WCLA NEWSLETTER
CASE LAW UPDATE JANUARY 2018 SUMMARIES

I. EMPLOYER-EMPLOYEE

***Cobarrubias v. D&M Custom Carpentry*, 17 I.W.C.C. 0304 (IWCC May 16, 2017)**

At Arbitration, the parties presented issues of employer-employee relationship, accident, causal connection, medical, and TTD.

The petitioner alleged he injured his back on September 29, 2015 while he unloaded equipment and a metal door from a truck to a third floor. Afterward while bending down, he felt paralyzing and intense back pain that immobilized him. The petitioner reported low back, hip, upper and lower leg and knee pain.

The Arbitrator made these findings: The respondent is a general contractor in the business of remodeling. The respondent subcontracted their remodeling jobs to experienced tradesmen with specialized skills and training to complete the different phases of the remodeling job. The petitioner was a carpenter and tasked with using his carpentry and cabinet making skills to work only on that part of a project. He was not a general laborer that would be expected to work full time. He was paid by the hour and did not have a set number of work hours per day or per week. The petitioner kept track of the hours he worked and billed the respondent for those hours. No withholdings were deducted from the money paid to the petitioner. He used his own hand tools and provided his own transportation. The petitioner did not work five days a week or even every week during the year prior to his injury. The need for his services depended on the remodeling project, and the petitioner determined how the carpentry was done to complete the task.
The respondent's owner testified the petitioner attributed his back condition to his grandson jumping on him. The Arbitrator found the petitioner failed to prove he was an employee of the respondent.

The Commission on review, reversed on the issue of employer-employee, but decided the petitioner failed to prove accident. Regarding the issue of employer-employee, the Commission reiterated the factors in determining this relationship. "The Illinois Supreme Court has identified a number of factors to assist in determining whether a person is an employee. Among those factors are: (1) whether the employer may control the manner in which the person performs the work; (2) whether the employer dictates the person's schedule; (3) whether the employer compensates the person on an hourly basis; (4) whether the employer withholds income and social security taxes from the person's compensation; (5) whether the employer may discharge the person at will; and (6) whether the employer supplies the person with materials and equipment. (Esquinca v. Ill. Workers' Comp. Comm'n. 2016 IL App (1st) 150706WC ¶47 citing Roberson v. Industrial Comm'n, 225 Ill.2d 159, 175 (2007))."

Although the Commission found credibility issues with all witnesses, the Commission noted the respondent had an independent contractor agreement with all other persons, except the petitioner. The Commission also noted the respondent required proof of worker's compensation coverage

from all other persons, except the petitioner. The Commission also found the respondent dictated the petitioner's scheduled, assigned the petitioner to a particular job site and went over the job performed. Although the Commission found the respondent did not withhold taxes or provide insurance for the respondent, the respondent could terminate the petitioner's employment, and provided all the tools other than what the petitioner had on his tool belt.

Regarding the issue of accident, the Commission found a co-employee and owner more credible than the petitioner regarding whether the accident occurred at work as petitioner described or occurred outside of work lifting his grandson. Ultimately, the Commission denied the claim.

II. ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

***DeGarmo v. Southern Illinois University*, 17 I.W.C.C. 0510 (August 18, 2017)**

At hearing the parties presented the issues of accident, causal connection, TTD, medical expenses and prospective medical care. The petitioner worked as an associate professor for the respondent. On March 21, 2016, the petitioner taught a class at Peck Hall and parked her car in lot A or the "green lot." Petitioner testified this lot was the closest one to the campus academic buildings. The petitioner also testified her vehicle needed a parking tag or she had to pay the parking meter to park at this lot. The respondent maintained the lot. The petitioner testified the lot is one lot where the faculty park.

On the date of injury, between 4:20 and 4:30 p.m., the petitioner was headed towards the lot with her colleague at an exit with five doors. She exited the door to her far left. As she walked in the outdoor area outside of the doors, she felt the toe of her shoe catch a groove between two sidewalk pavers and fell. The pavers are large approximately 2' x 2'. The petitioner testified when she caught her right toe she fell forward, landed on her left side on the pavers, hit her head and bent her glasses, and her right knee ended up over part of her body. She was wearing open toe Birkenstock sandals.

The petitioner testified she took the photographs of the parking lot and they accurately depict the noted groove between the pavers where she fell. The whitish caulking-type material seen in the photos exists between some of the pavers, but not all of them, and there is no symmetry as to which have it and which don't. The part where petitioner caught her toe did not have this caulk-type material in the groove. The petitioner testified there was no uniformity regarding the caulk in the grooves, and that the photo in Px5 where her finger is in the groove was next to where her toe got caught. It was a part of the groove that had caulking in it.

The petitioner also testified her job required her to go to different buildings on campus, and she must take materials with her between buildings, including syllabi, curriculum, iPad, teaching materials and student materials. She was carrying those items when she fell.

The Arbitrator noted both parties cited the case of Litchfield Healthcare Center v. Industrial Commission, 812 N.E.2d 401, 349 Ill.App.3d 486, 285 Ill.Dec. 581 (2004), to support their respective arguments. In Litchfield, after punching in at a time clock inside the employer's

building, the claimant, a certified nursing assistant, realized she had forgotten her "gait belt" in her car, exited the building and returned to her car to get it. After retrieving the gait belt, she walked back to the building and tripped on an area of the sidewalk where the concrete slabs were not level with each other. She identified an exhibit, which showed one concrete slab higher than the adjoining slab and testified that the height difference was approximately 1 1/4 inches. The Appellate Court determined tripping on a sidewalk is a neutral risk of injury, and thus the question was whether the claimant had been exposed to a risk of injury to a greater extent than that to which the general public was exposed. The Appellate Court stated that "this case does not merely involve the risks inherent in walking on a sidewalk which confront all members of the general public." To support this, they cited the claimant's testimony and photographs showing varying heights in the adjoining concrete slabs, the Appellate Court found there was a defect or hazard in the sidewalk and, therefore, there was a causal connection between the condition of the premises and the injury: "Special hazards or risks encountered as a result of using a usual access route satisfy the 'arising out of requirement of the Act.'" (citing Bommarito v. Industrial Comm'n 82 Ill.2d 191, 412 N.E.548, 45 Ill.Dec. 197 (1980) and Mores-Harvey v. Industrial Comm'n, 345 Ill.App.3d 1034, 804 N.E.2d 1086, 281 Ill.Dec. 791 (2004)). Id.

Based upon the Arbitrator's review of the facts and the Litchfield case, the Arbitrator found the petitioner failed to prove an accident arising out of and in the course of her employment. The Arbitrator found, unlike in Litchfield, there was no indication of an uneven walkway, but rather a "pretty typical gap between two pieces of concrete that her sandal happened to get caught in." The respondent's grounds superintendent testified the walkway is actually a solid piece of concrete, as opposed to pavers, and has gaps carved into it to address expansion and contraction of the surface. The petitioner also did not testify regarding the frequency with which she traveled to and from academic buildings or how often she traversed the walkway in this area (quantitative information -editor's note). The petitioner also presented no actual measurements regarding the size of the gap. (qualitative information – editor's note).

Upon review, the Commission affirmed and adopted the decision of the Arbitrator.

***Ashby v. Hy-Vee,* 17 I.W.C.C. 0491 (August 11, 2017)**

At Arbitration, the parties presented the issues of accident, TTD, medical expenses and nature and extent of the injury. The petitioner worked as a dishwasher for the respondent. After arriving to work his shift, the petitioner entered the front door and walked up a flight of stairs to the right of the front door, so he could clock in. Photographs of the stairs were tendered into evidence, which depicted a flight of stairs with a landing at the top and a shorter flight of stairs to the left of the landing. The petitioner testified the stairs were not used by the public and the upstairs included a break room for employees, lockers, and the area where he had to clock in. The petitioner stated the weather, was rainy and he was wearing boots. The petitioner walked up the flight of stairs, reached the landing, turned and attempted to walk up the second set of stairs to the left. The petitioner slipped and fell backward onto the landing.

On cross-examination, the petitioner agreed when he was walking up the stairs, he was taking two steps at a time. Regarding the boots he was wearing, the petitioner acknowledged the respondent did not require him to wear them. The petitioner also stated there was a "club room" on the second

floor, but he did not know if the general public had access to it or not. Six witnesses testified on behalf of the respondent. Five witnesses' testimony pertained to the circumstances of the fall. The testimony of the sixth witness pertained to an offer of light duty work made to the petitioner after he was released to return to work.

One witness stated the stairs where the petitioner fell are used by the public and the "club room" is rented out to customers for parties and events. Further, she stated the room was also used for cooking demonstrations for the respondent's customers. The witness also observed the petitioner after he fell and noted there was no accumulation of water on the stairs and that they were dry. She also stated there was carpeting at the base of the stairs and its purpose was to catch water that might be on the soles of shoes. The stairs themselves also had a rubber coating, another safety precaution. The witness also remembered the petitioner climbing the stairs two at a time.

Another witness, an assistant manager, observed the petitioner lying on the landing shortly after the occurrence. He stated the stairs were dry, and the petitioner was wearing his boots untied. A third witness observed that some of the rubber was coming off the petitioner's boots. This witness also stated the "club room" is rented to customers for meetings, and parties and is also used for cooking demonstrations. The witness testified there were restrooms in the same area open for use by the general public.

