted his primary care physician and he was referred to Dr. Asihene, a wound specialist. Petitioner saw Dr. Asihene on March 9, 2015. The wounds were cleansed and re-dressed and it was recommended that Petitioner follow up with a burn clinic (PX3).
5) Petitioner was seen by Loyola University Medical Center on multiple dates. Ultimately Loyola recommended the option of surgical skin grafting (PX5). Petitioner sought a second opinion and consulted with Dr. Douglas Pacaccio who recommended EpiFix grafting. Petitioner ultimately opted to treat with Dr. Pacaccio and beginning on April 30, 2015 underwent a staged series of EpiFix grafting procedures (PX4).
6) On November 3, 2015 Dr. Pacaccio recommended Petitioner follow up in 6 months and Petitioner testified that he did.
7) Petitioner was examined at the request of Respondent pursuant to Section 12 by Dr. Anand Vora on April 1, 2016. Dr. Vora's examination revealed area of secondary soft tissue healing of large eschar burn lesion measuring along the entire lateral compartment of the left leg and to the lateral ankle and hindfoot in 10 centimeters at its greatest length, and 3 inches in diameter at its greatest diameter at the mid-calf level. The doctor noted pain

and stated the skin had healed in a thickened, hyperindurated nature. There was complete loss of sensation with pinprick and 2 point discrimination objectively in the entire soft tissue burn which had healed with secondary healed tissue and loss of sensation in the sural nerve distribution (RX1, pg11). The remainder of the distal sensation was intact. There was a separate lesion on the anterior ankle along the midline measuring one centimeter by one centimeter with secondary eschar and thickening. There was complete loss of feeling with objective testing and pin prick (RX2).

8) Dr. Vora also performed an impairment rating and indicated that the rating was 5% loss of use of the whole person (PX2).

9) Dr. Vora testified by vehicle of evidence deposition on August 26, 2016 (RX1). Dr. Vora indicated that second degree burns are also referred to as partial thickness burns and they involve the epidermis and part of the dermis layer of the skin. A third degree burn is sometimes referred to as a full thickness burn wherein the outer layer, the epidermis and the layer beneath the dermis are destroyed as well as nerve endings along with the dermis (RX1, pg26). Dr. Vora stated that Petitioner reported that he utilized pain relievers and that on the written information sheet Petitioner indicated that he continued to utilize lotions (RX1, pg22). Dr. Vora noted that Petitioner complained that boots would irritate the area of the scarring and Petitioner would wear socks going above the boots. Petitioner also complained of morning pain and swelling (RX1, pg24). Dr. Vora indicated that in any area that was burned there is a loss of sensation (RX1, pg25). The doctor continued that in areas where there is nerve damage that Petitioner will continue

to experience diminished resistance to mechanical, chemical and thermal trauma (RX1, pg36). The doctor indicated that the complaints Petitioner experiences clearly are the result of the incident of March 3, 2015 (RX1, pp29-30). Dr. Vora indicated that the areas of scarring were hyperindurated which means they were not only thickened but thickened to a greater extent and that in the areas where the grafting was performed it is impossible for Petitioner to sweat or hair to exist (RX1, pp42-43).

10) Dr. Vora performed AMA impairment rating and concluded that Petitioner sustained impairment to the extent of 5% of whole body (RX2). Dr. Vora agreed that impairment does not equate to the term disability (RX1, pg31). The doctor continued that the impairment ratings deal with activities of daily living (ADL) which are things like dressing, bathing, showering, eating, feeding, etc. (RX1, pp36-37). The doctor continued that activities of daily living do not include such things as being required to stand in one position for a period of time or being seated for a period of time without being able to move about (RX1, pg45). The doctor testified that he arrived at the impairment rating of 5% loss of the whole body by utilizing the skin disorder table 8.2 appearing on page 166 of the guides (RX1, pg14). The doctor indicated that he did not combine the above skin impairment rating with impairment rating from the chapter on the lower extremities (RX1, pg46). The doctor admitted that at page 163 of the guides under the section of scars and skin grafts that it is mandated that "when an impairment resulting from a burn or scar is based upon peripheral nerve dysfunction or loss of range of motion" the skin impairment should

be evaluated separately and then combined with the impairment rating from Chapter 16, the lower extremities.

11) Petitioner was released to perform light duty beginning July 6, 2015 and ultimately resumed regular duties on September 2, 2015. Petitioner and Respondent agree that all temporary total disability was paid and Respondent indicates that it has or will resolve any issues regarding payment of temporary partial disability and reimbursement of out-of-pocket expenses.

12) Petitioner complains that an area of his mid-calf along the scar line is very sensitive when the area is bumped. On the front or anterior portion of the ankle he has no feeling at all. Petitioner is sensitive to temperature extremes. In the cold he notices a tingling sensation and a numbness type of sensation. When it is extremely hot he notices itching type of sensation. Petitioner complains of numbness, burning and itching in the morning when he awakens. There is tiredness and fatigue which requires him to move around in order to alleviate. If he stands too long he notices pain and numbness in the leg. This is when he is showering or shaving as well as when he is required to stand on a ladder in one position at work or be in one position for a period of time. If Petitioner is seated for a long time (such as when he is riding in a car for a long time) it takes him a while to alleviate numbness and tingling by moving about. Petitioner is very sensitive and wears a minimum of 45 SPF screen when he is wearing shorts. He also utilizes runner sleeves or high socks and some socks are irritating. He uses cotton and looser fitting socks. Petitioner applies over the counter

lotions and moisturizers and takes over the counter pain medications.