The Arbitrator concluded the petitioner sustained no accident arising out of and in the course of his employment. The Arbitrator noted "(w)hile the evidence clearly indicates that the stairs were available for use by the public, this is not the critical issue in this case." The Arbitrator concluded the petitioner must prove his employment exposed him to a greater degree of risk than the general public. [citing *Caterpillar Tractor Co. v. Industrial Commission*, 541 N.E.2d 665 (Ill. 1989)]. The Arbitrator found when the petitioner was climbing the stairs, he was performing an activity of daily life also performed by members of the general public. The petitioner's employment by the respondent did not expose him to a greater degree of risk than that of the general public. The stairs were dry and had a protective rubber coating. The Arbitrator found the petitioner's actions were similar to an employee sustaining an injury while walking across the floor at his employer's place of business. This was likewise held not to expose an employee to a risk greater than that faced by the general public. [citing *Illinois Consolidated Telephone Co. v. Industrial Commission*, 732 N.E.2d 49 (Ill. App. 5 Dist. 2000)].

The Commission affirmed and adopted the decision of the Arbitrator.

***Sanders v. State of Illinois, Centralia Correctional Center*, 17 I.W.C.C. 0261 (May 4, 2017)**

At Arbitration the parties appeared for a 19b setting with the issues of accident, TTD, medical expenses and 8(j) credit in dispute. The petitioner worked as a correctional officer for the respondent. On the alleged date of accident, the petitioner participated in a basketball game with his fellow officers while on lunch break. During the game, the petitioner injured his right foot and right knee.

The petitioner stated he may not leave the premises during his lunch break. The petitioner was not the gym officer on the date of his accident. The petitioner testified he was paid during his lunch break, but he was a salaried employee. The petitioner testified he had been working at the Centralia Correctional Center for six months, and he had been playing basketball for at least two months. The petitioner testified he had never gotten in trouble for playing basketball. The petitioner testified the respondent provided both the court and the basketballs for use by the correctional officers during their break hours. The petitioner testified he had to stay in good physical shape to perform his job duties. Although he testified he had to take and pass a physical to secure employment with the State of Illinois approximately three and a half years prior, he had undergone no physical testing for fitness since then.

On cross-examination the petitioner admitted there was no official mandate or memorandum asking correctional officers to work out or play basketball on their lunch periods. The petitioner testified he received no kind of monetary bonus or incentive to work out or play basketball on his lunch break. The petitioner testified he did not have to report to anyone he was working out on his lunch break and he agreed the facility would not know whether he was eating lunch or working out.

A former warden testified on behalf of the respondent. The former warden testified correctional officers are paid for seven and a half hours and they are not paid for their lunch break. The witness indicated what correctional officers do on their lunch was their own time "per contract". The witness stated there was no mandate from the Department of Corrections, or Centralia Correctional Center, requiring the petitioner to do any physical activities to stay in shape for his job. The witness stated during his career at the Department of Corrections there had never been a mandate requiring a correctional officer to perform physical activities to stay in shape for their job. The former warden stated there were correctional officers who were overweight and who were physically fit, but it was their own choice. The former warden testified that although the officers could use them, the basketballs were provided by Leisure Time Service (LTS) and bought by the Inmate Benefit Fund for inmate use, not Centralia Correctional Center.

Since the Arbitrator found the petitioner alleged no defect on the employer's premises, or that the basketball court caused or contributed to his fall and lead to his injury, the issue then became whether the petitioner's participation in a purely voluntary recreational activity during an authorized unpaid lunch break is compensable under the Illinois Workers' Compensation Act. The Arbitrator, citing Section 11 of the Act, noted that "(a)ccidental 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 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."

Based upon the testimony, the Arbitrator found there was no compulsion by the respondent to have the petitioner use the courts or to participate in the playing of basketball. There were no factors introduced to indicate the respondent offered the recreational facilities as anything other than on a voluntary basis as a courtesy to its employees. Upon review, the Commission affirmed and adopted the decision of the Arbitrator.

***Brooks v. Kankakee School District,* 17 I.W.C.C. 0518 (August 18, 2017**

At Arbitration the parties presented the issues of accident, medical expenses, TTD and nature and extent of the injury. The petitioner worked as a head cook for the respondent. Her job duties included preparing food for four schools in a co-op building. Her shift normally began at 7:00 a.m. and ended at 1:30 p.m. She parked her vehicle in a parking lot where other employees typically parked. The petitioner also volunteered at a Montessori school in the same district, where she bagged vegetables and prepared food. The petitioner normally began her tasks for the Montessori school at 2:00 p.m.

On the date of accident, after finishing her shift as a head cook for the respondent and "signing out" she slipped and fell in an icy parking lot while walking to her car to go to the Montessori school. The petitioner admitted neither the parking lot where she normally parked nor the parking lot in which she fell were owned by the respondent. The respondent did not direct its employees to park in the lot the petitioner used, but the general public could not use the parking lot.

The Arbitrator noted the "parties' dispute regarding accident stems primarily from three theories of compensability. First, whether Petitioner's injury is compensable under either an increased risk analysis, second whether the injury is compensable under a 'parking lot exception' analysis and finally whether the injury is compensable under a traveling employee analysis. In light of the facts adduced at trial, the Arbitrator finds that Petitioner has established that she sustained a compensable injury at work under the parking lot exception theory of recovery."

The Arbitrator found the petitioner proved a compensable accident even though she had "clocked out" of her head cook job, because her accident occurred in a parking lot provided by Respondent. [citing *Vill v. Industrial Comm'n*, 365 Ill.App.3d 906 (1st Dist., 2006)]. The Arbitrator noted the general rule that injuries from slip and falls off an employer's premises while traveling to or from work are ordinarily not compensable under the Workers' Compensation Act. However, the Arbitrator found the facts herein placed the petitioner's claim within the "parking lot exception" to the general rule as noted in *Vill*: such injuries are compensable if the fall occurred in a lot provided by and under the control of the employer. In those circumstances, the rationale for awarding workers' compensation benefits is the "employer-provided parking lot is considered part of the employer's premises." [(citing *Mores-Harvey v. Industrial Commission*, 345 Ill.App.3d 1034 (3rd D. 2004) and *Suter v. Ill. Workers' Comp. Comm'n*, 2013 IL App (4th) 130049WC (4th Dist., 2013)].

The Arbitrator concluded the petitioner was injured when she slipped and fell on ice walking through the parking lot because the sidewalk she normally used to reach the co-op building was covered with plowed snow. The parking lot in which the petitioner was injured constituted a part of the respondent's premises, was implicitly provided by the respondent for the petitioner and other employees to use and it was in a hazardous condition given the ice on which the petitioner slipped and fell. Based on the foregoing, the Arbitrator found the petitioner established she sustained a compensable accident.

On review, the Commission reversed. The Commission found the petitioner failed to prove the respondent provided or controlled the lot where she fell, both of which were required for the parking lot exception to apply. The Commission found nothing in the record which proved the respondent controlled the parking lot. The petitioner's testimony she never saw the general public park in the lot is similarly insufficient to establish control of the lot by the respondent. The only evidence showing who controlled the lot was the testimony of the respondent's witness who testified the lot was maintained by the co-op, not by the respondent. The petitioner admitted she did not know who controlled the lot when she was asked, and she offered no other evidence to refute this witness' credible testimony. While the Commission acknowledged a petitioner may prove who controlled a parking lot by establishing facts other than showing who maintained it, no such facts are present here. The evidence supported a conclusion that the co-op, not the respondent, controlled the lot where the petitioner fell.

The Commission found the facts are similar to those in *Wal-Mart Stores, Inc. v. Industrial Commission*, 326 Ill.App.3d 438 (4th Dist., 2001). There, after leaving work, the petitioner slipped and fell in an icy parking lot which was not restricted to employees only. The court found the petitioner's injuries not compensable and the accident to not result from a hazard arising out of her employment or a risk greater than faced by the general public. The Commission also found Petitioner was not a traveling employee at the time of the fall. She had clocked out of her head cook job, which did not require her to travel. She was not in the furtherance of any job duties of the respondent when she fell. She was not bringing anything from her head cook job to her second volunteer job. She was not directed by her employer to go to her second job, or to take a particular route. She was not paid for her time or her mileage after leaving her head cook job. The Commission found the petitioner's fall did not arise out of or in the course of her employment.

III. CAUSAL CONNECTION

***Watson v. Wal-Mart Associates, Inc.*, 17 I.W.C.C. 0519 (August 18, 2017)**

At Arbitration, the parties presented the issues of causal connection, TTD, medical expenses and prospective medical care. The petitioner had pre-existing arthritic conditions in both knees. The petitioner worked as a maintenance worker for Wal-Mart. On the date of accident, the petitioner injured both knees while pushing shopping carts. He was attempting to maneuver the carts to avoid hitting a parked car when he felt a painful pulling or stretching in the back of both knees. The petitioner explained past episodes of knee pain would subside with medication and rest, but this time the pain persisted. The treating physician opined the accident aggravated the petitioner's pre-existing condition to become symptomatic.

The respondent's Section 12 examiner opined petitioner had symptomatic osteoarthritis in both knees, right worse than left. He opined the osteoarthritis was longstanding and had developed over years and the medial meniscal tears in both knees were consistent with chronic degenerative tearing as opposed to acute tearing. The Section 12 examiner found the accident did not aggravate the pre-existing condition as a medical note one week after the accident indicated the petitioner's bilateral knee pain had been ongoing for four months. Finally, the examiner opined the alleged mechanism of injury whereby the petitioner hurt his knees through pushing shopping carts

represented a "minimal" amount of force and such a trivial incident was "more consistent with a chronic, ongoing, and lingering condition."