13) The Arbitrator had an opportunity to view Petitioner's area of scarring and Petitioner offered as Petitioner's exhibit 6 a group consisting of 10 photographs taken the evening before this case was presented. Respondent noted that the scarring in the photos is lighter than what was actually viewed when Petitioner's scarring was viewed at Arbitration on October 27, 2016. There is extensive scarring about the left lower leg particularly on the lateral posterior portion from approximately mid-calf down to the ankle area. On the front of the ankle there is area of marked scarring as well as on the rear portion of the lower leg just above the ankle.

**Findings**

**In support of the Arbitrator's decision relating to item F, causation, the Arbitrator finds the following facts:**

Based upon Petitioner's testimony as well as all of the medical records including the opinions of Dr. Vora, the Arbitrator finds a causal connection exists between the accident of March 3, 2015 and the disfigurement and its residuals on Petitioner's left leg, foot and ankle.

**In support of the Arbitrator's decision relating to item L, nature and extent of injury, the Arbitrator finds the following facts:**

The Arbitrator adopts as if is fully set forth herein all of the above contained findings.

1) While the Arbitrator notes there was an impairment rating completed, the Arbitrator feels that this case is properly

compensable under Section 8(c) as Petitioner's residuals clearly result from the scarring and disfigurement caused by the accident. The Arbitrator does note that Dr. Vora did not perform additional impairment rating relative to the lower extremity (in RX2 Dr. Vora stated there was a loss of motion in the sural distribution and a loss of sensation about the scarring and the sural nerve distribution) and thus the doctor did not comply with the mandates of the guides.

2) The Arbitrator finds that Petitioner's complaints are credible and finds the burns caused extensive scarring resulting in significant residuals.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that the record contains an impairment rating of 5% of the whole person as determined by Dr. Vora, pursuant to the most current edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment. (RX1). The Arbitrator notes that this level of impairment does not necessarily equate to permanent partial disability under the Workers' Compensation Act, but instead is a factor to be considered in making such a disability evaluation. The doctor noted all of the residuals which are disabling but do not impact activities of daily living. Because of this and the extensive scarring, the Arbitrator therefore gives *lesser* weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a SSR/Fire Technician at the time of the accident and that he *is* able to return to work in his prior capacity as a result of said injury. The Arbitrator

notes Petitioner's job requirements. Because of the same, the Arbitrator therefore gives *greater* weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 41 years old at the time of the accident. Because of significant work life expectancy, the Arbitrator therefore gives *greater* weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes Petitioner has not suffered any loss of earning capacity. Because of the other residuals, the Arbitrator therefore gives *lesser* weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes the significant residuals of the injury. Therefore, the Arbitrator gives *greater* weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained disfigurement in the amount of 120 weeks pursuant to §8(c) of the Act.

STATE OF ILLINOIS )
) SS.
COUNTY OF MC LEAN )

| | |
|---|---|
| ☐ 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 down | ☒ None of the above |

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Mark Grady,
Petitioner,

vs. NO: 15 WC 28154

City of Bloomington
Respondent.

17IWCC0224

DECISION AND OPINION ON REVIEW

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

The underlying facts of this claim were well laid out in the Arbitrator's Decision, which is incorporated herein, and the Arbitrator's findings of fact are adopted. With regard to the nature and extent of the injury, however, the Commission reviews and weighs the facts somewhat differently than did the Arbitrator. Specifically, the Commission takes note of the fact that while the claimant did suffer an avulsion fracture to the left wrist, he was prescribed light duty and lost no time from work prior to his release to full duty on April 27, 2015. While at trial the claimant asserted persistent symptoms, the Commission finds it more informative that his treating physician, Dr. Oakey, assessed the claimant at MMI on July 20, 2015, and that the claimant has continued to work in his pre-accident employment through the date of the hearing without incident. Indeed, the claimant testified he had received raises since the accident.

17IWCC0224

The Commission notes the factors identified in Section 8.1b of the Act, as did the Arbitrator. The claimant had an AMA impairment rating of 4% to the left upper extremity (or 2% loss to the whole person). The Commission particularly notes this as a relevant distinction from the case of *Continental Tire of the Americas, LLC v. Workers Compensation Commission*, 43 N.E.3d 556 (5th Dist. 2015). In *Continental Tire*, the claimant also suffered a wrist fracture but lost no time from work. That petitioner was found by the Commission to have a 5% loss to the hand as permanent partial disability; however, that claimant had been assessed with a 0% AMA rating. The Arbitrator further noted the petitioner's employ as a mechanic, his age, and the petitioner's complaints as corroborated by the medical records, and assigned these issues appropriate weight. However, the Arbitrator gave no weight to the fact that there was no evidence that this injury had any effect on the petitioner's future earning capacity. The Commission finds that there was affirmative evidence presented on this point, specifically his ongoing employment and the raises he had received since the injury, which also weighed in on the petitioner's job history. The Commission assigns this some weight.