The Arbitrator found although the petitioner would experience soreness in his legs prior to the alleged accident the symptoms would go away by the next day. The Arbitrator also noted the petitioner underwent no medical treatment for his knees prior to the alleged date of accident. Given the petitioner's credible presentation, the fact that the Section 12 examiner did not review all of the treating medical records, and there is no evidence of the petitioner receiving medical treatment for his knees prior to the alleged accident date, the Arbitrator gave more weight to the treating physician's opinion and found a causal connection.

On review, the Commission reversed. The Commission concluded the petitioner's arthritis in both knees preexisted the workplace incident and the degeneration was advanced by the time of injury. The Commission noted the treating physician and Section 12 examiner disagreed on whether the current condition of the petitioner's knees - insofar as that condition may warrant restriction from working and total knee replacement - arose from that workplace incident. The Commission also noted the Arbitrator relied on the treating physician's opinion and the opinion was solely based on the history related to him by the petitioner, who told the treater he had no pain in his knees pre-dating the accident. The evidence showed this history was inaccurate. A few days after the accident, the petitioner complained to his primary care physician of knee pain that had been ongoing for four months. The treater testified his opinion would change if medical records indicated the petitioner had knee pain before the accident.

Therefore, the Commission found the treating physician's opinion was "flawed" and found the Section 12 examiner's opinion was more persuasive. The Commission concluded the petitioner's preexisting arthritis was symptomatic before the asserted date of accident and the asserted accident was not causally related to the current condition of ill-being in his knees. The evidence showed the current condition of his knees reflected the natural progression of the already-advanced arthritis and was not due to any compensable "aggravation."

***Griffeth v. R.W. Dunteman Co.*, 17 I.W.C.C. 0485 (August 3, 2017)**

At arbitration the parties proceeded to trial on the issues of causal connection, medical expenses and prospective medical care. The petitioner worked as a machine operator. His duties included running highway construction machinery. On April 2, 2015, the petitioner worked on an asphalt plant when a pipe cap exploded knocking out some of his teeth. The petitioner testified immediately after being struck he noticed blood and spit out pieces of broken teeth. The petitioner denied any prior teeth pain and never had a dentist recommend removal of any of his teeth prior to April 2, 2015. The petitioner admitted prior to the April 2, 2015 accident he had not seen a dentist for a long time. The petitioner also admitted his teeth were decayed prior to the accident, but he suffered no pain or discomfort in them. After the accident, the petitioner testified all of his teeth were in a great deal of pain.

The petitioner treated medically at Pana Community Hospital on April 2, 2015. The nurse's note from the visit noted; "Ambulatory with cloth and pressure to mouth. States he was at work and a pipe came up hitting me in the mouth, knocking my teeth out. Broken teeth X2 front middle noted

laceration to chin ..." The respondent entered into evidence pictures of Petitioner's teeth taken at Pana hospital. The multiple pictures of his mouth show the two top teeth being black and decayed but broken to some extent and the bottom teeth broken in half. Some pictures showed the petitioners' front tooth had a chip out of it, which the petitioner claimed resulted from the trauma.

The petitioner initially saw a dentist, Dr. Harrington, who required payment at the time of service. Thereafter, the petitioner saw a Dr. David Fisher at Springfield Maxillofacial on May 19, 2015. The petitioner came in for an evaluation and extraction of teeth #24 & #25. Under the assessment/plan portion of the record is noted the petitioner was a 45-year old male status post blunt trauma on April 2, 2015, suffering subluxation and concussion of teeth #s 6 through 11 and 22 through 27 with also a fracture of teeth #24 & #25. Dr. Fisher recommended the petitioner follow-up with Dr. Harrington to formulate a plan to restore these teeth.

Instead, the petitioner followed-up with a second dentist, Dr. Matthew Lynch, on May 20, 2015 who noted the petitioner had a work accident and discussed options for repair. Dr. Lynch noted teeth #23-26, #7 and #10 were damaged due to a possible loss of vitality/cracks from trauma and suggested bridges to replace the missing teeth. The petitioner was instructed to follow up with an oral surgeon. Dr. Matthew Lynch noted the petitioners' teeth #7-10 were carious[1] and broken. Teeth #7-10 were recommended for extraction due to severe carious[2], percussion sensitivity, loss of tooth structure, and long-term prognosis of endodontic. Dr. Lynch recommended bridges for #6-8, and #9-11 to strengthen and stabilize the teeth adjacent to trauma besides replacing teeth. Dr. Lynch also offered implants as an alternative. Dr. Lynch concluded that while the petitioner's teeth were carious[3] and would require treatment at some point, he had no pain in his teeth prior to the accident.

The respondent submitted into evidence a record review from a Dr. Bargamian. The Arbitrator noted this was a record review and Dr. Bargamian did not see the petitioner or examine his mouth. Dr. Bargamian agreed the extraction and rehabilitation of teeth #23, #24, #25, and #26 were causally related to this claim. However, regarding teeth #7 and #10, Dr. Bargamian noted the petitioner suffered from severe multi-surface tooth decay in the pictures and surrounding teeth and agreed teeth #7 and #10 should have been removed, but it was due to their advanced decay not because of the accident. Dr. Bargamian further opined he did not believe teeth #7 and #10 were damaged because of the trauma. He based this opinion on the fact the teeth adjacent to teeth #7 and #10 were not damaged.

The Arbitrator awarded benefits and ordered Respondent provide prospective and already incurred dental care regarding teeth #6-#8 and #9-11 as causally related to the petitioner's injury. The Arbitrator found it was undisputed at the time of trial that the petitioner's teeth were decayed prior to the date of injury, but the petitioner had no pain or never sought treatment for his teeth prior to being struck in the face. Post injury, the petitioner complained of pain in both parts of his mouth and pictures of his mouth taken immediately post injury showed the teeth were damaged structurally. The petitioner's un-rebutted testimony was the teeth were whole prior to his injury. The Arbitrator acknowledged the opinion of Dr. Bargamian the treatment is not likely related to

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[1] Editor's Note – "carious" means affected with caries (a progressive destruction of bone or tooth).
[2] Id.
[3] Id.

trauma because the teeth were not struck in the accident, but due solely to the fact the petitioner suffered from advanced dental decay. However, the Arbitrator found the opinion unpersuasive. Dr. Bargamian did not exam the petitioner's mouth and there was enough medical documentation the petitioner suffered injury to the upper part of his mouth to dispute the assertion he suffered no trauma to that portion of his mouth.

The Commission on review modified the Arbitrator's decision. The Commission affirmed the Arbitrator's causal connection finding in relation to tooth #9 in the petitioner's upper row. However, the Commission reversed the Arbitrator's finding of causal connection in relation to teeth #'s 7, 8 and 10. The Commission found the petitioner had pre-existing tooth decay on the top row of teeth which accounted for the majority of his disfigurement. As noted by Dr. Bargamian, if the petitioner's current upper teeth conditions resulted from the accident related trauma, there would be injury to the adjacent soft tissue, of which there is little to none present in the photos. For perspective, the photos showed that the petitioner's lower lip was damaged, which was consistent with the (stipulated) trauma-induced structural damage to teeth #22-27 on the bottom row.

The Commission agreed with the Arbitrator's finding with relation to tooth #9. Despite Dr. Bargamian' s argument, the Commission found it count not be denied there was a noticeable chip on tooth #9, which does not seem to show any real evidence of decay. The Commission concluded the chip resulted from the work-related accident. Accordingly, the Commission affirmed the Arbitrator's causal connection finding, but only regarding tooth #9.

IV. PERMANENCY BENEFITS

***Schmidt v. CTA*, 17 I.W.C.C. 0521 (August 21, 2017)**

The parties proceeded to arbitration on the nature and extent of the petitioner's injuries. The petitioner suffered his injury on February 20, 2013 while working as a mechanic for the respondent. The petitioner worked on diesel engines which required kneeling down on engines and climbing ladders and stairs. On the date of accident, the petitioner knelt down to work on an engine and twisted his right knee, felt a pop, and an immediate onset of pain.

The petitioner sought treatment with Dr. Shah at Parkview Orthopedics. Dr. Shah diagnosed a meniscus tear, partial ACL tear, and patellar tendinopathy. Dr. Shah performed a right knee arthroscopy with partial medial meniscectomy, abrasion arthroplasty of the patellofemoral joint and femoral trochlea, patellar tendon debridement, arthrotomy, and excision of the Hoffa fat pad. The post-operative diagnosis was right knee patellofemoral chondromalacia, right knee medial meniscus tear, right knee patellar tendinitis and tendinosis, and right knee Hoffa fat pad syndrome. On May 5, 2014, Dr. Shah released the petitioner to return to work full duty. On August 1, 2016, the petitioner saw Dr. Shah one final time. The petitioner continued to feel periodic pain and clicking in his right knee. The petitioner reported his knee felt 85% improved since his pre-surgery condition. The doctor recommended injections, which were not approved.

The Arbitrator delineated the 8.1(b) factors:

Regarding subsection (i) of § 8.1b(b), the Arbitrator noted no permanent partial disability impairment report and/or opinion was submitted into evidence.