In light of the above, the Commission finds an award of permanent partial disability of 10% loss to the left hand to be more in line with the extent of the injuries sustained, and modifies the Arbitrator's award accordingly. All other findings of the Arbitrator are affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $726.92 per week for a period of 20.5 weeks, as provided in §8(e) of the Act, as the injuries sustained caused the loss of use of the left hand to the extent of 10%.

IT IS FURTHER ORDERED BY THE COMMISSION that, other than as noted above, the Decision of the Arbitrator filed October 26, 2016 is hereby affirmed and adopted.

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.

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.

APR 13 2017

DATED:

Joshua D. Luskin

Charles J. DeVriendt

L. Elizabeth Coppoletti

o-04/05/17
jdl-jl
68

# ILLINOIS WORKERS' COMPENSATION COMMISSION
# NOTICE OF ARBITRATOR DECISION

**GRADY, MARK**
Employee/Petitioner

Case# **15WC028154**

**CITY OF BLOOMINGTON**
Employer/Respondent

**17IWCC0224**

On 10/26/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.47% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0564 WILLIAMS & SWEE LTD
JEAN A SWEE
2011 FOX CREEK RD
BLOOMINGTON, IL 61701

2674 BRADY CONNOLLY & MASUDA PC
GRANT M CAMPBELL
211 LANDMARK DR SUITE C2
NORMAL, IL 61761

STATE OF ILLINOIS )
)SS.
COUNTY OF MC LEAN )

☐ 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
### NATURE AND EXTENT ONLY

Mark Grady
Employee/Petitioner

v.

City of Bloomington
Employer/Respondent

Case # 15 WC 28154

Consolidated cases: n/a

17IWCC0224

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Bloomington, on September 29, 2016. By stipulation, the parties agree:

On the date of accident, January 5, 2015, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $63,000.08; the average weekly wage was $1,211.54.

At the time of injury, Petitioner was 51 years of age, married, with 1 dependent child(ren).

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

At trial, the parties stipulated that temporary total disability benefits were paid in full.

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

**ORDER**

Petitioner's demand for payment of bills for medical services provided subsequent to July 20, 2015, is denied.

Respondent shall pay Petitioner the sum of $726.92 per week for 30.75 weeks because the injury sustained caused the 15% loss of use of the left hand 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.

William R. Gallagher, Arbitrator

October 16, 2016
Date



OCT 26 2016

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained an accidental injury arising out of and in the course of his employment for Respondent on January 5, 2015. According to the Application, Petitioner fell and sustained an injury to the left wrist and upper extremity (Arbitrator's Exhibit 2). There was no dispute that Petitioner sustained a work-related injury and the primary disputed issue at trial was the nature and extent of disability. There was also a dispute regarding medical bills of $1,059.56 (Arbitrator's Exhibit 1).

Petitioner worked for Respondent as a mechanic and, on January 5, 2015, he was directed by Respondent did get a snow plow truck ready. The door to the driver's side of the truck was frozen shut so Petitioner had to use the door on the passenger's side. When Petitioner was in the process of walking in front of the truck, he slipped and fell on an accumulation of ice and injured his left wrist.

Petitioner initially sought medical treatment at IWIN (Integrated Work Injury Network) on January 6, 2015. X-rays were performed which revealed the presence of an avulsion fracture of the pisiform. Petitioner was also diagnosed with a left wrist contusion. A wrist brace was prescribed (Petitioner's Exhibit 2).

Petitioner was subsequently referred to Dr. Jerome Oakey, an orthopedic surgeon. Dr. Oakey initially saw Petitioner on January 12, 2015. Dr. Oakey diagnosed Petitioner with an avulsion fracture of the triquetral and prescribed a cock up wrist splint. He also imposed a one pound lifting restriction (Petitioner's Exhibit 3).

Dr. Oakey ordered physical therapy and continued to see Petitioner. When he saw Petitioner on April 27, 2015, Petitioner still had complaints of pain in the wrist with full extension as well as some swelling. Dr. Oakey released Petitioner to return to work without restrictions at that time (Petitioner's Exhibit 3).

When Dr. Oakey saw Petitioner on July 20, 2015, Petitioner still had some complaints of pain in the wrist. Dr. Oakey opined that Petitioner was at MMI (Petitioner's Exhibit 3).

At trial, Petitioner testified that he continued to have pain and swelling after Dr. Oakey discharged him from care. Petitioner sought treatment from Dr. Eric Farinas, his family physician, on September 18, 2015. At that time, Dr. Farinas ordered additional physical therapy (Petitioner's Exhibit 4).

Petitioner received physical therapy from November 24, 2015, through December 17, 2015, and his condition gradually improved (Petitioner's Exhibit 7). Respondent disputed liability for the medical bills incurred subsequent to Dr. Oakey's finding that Petitioner was at MMI as of July 20, 2015.

At the direction of Respondent, Petitioner was examined by Dr. Lawrence Li on April 28, 2016. In connection with his examination of Petitioner, Dr. Li reviewed medical records provided to

him by Respondent. On examination, Dr. Li noted some tightness in the joint capsule. Petitioner also advised Dr. Li that he had difficulties and experienced pain in his left wrist while performing various activities. Dr. Li opined that Petitioner had an AMA impairment rating of four percent (4%) of the left upper extremity and whole person impairment of two percent (2%). Dr. Li also opined that the physical therapy Petitioner received in November and December, 2015, was not medically reasonable or necessary.

At trial, Petitioner testified that he had no prior left wrist injuries or symptoms. Petitioner is right hand dominant; however, he testified that he still used his left hand while performing his work as a mechanic. Petitioner complained of soreness in the left hand when using various tools and that the range of motion of the left wrist is limited usually in the morning, but that it does improve over the course of the day.

Petitioner is still employed by Respondent as a mechanic. He has received some cost-of-living raises since the time of the accident.

Conclusions of Law

The Arbitrator concludes that Respondent is not liable for the medical bills for treatment received by Petitioner subsequent to July 20, 2015. Petitioner's treating physician, Dr. Oakey, opined that Petitioner was at MMI as of July 20, 2015. Further, Respondent's Section 12 examiner, Dr. Li, opined that the physical therapy Petitioner received in November and December, 2015, was not medically reasonable or necessary.

The Arbitrator concludes that Petitioner has sustained permanent partial disability to the extent of 15% loss of use of the left hand.

In support of this conclusion the Arbitrator notes the following:

Dr. Li opined that Petitioner had an AMA impairment rating of four percent (4%) of the left upper extremity and two percent (2%) of the whole person. The Arbitrator gives this factor moderate weight.

Petitioner was employed as a mechanic at the time of the accident and continues to work for Respondent in that capacity. Petitioner's occupation required the active and regular use of both hands. The Arbitrator gives this factor significant weight.

Petitioner was 51 years of age at the time of the accident. He will have to continue to work with the effect of this injury for the remainder of his working life as well as the remainder of his natural life. The Arbitrator gives this factor moderate weight.

There was no evidence that the injury had any effect on Petitioner's future earning capacity. The Arbitrator gives this factor no weight.

The medical records indicated that Petitioner sustained an avulsion fracture of the triquetral. The injury required splitting and physical therapy. Petitioner's complaints are consistent with the injury he sustained. The Arbitrator gives this factor moderate weight.

William R. Gallagher, Arbitrator

STATE OF ILLINOIS )
) SS.
COUNTY OF )
WILLIAMSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ROBERT BROCK,

Petitioner,

**17IWCC0302**

vs.

NO: 10 WC 00629

CENTURION INDUSTRIES, INC.A/K/A A-LERT,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of temporary diability, wage differential, and maintenance and penalties and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission modifies the Decision of the Arbitrator to vacate the awarded wage differential and remands this matter to the Arbitrator with instructions for Petitioner to be enrolled in a vocational rehabilitation program with a specific emphasis in returning Petitioner to a career in welding.

Petitioner, by virtue of training and experience, was an industrial welder prior to his December 18, 2009, accident to his left shoulder. The accident resulted in him undergoing a Type II labral repair, subacromial decompression, and bursectomy and eventually being returned to work at a medium physical demand level with a prohibition against lifting more than thirty pounds above shoulder level. These restrictions have, to date, precluded Petitioner from returning to his pre-accident career as an industrial welder.

Petitioner conducted what was ultimately an unsuccessful self-directed job search in which he sought employment as a welder both in and outside of Illinois. Failing to obtain such

employment, he has worked a succession of non-welding jobs and earning the prevailing minimum wage at each job. He currently works as a maintenance person at an apartment building.

Petitioner's attorney procured the services of June Blaine, a certified rehabilitation counselor, and owner of Blaine Rehabilitation Management, Inc. Ms. Blaine met with Petitioner on September 17, 2013, and obtained information concerning Petitioner's background, including a work history. After meeting with Petitioner and reviewing his medical records, she concluded Petitioner was precluded from returning to a career as an industrial welder but thought Petitioner was capable of working as a forklift operator, a trade Petitioner previously performed, and, with training, as a crane operator, a trade that interested Petitioner. She made passing reference to shop welding, noting only an estimated salary range. Ms. Blaine made no suggestion Petitioner attempt returning to work as a welder.

Respondent secured the services of Joseph Belmonte, the president of Vocamotive, Inc., and, as is Ms. Blaine, a certified rehabilitation counselor. Mr. Belmonte reviewed Petitioner's medical records and met with Petitioner, using that opportunity to obtain addition medical information as well as information about Petitioner's work history. He concluded Petitioner had not necessarily lost access to his pre-accident career as an industrial welder provided Petitioner worked within his imposed medical restrictions. He identified welding as a growing field in Illinois and found openings for welding jobs posted on the American Welding Society website.