Regarding subsection (ii) of § 8.1b(b), the occupation of the employee, the Arbitrator noted the petitioner was employed as a lineman/electrician[4] at the time of the accident and he can return to work in his prior capacity. The Arbitrator noted the petitioner testified credibly he struggles to complete his duties due to right knee pain and weakness. The Arbitrator noted the petitioner testified he still struggles to bend his knee, kneel down, and climb and descend stairs and ladders. The Arbitrator noted kneeling down and climbing stairs and ladders were a part of the petitioner's job duties. The Arbitrator noted the petitioner testified he completes his job duties more slowly and he requests assistance from other workers more often. Because of heavy labor job duties, the petitioner continues to have right knee pain and weakness while completing his job duties, which is corroborated by follow-up visits to his orthopedic physician and a full-duty release, the Arbitrator therefore gave *greater* weight to this factor.

Regarding subsection (iii) of § 8.1b(b), the Arbitrator noted the petitioner was 60 years old at the time of the accident, meaning he would continue to work with the effects of his injuries and may feel those effects to a degree greater than a younger person. The petitioner's testimony on those effects and difficulties were credible and borne out in his medical records. The Arbitrator therefore gave *lesser* weight to this factor.

Regarding subsection (iv) of § 8.1b(b), the petitioner's future earnings capacity, the Arbitrator noted the petitioner maintained his earning capacity and the Arbitrator therefore gave *lesser* weight to this factor.

Regarding subsection (v) of § 8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator noted the medical records corroborate the petitioner's disability. The medical records revealed positive objective findings of structural damage and limited range of motion in the petitioner's right knee. The petitioner testified he had marked deficit regarding his right knee strength and motion. He also testified his right knee affects the performance of his job duties and his activities of daily living. The petitioner testified he has difficulties performing job duties that require physical work that includes kneeling and climbing stairs and ladders. He also testified when he must perform physical work, he performs the work more slowly and often requires help from other employees. The petitioner testified he continues to take medication after completing work throughout the week. Kneeling, climbing ladders and stairs, and bending his knee are all part of the full performance of the petitioner's job duties and the medical records accurately described the petitioner's current functioning, limitations and disabilities. The petitioner's complaints, which highlighted impaired motion and strength, were corroborated by medical records, which also noted the recommendation for injections, but those were never approved. The Arbitrator therefore gave *greatest* weight to this factor.

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[4] Editor's Note – in the Findings of Fact, the Arbitrator labeled the petitioner's job as a **mechanic** at the time of injury and at time of arbitration the petitioner's job is described as a "team leader" or "supervisor." It is unknown where the Arbitrator based her finding that the petitioner worked as a lineman, electrician.

The Arbitrator, after reviewing the 8.1(b) factors determined the petitioner sustained permanent partial disability of 25.5% loss of use of the right leg under Section 8(e).

The Commission on review modified the award of the Arbitrator and reduced the award to 20% loss of use of the right leg. The Commission noted the respondent's argument that when the petitioner's treating physician released the petitioner for full duty, the physician stated, "impairment rating is zero." The Commission found this statement by the doctor was not a report as contemplated under Section 8.1b(a) nor was there any indication this impairment rating opinion was determined based upon the most current edition of the AMA guides to evaluating permanent impairment.

The Commission, however, found the Arbitrator gave too much weight to the fifth factor – evidence of disability corroborated by the treating medical records. The Commission noted the petitioner did not "specifically testify about having any strength or range of motion issues." Further, the Commission noted the May 5, 2014 medical note of Dr. Shah demonstrated the petitioner had full range of motion and full strength and significantly improved pain. The Commission concluded the petitioner had some evidence of disability corroborated by the medical records, but not to the degree found by the Arbitrator.

V. OTHER ISSUES

a. 19(h) and 8(a)

***Zielinski v. Cerami Construction,* 17 I.W.C.C. 0594 (September 28, 2017)**

At arbitration, the parties presented the issues of earnings, medical expenses, TTD, TPD, maintenance benefits and nature and extent of the injury. The Arbitrator entered an award, finding among other issues, that the petitioner was entitled to wage differential benefits in an order dated September 4, 2012.

The Arbitrator found the petitioner's right rotator cuff and biceps tendon rupture injuries for which petitioner underwent two surgeries resulted in an impairment of earnings as a valid functional capacity evaluation of April 10, 2012 showed the petitioner was limited to medium duty, with occasional lifting of 55 pounds, and the petitioner was not capable of resuming his former trade as a cement finisher. Dr. Ho, a treating physician, reviewed the functional capacity evaluation on May 14, 2012 and agreed the petitioner should be permanently restricted from resuming work as a cement finisher. Dr. Rubinstein, the petitioner's selected examiner, agreed. The respondent offered no contrary opinion from its examiner, Dr. Tonino. The petitioner offered into evidence a report from Susan Entenberg, a certified vocational rehabilitation counselor. Entenberg found the petitioner's present earning capacity to be approximately $12.00 to $15.00 per hour based on his work history and restrictions. The Arbitrator awarded 8(d)1 benefits of $799.92 per week.

In 2016, the respondent received notice from a claims examiner the petitioner had been working as a cement mason. The respondent filed a 19(h)/8(a) petition to modify the benefits of the petitioner. The respondent presented three witnesses to support its petition. The first witness held

the position of Flat Work Supervisor and hired the petitioner as a cement finisher for one day from Local Union Number 502 in 2015.The petitioner was hired to pour a floor and the daily work log indicated he worked eleven hours. The witness testified pouring a floor requires the use of a ten-pound bull float to smooth concrete, but he did not recall which arm the petitioner used to operate the float. To operate a bull float, a cement finisher floats it across concrete until it gets to the desired distance, then twists the handle a quarter turn to cock it back towards him or herself, smoothing the concrete as it returns. The second witness testified he hired the petitioner for two days of work on October 29th and 30th of 2015. There was testimony a cement finisher entailed several duties, more intense than others. The petitioner worked sixteen hours on the 29th and one hour on the 30th as a concrete finisher. The second witness was not on site on the days the petitioner worked and did not know if the petitioner actually operated a bull float or simply used a rake the entire time. A garden rake would make sure perforated plastic did not get covered up while concrete was being poured.

The third and final witness testified he hired the petitioner for two and-a-half days to pave cement. The petitioner was one of fifty employees paving cement, which entails numerous duties, including carrying a spray can around with water in it to mist the concrete so it does not dry out before it has been properly smoothed. The third witness acknowledged the person performing this duty could fill up the can at his or her discretion.

The Commission denied the respondent's petition. The Commission found that since the 2012 award the petitioner had not worked as a cement finisher except for four and one-half days in 2015. The Commission found petitioner did not perform work requiring him to lift over 50 pounds or use his right shoulder. The Commission found the petitioner's need for funds were due to his diabetic condition and not with improvement of his condition. In 2016, the petitioner received his pension, so he no longer needed to seek money from employment.

b. Jurisdiction

***Gilmartin v. Kipin Industries, Inc, and State Treasurer as ex-officio custodian of the Illinois Workers' Benefit Fund* 17 I.W.C.C. 0660 (October 18, 2017)**

At arbitration, the parties proceeded to hearing on all issues due to the respondent failing to carry workers' compensation insurance and the matter proceeding against the Illinois Workers' Benefit Fund. The petitioner alleged an accident date of December 20, 2008. On the date of accident, he was working as a project manager. The petitioner testified that in the middle of December 2008 he informed his supervisor, he was not feeling well. The supervisor told him to go to the nearby clinic. At the time of the accident, the petitioner worked at a job site in West Virginia. The first four years of working for the respondent he worked at projects in Chicago. Thereafter, the petitioner worked at out-of-state job sites. The petitioner presented to the clinic and was diagnosed with an aneurysm in the right side of the groin area. The Petitioner recalled telling his supervisor he needed to take care of the aneurysm. On January 5, 2009, the petitioner underwent surgery comprising cystoscopy, bilateral ureteral catheterization, and bilateral retrograde pyelogram. The petitioner was released to work full duty on March 14, 2009.

The petitioner testified he was let go by the respondent after his injury because they had no work for him. The petitioner, helped by his wife, applied for jobs after being released to full duty work. The parties took the evidence deposition of Dr. Mulamalla. He is a cardiologist and only performed the screening to make sure the petitioner was healthy enough to undergo surgery. Dr. Mulamalla does not treat groin pseudoaneurysms as part of his practice. Dr. Mulamalla did not evaluate the petitioner's pseudoaneurysm. He did no testing to confirm the diagnosis. Dr. Mulamalla could not draw a causal connection between the petitioner's work activities and the injury. Dr. Mulamalla testified he did not evaluate the injury and could not say whether it was trauma induced. The Arbitrator found the petitioner failed to prove an accident arising out of and in the course of his employment.

On review, the Commission denied the claim finding it should be dismissed for lack of jurisdiction. The Commission found that the respondent was a Pennsylvania corporation and the decedent (petitioner subsequently died from unrelated causes) was allegedly injured in West Virginia. The Commission found there was no evidence in the record regarding the situs of the decedent's contract of hire with the respondent. The Commission found that Illinois only had jurisdiction if the contract of hire occurred in Illinois. Although the petitioner worked in Illinois for the initial four years, the Commission explained it was unwilling to rely on an inference that the contract of hire occurred in Illinois to exercise jurisdiction for an out-of-state injury.

c. Injured Workers' Benefit Fund

Espino v MLV Construction, and State Treasurer as ex-officio custodian of the Illinois Worker's Benefit Fund, **17 I.W.C.C. 0662 (October 20, 2017)**

The parties proceeded to arbitration on all issues since the respondent carried no insurance at the time of the accident and the case proceeded against the Illinois Workers' Benefit Fund. Petitioner was the sole witness as no one appeared on behalf of the respondent MLV Construction. On October 26, 2009, the petitioner worked at a MLV jobsite on a tile project when he heard a "big lock" in his knees.