Petitioner testified to believing that he is capable of performing shop welding and fabrication welding as these forms of welding are less strenuous than industrial welding and the Commission is persuaded by the testimony and vocational rehabilitation report of Mr. Belmonte that a viable market exists for Petitioner to be employed as a welder albeit with the assistance of a vocational rehabilitation counselor.

To provide Petitioner the best opportunity to return to work as a welder, the Commission compels Respondent to place Petitioner in a vocational rehabilitation program that will allow Petitioner to take advantage of his already-present skills and experience as a welder. Respondent is to pay Petitioner maintenance pursuant to Section 8(a) of the Act while Petitioner participates in the vocational rehabilitation program.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, dated August 24, 2016, is modified to vacate the wage differential benefits awarded under Section 8(d)1 of the Act effective the last day before vocational rehabilitation.

IT IS FURTHER ORDERED BY THE COMMISSION that this matter be remanded to the Arbitrator with instructions to order Respondent to authorize the enrollment of Petitioner in a vocational rehabilitation program with the objective being to return Petitioner to work as a welder.

IT IS FURTHER ORDERED BY THE COMMISSION Respondent pay to Petitioner the sum of $775.72 per week for a period of 83-5/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

17IWCC0302

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner maintenance benefits of $775.72 per week for a period of 134-3/7 weeks, commencing August 1, 2012, through February 18, 2015, as provided in §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner maintenance benefits of $775.72 per week that is to commence the first day of vocational rehabilitation, as provided in §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $7,341.00 for medical expenses under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner penalties of $6,390.00 as provided for in §19(l) of the Act.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit in the amount of $60,727.79 for payments made to Petitioner under §8(b).

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

DATED: MAY 10 2017
KWL/mav
O: 03/14/17
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Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

# ILLINOIS WORKERS' COMPENSATION COMMISSION
## NOTICE OF ARBITRATOR DECISION

17IWCC0302

**BROCK, ROBERT H**
Employee/Petitioner

Case# **10WC000629**

**CENTURION INDUSTRIES INC A/K/A A-LERT**
Employer/Respondent

On 9/6/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.48% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0299 KEEFE & DePAULI PC
JAMES K KEEFE JR
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

2986 PAUL A COGHLAN & ASSOC
15 SPINNING WHEEL RD
SUITE 100
HINSDALE, IL 60521

STATE OF ILLINOIS )
)SS.
COUNTY OF Williamson )

- ☐ 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 17IWCC0302

Robert H. Brock
Employee/Petitioner

v.

Centurion Industries, Inc., A/K/A - A-Lert
Employer/Respondent

Case # 10 WC 00629

Consolidated cases: N/A

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Michael Nowak**, Arbitrator of the Commission, in the city of **Herrin**, on **10/15/15**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

**DISPUTED ISSUES**

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

17IWCC0302



FINDINGS

On **12/18/09**, 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 **$60,506.16**; the average weekly wage was **$1,163.58**.

On the date of accident, Petitioner was **32** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit of **$60,727.79** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$60,727.79**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $775.72/week for 83 5/7 weeks, commencing 4/27/10 through 10/13/11 (76 3/7 weeks) and 6/11/12 through 7/31/12 (7 2/7 weeks), as provided in Section 8(b) of the Act. Respondent shall be given a credit of $60,727.79 for temporary total disability benefits that have been paid.

Respondent shall pay Petitioner maintenance benefits of $775.72/week for 134-3/7 weeks, commencing 8/1/12 through 2/18/15, as provided in Section 8(a) of the Act.

Respondent shall pay reasonable and necessary medical services of $7,341.00, as set forth in Px. 13, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits, commencing 2/19/15, of $583.22/week for the duration of the disability, because the injuries sustained caused a loss of earnings, as provided in Section 8(d)1 of the Act.

Respondent shall pay to Petitioner penalties of $6,390.00, as provided in Section 19(l) of the Act.

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

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

Signature of Arbitrator

**8/24/16**
Date



SEP - 6 2016

## FINDINGS OF FACT

On December 18, 2009 Petitioner injured his left shoulder working for Respondent as an industrial welder. He came under the care of Dr. George Paletta, who recommended left shoulder surgery. Respondent disputed the case.

On February 11, 2010 and April 26, 2010, the matter proceeded to hearing on a 19(b) Petition. The Arbitrator held Petitioner proved accident and causation. The Arbitrator awarded TTD benefits, medical expenses, penalties and a left shoulder surgery. (Ax. 6). The Commission affirmed the Arbitrator's Decision on March 18, 2011. The Circuit Court affirmed the Commission Decision on September 8, 2011. The Fifth District Appellate Court affirmed the Commission Decision, other than vacating the award for penalties and attorneys' fees, on September 26, 2012. (Ax. 7-9). No further appeal was taken. This matter proceeds to hearing following remand from the Appellate Court. Respondent disputes medical bills, TTD benefits, maintenance benefits, Section 19(l) penalties and the nature and extent of the injury. (Ax. 1).

Petitioner worked for Respondent as an industrial welder when he injured his left shoulder on December 18, 2009. He passed a pre-employment physical. Petitioner was non-union and therefore the job required him perform both welding and labor duties. Petitioner described the work activities to include lifting material weighing up to 40-60 pounds above chest level and welding overhead. Welding overhead required holding both arms overhead between two and half to seven minutes at a time. Petitioner denied experiencing problems performing the work activities prior to December 18, 2009. Petitioner testified he previously worked for Trilium Construction and Zachary Construction as a non-union industrial welder performing the same work without restriction.

On May 26, 2011, Dr. Paletta performed a left shoulder surgery consisting of a type II labral repair, subacromial decompression and bursectomy. (Px. 1). Dr. Paletta kept Petitioner off work or placed restrictions that Respondent did not accommodate through October 13, 2011. (Px. 2 at 1-9). Respondent paid TTD benefits for this period.

Following surgery, Petitioner underwent physical therapy June 19 through October 6, 2011. (Px. 3). The therapist documented left shoulder weakness, inability to move the left arm into welding positions, feeling of the shoulder wanting to pop out, impaired abduction and atrophy. (Px. 3 at 3, 7-9, 17-18). Petitioner testified he noticed instability, limited range of motion and weakness of the left shoulder.

On October 14, 2011, Dr. Paletta felt Petitioner was doing reasonably well and noted Petitioner did not have work to return to. Dr. Paletta documented minimal rotational losses and full strength. He released Petitioner to return to work full duty and placed him at MMI. (Px. 2 at 8).

On November 1, 2011, Dr. Paletta, after reviewing the physical therapy records, ordered four weeks of work conditioning. (Px. 3 at 46-47). Petitioner underwent work conditioning from November 3 through December 2, 2011. The therapist documented continued limited abduction and weakness. (Px. 3 at 10-12, 19-20, 33-34, 36). On January 11, 2012, Dr. Paletta ordered a functional capacity evaluation. (Px. 2 at 11-12). The January 23, 2012 FCE demonstrated Petitioner could return to work in the medium physical demand level with modifications due to Petitioner's inability to perform overhead activities. The examiner concluded Petitioner provided maximal effort. (Px. 4 at 3-4). On June 4, 2012 Petitioner returned to Dr. Paletta. Dr. Paletta

recommended an MRI of the left shoulder. (Px. 2 at 19-20). The MRI, according to the radiologist, demonstrated the labral repair, but that a recurrent tear could not be excluded. (Px. 5 at 1). On July 31, 2012, Dr. Paletta reviewed the MRI and opined no further surgery was necessary. He also noted that the findings on his exam those documented by the functional capacity evaluator were inconsistent with regard to range of motion. Dr. Paletta therefore recommended either an IME or that Petitioner be placed at MMI with no restrictions. (Px. 2 at 21).

On June 11, 2012, Respondent sent Petitioner to Dr. James Strickland for a section 12 exam. Dr. Strickland documented 20-25% atrophy with moderate weakness in abduction. He opined the persistent weakness could be related to the 15 month delay between the accident and surgery. Dr. Strickland opined that at the current time Petitioner was limited to medium work level and should avoid extensive exercise over shoulder level. He opined Petitioner was incapable of returning to full duty at his pre-injury job. (Px. 7 at 4-5).

On November 26, 2012, Dr. Paletta reviewed Dr. Strickland's IME report, a welding job description and job video. He opined Petitioner required a permanent restriction of no lifting 25 pounds above chest level. (Px. 6 at 3).

Petitioner testified that since Dr. Paletta's original release October 14, 2011 he noticed atrophy and instability in the left shoulder with the inability to lift the left arm fully up to the side. The Arbitrator observed Petitioner's left arm could not get parallel with the shoulder to the side and was 85-90 degrees normal compared to the right when raising the left arm in the front.

Petitioner testified that based upon the medical restrictions and limited ability to raise his left arm he cannot return as an industrial welder because he would not pass an overhead weld test, or be able to perform overhead welding and lifting greater than 25 pounds above chest level, as is required. Petitioner testified that he is able to perform shop and fabrication welding because it is performed at a table and is not strenuous. Unfortunately he has been unsuccessful locating those jobs in Southern Illinois. It was noted that the pay rate of a shop/fabrication welder is significantly lower than his wage as an industrial welder.

Petitioner performed multiple job searches from October 2011 through December 2014. (Px. 10). Petitioner requested vocational rehabilitation from Respondent, including training for a crane operator certification, and provided Respondent the job searches since June 25, 2012. (Px. 11).

Petitioner was able to secure part time employment with Ridgeway Tree Services from January 21, 2012 through April 20, 2012. Petitioner testified the employer let him go because he could not perform the overhead work. Casey's employed Petitioner June 30, 2013 through November 16, 2013 on a part-time basis and paid him total of $3,651.23. Risenumburger Trucking employed Petitioner on a part-time basis January 19 through February 21, 2015 and paid him a total of $991.56. (Px. 12). Petitioner testified these jobs did not exceed his restrictions. On February 19, 2015, Petitioner started working as a maintenance person for Ridgeway Apartments. Petitioner averages 30 to 35 hours per week at $8.25 per hour.