The petitioner underwent medical care with several providers before he sought treatment with Dr. Silver. On May 4, 2010, Dr. Silver performed a right knee prepatellar bursectomy, arthroscopic debridement, and removal of a loose body. After this surgery, Dr. Silver restricted the petitioner from returning to any work and implemented a post-surgical therapy program. During a July 14, 2010, follow-up appointment, Dr. Silver found the petitioner had both "significant quadriceps atrophy" and increasing pain in his left knee "due to the compensatory stress he has placed on it." An August 19, 2010 MRI study found a small tear in the medial meniscus and mild joint effusion that Dr. Silver then addressed via a second arthroscopic procedure on October 8, 2010, when he performed an arthroscopic debridement and removal of loose bodies in the joint. On May 24, 2011, an FCE indicated the petitioner was capable of medium duty work with a 45-pound lifting restriction and a 25-pound carrying restriction. The petitioner testified he returned to carpentry work for a different construction company approximately one month after the FCE.

The Arbitrator awarded medical expenses of $162,400, 67 weeks of TTD and 30% loss of use of the right leg under Section 8(e). The Arbitrator noted the Workers' Benefit Fund was liable as a co-respondent pursuant to Section 4(d).

On review, the Commission affirmed and adopted the decision of the Arbitrator in a 2-1 decision. Commissioner Simpson dissented. Commissioner Simpson was not persuaded the respondent MLV Construction was not covered by workers' compensation insurance at the time of the alleged accident. Commissioner Simpson noted the petitioner "failed to submit certification from the National Council on Compensation Insurance (NCCI)." Instead, the petitioner submitted exhibit #24 as evidence of MLV's lack of insurance. Commissioner Simpson found this document was hearsay and of no probative value, and it reflected an incorrect date of accident. Commissioner Simpson also noted the medical records of several providers reference Liberty Mutual as the insurance carrier and include a workers' compensation claim number. There are also Liberty Mutual documents in the medical records indicating charges were pending further investigation of the claim. The forms included a workers' compensation claim number and the date of accident. Commissioner Simpson concluded there was no credible evidence proving a Liberty Mutual policy, or any other carrier's policy, was not in effect during the alleged accident.

The Commissioner stated, "I do not believe that sufficient evidence has been presented to hold the Injured Workers' Benefit Fund responsible for any monetary award in this case and therefore I dissent from the majority opinion affirming and adopting the Decision of the Arbitrator." The Commissioner further noted the award should have been modified down to 15% loss of use of the leg. Commissioner Simpson noted Dr. Silver suspected "compensatory stress," and believed the petitioner had a torn medial meniscus. On arthroscopic examination, however, no tears were found and there was no bursitis in the left knee. Dr. Silver debrided loose bodies and cartilage fragments, and the records show no significant residual complaints.

17IWCC0304

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 Employment	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

HECTOR COBARRUBIAS,

Petitioner,

vs. NO: 15 WC 34073

D&M CUSTOM CARPENTRY,

Respondent,

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, employer/ee relationship, medical expenses, and temporary total disability, and being advised of the facts and law, reverses the Decision of the Arbitrator on the issue of employment relationship but attaches the Decision of the Arbitrator, which is made a part hereof, for the findings of facts, with the modifications noted below.

The Commission finds that Petitioner has proven that he was an employee of Respondent at the time of his alleged accident. Although there are credibility issues with all of the witnesses, we find that the most compelling testimony is that Respondent had a written independent contractor agreement with other individuals with whom he worked and required those individuals to show proof of workers' compensation insurance coverage. (T.102-103). Respondent testified that he only had an oral agreement with Petitioner. (T.137, 147, 166). Petitioner testified that he was never asked to carry or show proof of workers' compensation insurance to work at a particular job. (T.20).

The Illinois Supreme Court has identified a number of factors to assist in determining whether a person is an employee. Among those factors are: (1) whether the employer may control the manner in which the person performs the work; (2) whether the employer dictates the person's schedule; (3) whether the employer compensates the person on an hourly basis; (4) whether the employer withholds income and social security taxes from the person's compensation; (5) whether the employer may discharge the person at will; and (6) whether the employer supplies the person with materials and equipment. (Esquinca v. Ill. Workers' Comp. Comm'n, 2016 IL App (1st) 150706WC ¶47 *citing* Roberson v. Industrial Comm'n, 225 Ill.2d 159, 175 (2007)).

17IWCC0304

In this case, Respondent assigned Petitioner to a particular job site and went over the job to be performed. (T.17, 122). Respondent dictated Petitioner's schedule to the extent that Mr. Smith determined where and when Petitioner worked. (T.17) Respondent paid Petitioner based on the number of hours worked as recorded in a log provided by Respondent. (T.11-13). Respondent did not withhold income or taxes from Petitioner's compensation. (T.62-63). Respondent could discharge Petitioner at will. (T. 19, 24). Respondent provided all of the tools other than those that Petitioner carried on his tool belt. (T.16-17). Although Respondent did not withhold taxes or provide insurance to Petitioner, the manifest weight of the other evidence supports a finding that Petitioner worked as an employee rather than an independent contractor.

Nevertheless, we also find that Petitioner failed to prove that he sustained an accidental injury arising out of and in the course of his employment with Respondent on September 29, 2015. Although Petitioner testified that he hurt his back carrying a door at a job site and the medical records seem to also relay that version of events, Ed Couch testified that Petitioner told him, upon first arriving at the worksite, that Petitioner would be leaving early because he had hurt his back the day before. (T.95-99). Petitioner also told Dwight Smith, the owner of Respondent, that he hurt his back on the day before September 29, 2015, while trying to catch his grandson. (T.160). The Commission finds that the testimony of Mr. Couch and Mr. Smith are more persuasive on the issue of accident than Petitioner.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's claim for benefits is denied as he has failed to prove that he sustained an accidental injury arising out of and in the course of his employment with Respondent.

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: MAY 16 2017

Charles J. DeVriendt

Joshua D. Luskin

Deborah L. Simpson

SE/
O: 4/12/17
49

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

STATE OF ILLINOIS)
)
COUNTY OF COOK)

17IWCC0304

ILLINOIS WORKERS' COMPENSATION COMMISSION

19(b) ARBITRATION DECISION

HECTOR COBARRUBIAS
Employee/Petitioner

Case #15 WC 34073

V.

D&M CUSTOM CARPENTRY
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Robert Williams, arbitrator of the Workers' Compensation Commission, in the city of Chicago, on February 1, 2016. After reviewing all of the issues, the stipulations of the parties and the evidence, it is hereby found and ordered as follows:

ISSUES:

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

B. ☒ Was there an employee-employer relationship?

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

D. ☒ What was the date of the accident?

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

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

G. ☒ What were the petitioner's earnings?

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

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

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

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

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

M. ☐ Is the respondent due any credit?

N. ☐ Prospective medical care?

FINDINGS

- Timely notice of this accident was given to the respondent.
- At the time of injury, the petitioner was 45 years of age, single with no children under 18.

ORDER:

- The petitioner's request for benefits is denied and the claim is dismissed.

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

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

Robert E. Williams

Signature of Arbitrator

March 10, 2016
Date

MAR 10 2016

17IWCC0304

FINDINGS OF FACTS:

The petitioner, a carpenter, sought medical care with Dr. Salgado at Balance Body Therapy for his low back and reported that on September 29, 2015, he unloaded equipment and a metal door from a truck to a third floor and that afterward while bending down, he felt paralyzing and intense back pain that immobilized him. The petitioner reported low back, hip, upper and lower leg and knee pain. Therapy modalities approximately three times a week were provided. EMG and NCV studies on October 15th revealed radiculitis affecting L4-S1, bilaterally. MRIs on October 16th revealed a left-sided herniation at L5-S1 and extensive ACL reconstruction changes, a subtle intrasubstance horizontal irregularity and a small joint effusion of his left knee. Dr. Abdellatif saw the petitioner on November 10th. The petitioner was given a lumbar epidural at L5, lumbosacral medial branch blocks bilaterally at L5-S1 and L3-4 and lumbosacral medial facet blocks bilaterally at L4-L5, L5-S1 and S1 on November 18th. The petitioner had additional injections from Dr. Abdellatif on December 10th and January 22, 2016. He continued his therapy with Dr. Salgado through January 26, 2016.

FINDING REGARDING WHETHER THE RESPONDENT WAS OPERATING UNDER THE ILLINOIS WORKERS' COMPENSATION ACT:

The petitioner proved that the respondent was operating under the Illinois Workers' Compensation Act on September 29, 2015. The respondent was a general contractor engaged in the remodeling and altering of structures under the automatic coverage provision of subsection 1 of Section 3 of the Act.

FINDING REGARDING WHETHER THERE WAS AN EMPLOYER/EMPLOYEE RELATIONSHIP BETWEEN THE PARTIES AND WHETHER THE PETITIONER'S ACCIDENT AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT WITH THE RESPONDENT:

The petitioner failed to prove that an employer/employee relationship existed between him and the respondent on September 29, 2015, and that he sustained an accident on September 29, 2015. The respondent is a general contractor in the business of remodeling. The respondent subcontracted their remodeling jobs to experienced tradesmen with specialized skills and training to complete the different phases of their remodeling job. The petitioner was a carpenter and tasked with using his carpentry and cabinet making skills to work only on that part of a project. He was not a general laborer that would be expected to work full time. He was paid by the hour and did not have a set number of work hours per day or per week. The petitioner kept track of the hours he worked and billed the respondent for those hours. No withholdings were deducted from the money paid to the petitioner. He used his own hand tools and provided his own transportation. It is noted that the petitioner's log of the hours and weeks that he worked is not consistent with or supported by the compensation reflected in his exhibit 8, the check issuer transactions. In fact, the check issuer transactions reflect only thirty-four weeks from September 26, 2014, through September 29, 2015, and only two forty-hour weeks at the $20 per hour rate the petitioner testified he was paid. It is apparent that the petitioner did not work five days a week or even every week during the year prior to his injury. The need for his services depended on the remodeling project and the petitioner determined how the carpentry was done in order to complete the task.

Also, the petitioner's claim of an employee-employer relationship with the respondent and his claim of an injury moving a door were rebutted by Edwin Couch, a

carpenter subcontractor for the respondent. Dwight Smith, respondent's owner, also testified that the petitioner attributed his back condition to his grandson jumping on him. Nor does the petitioner have the protection of a statutory employee relationship provided by Section 1(a)3 of the Act, since he was the subcontractor and not an employee of a subcontractor. The petitioner's request for benefits is denied and the claim is dismissed.

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

Denise DeGarmo,

Petitioner,

vs.

NO: 16WC 17193

17IWCC0510

Southern Illinois University Edwardsville

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19b having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, causal connection, medical expenses, prospective medical care, 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 1, 2016 is hereby affirmed and adopted.

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

17IWCC0510

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

DATED: AUG 18 2017
SJM/sj
o-8/3/17
44

Stephen J. Mathis

Deborah L. Simpson

David L. Gore

17IWCC0510

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
19(b)/8(a)

DENISE DEGARMO
Employee/Petitioner

v.

SOUTHERN ILLINOIS UNIVERSITY - EDWARDSVILLE
Employer/Respondent

Case # **16** WC **17193**

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 **Paul Cellini**, Arbitrator of the Commission, in the city of **Collinsville**, on **July 20, 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 _____

17IWCC0510

FINDINGS

On the date of accident, **March 21, 2016**, 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.

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

In the year preceding the injury, Petitioner earned $**92,143.00**; the average weekly wage was $**1,771.98**.

On the date of accident, Petitioner was **60** 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** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

ORDER

The Arbitrator finds that the Petitioner has failed to prove an increased risk of injury, and therefore has failed to prove she sustained an accidental injury arising out of her employment with the Respondent on March 21, 2016.

No benefits are awarded.

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

November 29, 2016
Date

ICArbDec19(b)

DEC 1 - 2016

STATEMENT OF FACTS

The Petitioner worked as an associate professor at the Respondent's campus in Edwardsville, Illinois. On 3/21/16, the Petitioner had been teaching a class at 3406 Peck Hall. She had been teaching a class in Room 3406 of Peck Hall, and her car had been parked in Lot A, or the "Green Lot". The Petitioner testified that this lot was the one closest to most of the campus academic buildings. She also testified that an individual must either have a specific tag hanging in the car to park there, or must use a parking meter. She testified that the Respondent maintains the lot. Asked if the lot is where faculty members are directed to park, the Petitioner testified: "That is one lot that faculty can park in."

Between 4:20 and 4:30 p.m., the Petitioner was headed towards the lot with her colleague at an exit with five doors. She exited the door to her far left as she walked out, and as she walked in the outdoor area outside of the doors, she felt the toe of her shoe catch a groove between two sidewalk pavers and fell. The pavers are large approximately 2' x 2'.

She testified that when she caught her right toe she fell forward, landed on her left side on the pavers, hit her head and bent her glasses, and her right knee ended up over part of her body. She was wearing open toe Birkenstock sandals. She was dizzy, disoriented and nauseous when she fell, and needed help getting up. She testified that she needed help to get up, and that the colleague she was with then brought her to Anderson Hospital.

The Respondent's injury report documentation (dated 4/1/16) all indicates a consistent reported history of tripping between uneven grooves between sidewalk slabs. There was no loss of consciousness. A witness statement from Suranjan Weeraratne indicates that he and the Petitioner had made a presentation and were exiting Peck Hall towards the parking lot A. He was slightly ahead of Petitioner, but heard her fall, noting she had tripped on the concrete, and that he brought her to the hospital. (Rx1 through Rx3).

Petitioner testified that she had a head contusion and abrasion, and significant soreness in the right knee, neck and back. The Anderson Hospital report noted a history of the Petitioner tripping over uneven sidewalk and striking her forehead on the concrete. She reported a headache and dizziness but no loss of consciousness. She also noted left hand and neck pain, along with the development of anterior right knee pain. She had a left forehead hematoma. CT scans of the brain and cervical spine showed nothing acute, with some mild cervical spondylosis. Right knee x-rays, compared to June 2011 x-rays and August 2011 MRI, reflected no effusion or acute fractures, and mild to severe tricompartmental osteoarthritis with some loose fragments and a Baker's cyst. She was diagnosed with a minor head injury, cervical strain and right knee contusion, prescribed Ibuprofen, and was advised to see her primary provider, Dr. Reynolds, in 5 to 7 days. (Px1).

Petitioner saw Dr. Reynolds on 3/31/16, reporting she had been on a stone path at work, there were gaps between the large flat stones and she caught her foot, striking her head and injuring her right knee. She reported on and off mild headache and knee pain with standing and walking. The Petitioner testified that Dr. Reynolds recommended she follow up with an orthopedic surgeon for her right knee, and the report shows she was referred to Dr. Bicalho and for possible MRI. At a 5/26/16 follow up for multiple concerns, the Petitioner reported ongoing lateral right knee pain that radiated to the thigh and calf. Noting that only an MRI had been authorized, this was obtained on 5/27/16. The radiology report indicated: 1) moderate knee joint effusion with several intrascapular bodies, 2) a moderate Baker's cyst, 3) moderate chondromalacia (Grade 2 to 3 in all

compartments), 4) possible medial meniscus tearing or fraying, and 5) no ligament tears. On 6/13/16, Dr. Reynolds again recommended an orthopedic consultation. (Px1).

The Petitioner testified that she has been unable to see a surgeon because she could not be seen without workers' compensation authorization from the carrier. She testified that her head, neck and back "have been fine", but that her right knee hasn't improved and she still wants to seek treatment for this.

The Petitioner testified that she took the photographs in Px5, and that they accurately depict the noted groove between the pavers where she fell. The whitish caulking-type material seen in the photos exists between some of the pavers, but not all of them, and there is no symmetry as to which have it and which don't. The part where she caught her toe did not have this caulk-type material in the groove. She testified that Rx5(C) shows the white caulk between the pavers. The Petitioner testified that there was no uniformity regarding the caulk in the grooves, and that the photo in Px5 where her finger is in the groove was next to where her toe got caught, and that it was a part of the groove that actually had caulking in it.

The Petitioner also reviewed the photographs submitted into evidence by the Respondent (Rx5), and agreed they depict the area by Peck Hall where she fell. She also testified that the door she exited on 3/21/16 was depicted in Rx5(B) to the right of the handicapped entry button on the post. However, she said the location where she actually fell was not depicted in this photo, and would have been depicted if the photo were taken further to the right. The Petitioner was not sure what doors Rx5(D) showed, possibly a different entrance / exit, but they were not the entry/exit where she fell.

The Petitioner's job requires her to go to different buildings on campus, and she would have to take materials with her between buildings, including syllabi, curriculum, IPad, teaching materials and student materials. She was carrying those items when she fell.

The Petitioner testified that she missed three days of work immediately after the injury, and had signed a revocable waiver of TTD (Rx4).

The Petitioner testified to a prior work-related right knee surgery in 2007, and that she had recovered from that normally with no further problems until this incident. On cross examination, she testified that this 2007 surgery involved the removal of a piece of cartilage, and there was a tear of some sort outside of the knee. She agreed she had an aneurysm down in the right calf in 2011 after breaking her right ankle, but was not aware of such aneurysm being behind her right knee, though she had no reason to disagree if the medical records indicated this – this was indicated in the 3/21/16 notes from Anderson Hospital, along with a possible deep vein thrombosis in the right leg at that time. She also agreed that she has undergone two left knee surgeries.

Also on cross exam, the Petitioner testified that when was exiting the building and fell, she was leaving work for the day and was going to go home. She said that when she fell she had been carrying her curriculum, course syllabi, student handouts and her university assigned IPad in a messenger bag over her shoulder. She agreed that she didn't note that she was carrying anything when she completed the Respondent's Employee's Notice of Injury form. (Rx1).

The Petitioner agreed she only missed the three days of work, which the ER authorized (Px1), and otherwise has been working full duty without restrictions. She has not undergone physical therapy for this injury, but testified she does take pain and inflammation medications prescribed by Dr. Reynolds. She currently teaches online and so hadn't attempted to return to the classroom duty prior to the hearing date.

The Respondent's assistant grounds superintendent, Kert MacLaughlin, was called to testify by the Respondent. He indicated that his job involves taking care of anything related to the grounds outside of the buildings, including maintenance of sidewalks as far as removal of debris and obstructions.

Mr. MacLaughlin testified that if he gets notice of a sidewalk defect, his department would put a caution cone or barricade up, and notify Respondent, who would determine which party was responsible for repairs. Part of his job would also be to report such defects. He testified that he is familiar with the walkways around Peck Hall. He identified Rx5A and 5B as the west entrance to Peck Hall, and agreed his department maintains the area.