Respondent submitted surveillance evidence that did not demonstrate Petitioner exceeding his work restrictions. (Rx. 6, 7).

On October 30, 2013, June Blaine performed a vocational assessment at the request of Petitioner's attorney. Ms. Blaine opined Petitioner could not return to his previous job as a welder and that he was an excellent candidate for retraining to obtain a crane operator certification. (Px. 9). In a report dated March 27, 2015, Ms. Blaine reaffirmed her opinion that Petitioner could not return to work as an industrial welder and without further training that he could earn up to $10.00-$11.00 per hour in the local area. (Px. 9).

On May 7, 2014, Joseph Belmonte performed a vocational assessment at Respondent's request. Mr. Belmonte opined that he "cannot definitively determine that [Petitioner] has lost access his customary line of occupation" based upon the physical restrictions of no lifting in excess of 25 pounds above shoulder level. (Rx. 3, at 16).

Petitioner deposed June Blaine June 4, 2015. She testified Petitioner's industrial welding job was within the heavy demand category, which requires 50 pounds of force occasionally and 25 to 50 pounds frequently. (Px. 9 at 15). She opined that Petitioner was incapacitated from returning to his usual and customary line of employment as an industrial welder because as a non-union welder he would have to lift 25 pounds above chest level. (Px. 9 at 16-17). Ms. Blaine testified Petitioner could perform shop welding positions, but they pay range in Southern Illinois is $11.00 to $13.00 per hour versus $29.00 to $30.00 per hour as an industrial welder. (Px. 9 at 17-20). As result, Petitioner suffered an impairment of earnings. (Px. 9 at 24-25). Ms. Blaine opined employers are currently offering more part time jobs and Petitioner's current job paying $8.25 per hour for 35 hours per week is consistent with his job search. (Px. 9 at 23-24).

Respondent deposed Joseph Belmonte July 22, 2015. Mr. Belmonte opined Petitioner is determined to have lost access to his usual and customary job as welder for Respondent, but that he was unable to definitively determine Petitioner lost access to his usual and customary line of occupation. (Rx. 4 at 9). He explained that the dictionary of occupational titles for the heavy demand does not specify lifting requirements for a welder are above chest level. (Rx. 4 at 9-11). He opined Petitioner could work welding jobs in the heavy demand level as long as the job did not require lifting 25 pounds above chest level. (Px. 9 at 13-14). He opined that Petitioner was not subject to radical wage loss based upon median wage earnings for welders. (Rx. 4 at 15). On cross examination, he admitted that Petitioner could not perform any welding jobs that require lifting more than 25 pounds above shoulder level. (Rx. 4 at 30). He did not know the physical demands of the job Petitioner performed for Respondent. (Rx. 4 at 31). He did not ask Petitioner whether his work for Respondent and prior employers required lifting 25 pounds over chest level. (Rx. 4 at 34). He never reviewed the job searches completed by Petitioner and did not know whether Petitioner applied for welding positions. (Rx. 4 at 54-58).

## CONCLUSIONS

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

There is no evidence in this record to support Respondent's dispute regarding causal connection. The earlier decision of Arbitrator Dibble which was affirmed through the Appellate Court decided the issue in Petitioner's favor. The Arbitrator therefore finds Petitioner's current condition of ill-being is causally related to the accident.

**Issue (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?**

Also without an evidentiary basis, Respondent disputes Petitioner's claim for medical benefits. Petitioner submitted medical bills totaling $7,431.00. (Px. 13). Based upon the Arbitrator's finding with regard to Issue F, and the record taken as a whole, Respondent shall pay reasonable and necessary medical services of $7,341.00, as set forth in Px 13, as provided in Sections 8(a) and 8.2 of the Act.

**Issue (K): What temporary benefits are in dispute?**

**TTD Benefits**

Petitioner claims entitlement to temporary total disability benefits of $775.72/week for 76-3/7 weeks, commencing 4/27/10 through 10/13/11 and for 7-2/7 weeks, commencing 6/11/12 through 7/31/12, as provided in Section 8(b) of the Act.

Although they have not been paid, Respondent agrees Petitioner is entitled to TTD benefits for the first period. In support of the second period, the Arbitrator relies on Respondent's Section 12 examiner Dr. James Strickland's opinion that Petitioner had not reached maximum medical improvement as of June 11, 2012 and required restrictions that prevented Petitioner from returning to work for Respondent. The Arbitrator notes that Respondent had terminated Petitioner by that time. (Px. 8). Petitioner reached maximum medical improvement July 31, 2012, when he returned to Dr. Paletta and had permanent restrictions ordered.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds Respondent shall pay Petitioner temporary total disability benefits of $775.72/week for 76-3/7 weeks, commencing 4/27/10 through 10/13/11 and for 7-2/7 weeks, commencing 6/11/12 through 7/31/12, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $60,727.79 for temporary total disability benefits that have been paid.