Mr. MacLaughlin testified that he is not aware of any defects in the walkway, and if he had been he would have reported it. He indicated that the caulk between the "pavers" is cosmetic, as the walkway is actually one large piece of concrete with exposed aggregate surface, and there are grooves cut into it rather than individual pavers. In reviewing the photos in Px5, he testified that he would not consider what was depicted to be defects.

On cross examination, he testified that he knows nothing about the Petitioner's fall other than what he heard during her hearing testimony. He knew the area where she fell, and that the entire area is covered by the pavers, but not the exact location where she fell. He and his crew regularly examine the area, noting they have to blow out and remove debris. He agreed that in some areas the caulk is gone due to weathering. He testified that it would be unusual for there to be pieces of broken aggregate or aggregate debris in the grooves, but that it is possible. If a break is found in the concrete and it separates, those sections would be cut out and repaired. With regard to the grooves depicted in Px5, he testified he would consider them normal and consistent with the rest of the groove gaps throughout.

The Petitioner has submitted medical expenses totaling $6,325.38 she alleges to be related to this case as Petitioner's Exhibit 3. The parties have stipulated that if the Arbitrator awards causally related reasonable and necessary medical expenses in this case, the Respondent shall pay same directly to the applicable medical providers pursuant to the Medical Fee Schedule in Section 8.2 of the Act or by PPO agreement, whichever as less, and that the Respondent is entitled to credit for any payment of the awarded medical that was made prior to hearing.

CONCLUSIONS OF LAW

WITH RESPECT TO ISSUE (C), DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF THE PETITIONER'S EMPLOYMENT BY THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator initially notes that the claimant has the burden of establishing, by a preponderance of the evidence, that her injury arose out of and in the course of her employment with the Respondent on 3/21/16.

In the course of the employment" refers to the time, place, and circumstances under which the claimant is injured. *Scheffler Greenhouses, Inc. v. Industrial Comm'n*, 66 Ill. 2d 361, 366, 362 N.E.2d 325, 5 Ill. Dec. 854 (1977). Injuries sustained on an employer's premises, or at a place where the claimant might reasonably have been while performing her duties, and while a claimant is at work, or within a reasonable time before and after work, are generally deemed to have been received in the course of the employment. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d at 57. The evidence indicates that the Petitioner had just exited her work building that day, Peck Hall, and fell just outside the door while she was walking

to her car, and while remaining on the Respondent's premises. Based on this evidence, the Arbitrator finds that the Petitioner's incident occurred in the course of her employment.

With regard to the second prong of the accident test, the Petitioner must show that the injury arose out of her employment with the Respondent. Both parties have cited the case of *Litchfield Healthcare Center v. Industrial Commission*, 812 N.E.2d 401, 349 Ill.App.3d 486, 285 Ill.Dec. 581 (2004), in support of their respective arguments in this case.

In *Litchfield*, after punching in at a time clock inside the employer's building, the claimant, a certified nursing assistant, realized that she had forgotten her "gait belt" in her car, exited the building and returned to her car to get it. After retrieving the gait belt, she began walking back to the building and tripped on an area of the sidewalk where the concrete slabs were not level with each other. She identified an exhibit, which showed one concrete slab higher than the adjoining slab, and testified that the height difference was approximately 1 1/4 inches. The Court determined that tripping on a sidewalk is a neutral risk of injury, and thus the question was whether the claimant had been exposed to a risk of injury to a greater extent than that to which the general public was exposed. The Court stated that "this case does not merely involve the risks inherent in walking on a sidewalk which confront all members of the general public." In support of this, they cited the claimant's testimony and photographs showing varying heights in the adjoining concrete slabs, the Court found that there was a defect or hazard in the sidewalk and, therefore, there was a causal connection between the condition of the premises and the injury: "Special hazards or risks encountered as a result of using a usual access route satisfy the 'arising out of' requirement of the Act." (citing *Bommarito v. Industrial Comm'n*, 82 Ill.2d 191, 412 N.E.548, 45 Ill.Dec. 197 (1980) and *Mores-Harvey v. Industrial Comm'n*, 345 Ill.App.3d 1034, 804 N.E.2d 1086, 281 Ill.Dec. 791 (2004)). *Id.*

Based on this case law, the Arbitrator reasons that the issue here becomes whether the neutral risk of traversing the walking area outside of Peck Hall involved a risk to the Petitioner which was greater than that encountered by the general public. The question is whether the paver-like gap created in the concrete where she fell constitutes a "special hazard or risk." The Arbitrator does not believe that the Petitioner has shown this through the evidence in the case.

The Arbitrator notes that the Petitioner testified that she tripped on a gap in the walkway surfaces. Mr. MacLaughlin testified that the walkway is actually a solid piece of concrete, as opposed to pavers, and has gaps carved into it to address expansion and contraction of the surface.

While the Petitioner testified that she has to traverse between multiple buildings on campus in the course of her duties, she did not testify with regard to the frequency with which she traveled to and from Peck Hall. The witness statement of Mr. Weeraratne indicates that he and the Petitioner had made a presentation there. It is unclear from the evidence whether this means that the visit to Peck Hall was unusual for the Petitioner or if she regularly visited this building. She did not testify as to how often she traversed the walkway in this area.

The Petitioner also has not provided any evidence that the messenger bag she was carrying on her shoulder contributed to her fall in any way, whether due to its weight or any impact on her vision.

There are no real measurements that were submitted into evidence with regard to the size of the gap where the Petitioner testified she fell. There are photographs in evidence. There is a photograph with the Petitioner putting her fingertip into one of the grooves. However, this does not really indicate exactly how

large this gap was. The photos in evidence which depict the entire area which appears to have pavers does not seem to the Arbitrator to show any significant gaps. Instead, it appears to show a fairly consistent

It appears to the Arbitrator that the Petitioner testified that the area which caused her to fall did, in fact, have caulk within it. Additionally, Mr. MacLaughlin testified that the caulk was placed for aesthetic purposes as opposed to as gap filler placed for safety. Given that this is a public university setting, the Arbitrator has to assume that this walkway is traversed very often by students and faculty alike, and no evidence was presented that anyone had ever had an issue with walking over the gaps in the concrete.

Overall, the Arbitrator finds that the gap the Petitioner tripped on is a very common thing encountered generally on concrete outdoor walking surfaces, and that there was no special defect or hazard proven in this case. Unlike the situation in *Litchfield*, there was no indication of an uneven walkway here, but rather a pretty typical gap between two pieces of concrete that her sandal happened to get caught in. The Arbitrator finds that the Petitioner has failed to prove an increased risk over and above that encountered by the general public.

WITH RESPECT TO ISSUE (F), IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

Based on the Arbitrator's findings that the Petitioner failed to prove that she sustained accidental injury arising out of her employment with the Respondent on 3/21/16, this issue is moot.

WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:

Based on the Arbitrator's findings that the Petitioner failed to prove that she sustained accidental injury arising out of her employment with the Respondent on 3/21/16, this issue is moot

WITH RESPECT TO ISSUE (K), IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE, THE ARBITRATOR FINDS AS FOLLOWS:

Based on the Arbitrator's findings that the Petitioner failed to prove that she sustained accidental injury arising out of her employment with the Respondent on 3/21/16, this issue is moot

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

☒ 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

Torrie Ashby,

Petitioner,

vs.

NO: 16WC 3652

17IWCC0491

Hy-Vee,

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 5, 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.

17IWCC0491

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: AUG 11 2017
o072517
KWL/jrc
042

Kevin W. Lamborn

Michael J. Brennan

Thomas J. Tyrrell

17IWCC0491

STATE OF ILLINOIS)
)SS.
COUNTY OF PEORIA)

- ☐ 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

Torrie Ashby
Employee/Petitioner

v.

Hy-Vee
Employer/Respondent

Case # 16 WC 03652

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 William R. Gallagher, Arbitrator of the Commission, in the city of Peoria, on October 20, 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 _____

17IWCC0491

FINDINGS

On January 25, 2016, 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 $10,556.00; the average weekly wage was $203.00.

On the date of accident, Petitioner was 37 years of age, single with 0 dependent child(ren).

Petitioner has received all reasonable and necessary medical services.

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

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

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

ORDER

Based upon the Arbitrator's Conclusions of Law attached hereto, claim for compensation is denied.

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

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

William R. Gallagher, Arbitrator

November 29, 2016
Date

ICArbDec p. 2

DEC 5 - 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 25, 2016. According to the Application, Petitioner "fell down stairs" and sustained an injury to the "head, back and neck" (Arbitrator's Exhibit 2). Respondent disputed liability on the basis of accident and causal relationship (Arbitrator's Exhibit 1).

Petitioner worked for Respondent as a dishwasher and, on January 25, 2016, Petitioner was scheduled to work second shift which began at 4:00 PM. Petitioner arrived at Respondent's store at approximately 3:30 PM and entered through the front door. Petitioner testified that he proceeded to walk up a flight of stairs to the right of the front door so that he could clock in. At trial, photographs of the stairs were tendered into evidence which revealed a flight of stairs with a landing at the top of them and a shorter flight of stairs to the left of the landing (Petitioner's Exhibit 6).

Petitioner testified that the stairs were not used by the public and the upstairs included a break room for employees, lockers, the area where he had to clock in, etc. Petitioner stated that the weather on January 25, 2016, was rainy and that he was wearing boots. Petitioner proceeded to walk up the flight of stairs, reached the landing, turned and attempted to walk up the second set of stairs to the left. At that point, Petitioner slipped and fell backward onto the landing.