**Maintenance Benefits**

Maintenance benefits have been awarded when a claimant undertakes a self-created job search and his own rehabilitation program. *See* Greaney v. Industrial Comm'n, 358 Ill.App.3d 1002 (1st Dist. 2005) citing Roper Contracting v. Industrial Comm'n, 349 Ill.App.3d 500 (2004).

In this case Petitioner had no choice but to undertake a self-directed job search. Dr. Strickland opined Petitioner could not return to his pre-injury job and Dr. Paletta placed permanent restrictions on July 31, 2012. Respondent did not accommodate those restrictions and Petitioner requested vocational rehabilitation on multiple occasions, including a specific request for enrolment in a crane operator certification program on December 18, 2012. (Px. 11 at 3-4). Respondent did not respond to the demand until it eventually secured a vocational opinion May 7, 2014.

The Arbitrator finds the opinions June Blaine more persuasive than those of Joseph Belmonte. Further, the medical evidence establishes that Petitioner cannot return to his pre-accident job as an industrial welder where he made $29.00 to $30.00 per hour. The welding positions Petitioner is physically capable of performing are at a significantly reduced wage.

Petitioner reached MMI July 31, 2012. His left shoulder condition prevented him from returning to his pre-accident work as an industrial welder which reduced his earning capacity; and the self-directed job search resulted in Petitioner finding substantial gainful employment February 19, 2015.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds Petitioner has met his burden of establishing his entitlement to maintenance benefits.

Respondent shall pay Petitioner maintenance benefits of $775.72/week for 134-3/7 weeks, commencing 8/1/12 through 2/18/15, as provided in Section 8(a) of the Act.

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

Petitioner cannot return to his pre-injury job as an industrial welder. The Arbitrator relies on the opinion of Dr. Strickland that Petitioner could not return to his pre-injury position. Furthermore, Ms. Blaine opined Petitioner cannot work as an industrial welder because the job requires lifting 25 pounds above chest level, which is the restriction placed by Dr. Paletta. Mr. Belmonte's opinion is based on the nebulous statement that he "cannot definitively determine that [Petitioner] has lost access his customary line of occupation" based upon the physical restrictions of no lifting in excess of 25 pounds above shoulder level. This does not differentiate between welding in general and being an industrial welder. Mr. Belmonte admitted that Petitioner could not return to a welding job that required lifting 25 pounds above chest level and he did not know the physical demands of Petitioner's work as an industrial welder. Petitioner credibly described the lifting requirements of an industrial welder as distinguished from a shop welder.

In support of the conclusion Petitioner suffered an impairment of earnings the Arbitrator relies on the opinion of June Blaine. She opined that Petitioner could make up to $13.00 hour in a shop welding or fork driver position if it the positions were available. Petitioner engaged in an exhaustive job search and those positions are not available. Petitioner found employment averaging 35 hours per week at $8.25 per hour for $288.75 per week.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds Petitioner has proven entitlement to wage differential benefits because his current left shoulder condition prevents him from returning to his usual and customary employment as an industrial welder and he suffered an impairment of earnings. But for the injury, Petitioner could currently make the average weekly wage of $1,163.58. Petitioner is currently making $8.25 per hour on average 35 hours a week for $288.75. ($1,163.58 - $288.75 = $874.83 x 2/3= $583.22).

Respondent shall pay Petitioner permanent partial disability benefits, commencing 2/19/15, of $583.22/week for the duration of the disability, because the injuries sustained caused a loss of earnings, as provided in Section 8(d)1 of the Act.

**Issue (M) Should penalties or fees be imposed upon Respondent?**

Compensation authorized by section 19(l) is in the nature of a late fee. The statute applies whenever the employer or its carrier simply fails, neglects, or refuses to make payment or unreasonably delays payment "without good and just cause." If the payment is late, for whatever reason, and the employer or its carrier cannot show an adequate justification for the delay, an award of the statutorily specified additional compensation is mandatory. McMahan v. Industrial Comm'n, 183 Ill.2d 499, 515 (1998).

While the appeal of the earlier 19b hearing was proceeding, Respondent authorized Petitioner's surgery. Petitioner was paid TTD commencing on the date of the surgery. Respondent did not, however pay TTD

benefits between the date of the 19b hearing and the date of surgery. The Arbitrator finds that after the issuance of the Appellate Court Decision, Respondent had no reasonable basis to dispute TTD benefits covering April 27, 2010 (the day after the original Arbitration Hearing) through May 25, 2011 (the day before surgery) because Petitioner remained on work restrictions that Respondent did not accommodate. Petitioner sent Respondent five letters after the Appellate Court Decision demanding payment of TTD benefits for the afore-mentioned period. (Arb. Ex. 5). Respondent did not pay the benefits until six months later. Respondent never provided an explanation for the delay, much less an adequate justification for the delay.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds Petitioner is entitled to penalties under section 19(l) of the Act. Respondent shall pay to Petitioner penalties in the amount of $6,390.00, as provided in Section 19(l) of the Act. This represents $30.00 per day for 213 days from 9/28/12, the date the parties received the Appellate Court Decision, through 5/1/13, the date of the TTD payment. (Arb. Ex. 5).