On cross-examination, Petitioner agreed that when he was walking up the stairs, he was taking two steps at a time. In regard to the boots he was wearing, Petitioner acknowledged that Respondent did not require him to wear them. Petitioner also stated that there was a "club room" located on the second floor, but he did not know if the general public had access to it or not.

Six witnesses testified on behalf of Respondent when this case was tried. Five of the six witnesses' testimony was in regard to the circumstances of the fall Petitioner sustained. The testimony of the sixth witness was in regard to an offer light duty work and was made to Petitioner after he was released to return to work.

Stephanie Hascall testified on behalf of Respondent. Hascall was the Respondent's Health Market Manager. Hascall stated that the stairs where Petitioner sustained the fall are, in fact, used by the public and that the "club room" is rented out to customers for parties, events, etc. Further, she stated that the room was also used for cooking demonstrations for Respondent's customers. Hascall also observed Petitioner after he fell and noted that there was no accumulation of water on the stairs and that they were dry. She also stated there was carpeting at the base of the stairs and its purpose was to catch water that might be on the soles of shoes. The stairs themselves also had a rubber coating, another safety precaution. Finally, Hascall specifically remembered Petitioner climbing the stairs two at a time.

Josh Schreiner testified on behalf of Respondent at trial. Schreiner was Respondent's Assistant Manager. He observed Petitioner lying on the landing shortly after the occurrence. He stated that the stairs were dry and Petitioner was wearing boots that were untied.

Richard Allen testified on behalf of Respondent at the time of trial. Allen was Respondent's Food Service Manager. Allen also observed Petitioner on the landing shortly after the occurrence. He also noted that the stairs were dry and Petitioner's boots were untied. He also observed that some of the rubber was coming off of Petitioner's boots. Allen stated that the "club room" is rented to customers for meetings, parties, etc. and is also used for cooking demonstrations. Allen also testified that there were restrooms in the same area which were open for use by the general public.

Amanda Baumann testified on behalf of Respondent at trial. Baughmann was Respondent's Assistant Manager. She also observed Petitioner after he fell and confirmed that he was wearing boots with untied laces and the staircase was dry. She also said that the "club room" was used by customers for various purposes.

Chris Price testified on behalf of Respondent at trial. Price was the Store Director. Price also observed Petitioner after the accident and noted that Petitioner was wearing boots that were untied and the stairs were dry. He also said that the stairs were used by customers to access the "club room" and restrooms.

Following the accident, Petitioner was seen in the ER of St. Francis Medical Center. At that time, Petitioner gave a history of falling down stairs and that he had headaches, neck and back pain. Petitioner was diagnosed with a concussion and discharged (Petitioner's Exhibit 3).

Petitioner was subsequently seen and treated by Dr. Daniel Hoffman, a general practitioner, who initially saw Petitioner on February 1, 2016. Dr. Hoffman diagnosed Petitioner with a closed head injury, cervical strain and thoracic lumbar strain. He authorized Petitioner to be off work and ordered physical therapy (Petitioner's Exhibit 2).

Petitioner continued to be treated by Dr. Hoffman for neck and back pain as well as occipital headaches. Dr. Hoffman later referred Petitioner to Sally Coyle, an Advanced Practice Nurse, for evaluation of his headaches (Petitioner's Exhibit 2).

APN Coyle saw Petitioner on May 31, 2016. Coyle evaluated Petitioner and opined that it was difficult to determine the exact nature of his headache symptoms. Among other things, she recommended Petitioner make some changes in regard to his use of medications (Respondent's Exhibit 5).

Dr. Hoffman released Petitioner to return to work with restrictions of no bending, stooping or lifting more than 20 pounds. This release was effective on July 8, 2016 (Petitioner's Exhibit 2).

Jennifer Neice testified on behalf of Respondent when this case was tried. Neice was Respondent's HR Manager and she testified that she arranged for light duty to be offered to Petitioner when he was released to return to work. Petitioner did return to work for Respondent; however, Petitioner only worked a couple of days. According to Neice, Petitioner quit his job because it was not worth his time.

At trial, Petitioner testified that he has continued to experience severe headaches and stiffness in his neck, back and shoulders. In regard to his brief return to work for Respondent, Petitioner stated that the number of hours of work offered to him were so limited that he did not believe it was worth his time to continue to work there.

Conclusions of Law

In regard to disputed issue (C) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Petitioner did not sustain an accidental injury arising out of and in the course of his employment for Respondent on January 25, 2016.

In support of this conclusion the Arbitrator notes the following:

There was no dispute that Petitioner fell down some stairs and sustained an injury as a result thereof on January 25, 2016.

Petitioner testified that the stairs were not used by the public and the upstairs contained a break room for employees, lockers, the area where he had to clock in, etc. Petitioner was aware of the fact there was also a "club room" but he had no knowledge whether it was used by the public or not.

Five of the six witnesses that testified on behalf of Respondent were either present at the time of the accident or shortly thereafter. Five of the witnesses stated that the stairs were used by the public and the "club room" was rented out to customers for parties, events, etc. Some of Respondent's witnesses also testified that the "club room" was used for cooking demonstrations.

The aforementioned witnesses also testified that the stairs where Petitioner sustained the fall were dry on the day of the accident. Stephanie Hascall also stated that the stairs had a rubber coating. The Arbitrator also noted the presence of that coating on the photographs of the stairs that were tendered into evidence.

While the evidence clearly indicates that the stairs were available for use by the public, this is not the critical issue in this case.

For Petitioner to prove that this accident arose out of and in the course of his employment for Respondent, he must prove that his employment exposed him to a greater degree of risk than the general public. Caterpillar Tractor Co. v. Industrial Commission, 541 N.E.2d 665 (Ill. 1989).

When Petitioner was climbing the stairs, he was performing an activity of daily life also performed by members of the general public. Petitioner's employment by Respondent did not expose him to a greater degree of risk than that of the general public. The stairs were dry and had a protective rubber coating.

Petitioner's actions in this case were similar to an employee sustaining an injury while walking across the floor at his employer's place of business. This was likewise held not to expose an employee to a risk greater than that faced by the general public. Illinois Consolidated Telephone Co. v. Industrial Commission, 732 N.E.2d 49 (Ill. App. 5th Dist. 2000).

In regard to disputed issues (E), (F), (J), (K) and (L) the Arbitrator makes no conclusions of law as these issues are rendered moot because of the Arbitrator's conclusion of law in disputed issue (C).

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

Stuart Sanders,
Petitioner,
vs.

17IWCC0261

NO: 15 WC 12506

State of Illinois/Centralia Correctional Center,
Respondent.

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, medical expenses, temporary total disability, 8(j) credit 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 13 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.

DATED: APR 25 2017
KWL/vf
O-4/11/17
42

Kevin W. Lamborn

Michael J. Brennan

Thomas J. Tyrrell

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
19(b)

17IWCC0261

Case # 15 WC 012506

Consolidated cases: N/A

STUART SANDERS
Employee/Petitioner

v.

STATE OF ILLINOIS/CENTRALIA CORRECTIONAL CENTER
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 **Michael Nowak**, Arbitrator of the Commission, in the city of **Herrin**, on **July 14, 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 _____

FINDINGS

On the date of accident, **February 4, 2015**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did 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 $**55,980.00**; the average weekly wage was $**1,076.54**.

On the date of accident, Petitioner was **27** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of $**12,625.68** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**12,625.68**.

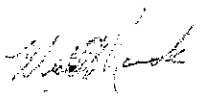
Respondent is entitled to a credit of $**IF ANY** under Section 8(j) of the Act.

ORDER

Because Petitioner failed to establish that he sustained an accidental injury which arose out of and in the course of his employment with Respondent benefits are 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

5/3/16
Date

ICArbDec19(b)

MAY 13 2016

FINDINGS OF FACT

At the time of injury, Petitioner was a 27 year-old employed by Respondent, Centralia Correctional Center, as a Correctional Officer. On the date of injury, January 4, 2015, Petitioner was playing basketball with his fellow officers on his lunch break when he came down on another officer's leg, injuring his right foot and right knee. (T. 13). Petitioner was taken to the ER at St. Mary's Good Samaritan Hospital where x-rays were taken of his right knee and right foot, which revealed no fractures in his knee and fractures of his distal 2nd, 3rd, and 4th metatarsals. (PX3). Petitioner was prescribed hydrocodone and tramadol, given a boot, and released. *Id.*

On January 5, 2014, Petitioner saw Dr. Angela Freehill at the Orthopedic Center of Southern Illinois, who took his medical history and placed Petitioner off work pending an MRI. (PX4 1/5/14). On February 26, 2015, Petitioner received an MRI which revealed objective findings of a complete ACL tear, a mild MCL sprain, a displaced bucket-handle tear medial meniscus, a sever chondromalacia posterior central medial femoral condyle and posterior medial aspect medial tibial plateau, a 6mm in depth impaction fracture lateral femoral condyle, and a large hemarthrosis. (PX4 2/26/15).

On March 20, 2015, Petitioner came under the care of Drs. Brian Wegman and Richard Rames at Woods Mill Orthopedics. (PX6 3/20/15). Dr. Wegman took Petitioner's history, reviewed his MRIs, recommended conservative treatment in the form of anti-inflammatory drugs and home exercises, and suggested he see Dr. Rames for possible knee surgery. *Id.* On March 25, 2015, Petitioner met with Dr. Rames, who recommended knee surgery. (PX6 3/25/15).

On April 1, 2015, Dr. Rames performed ACL reconstruction surgery and a partial medial meniscectonomy on Petitioner's right knee. (PX7). Intraoperative objective findings revealed a torn ACL and a bucket-handle medial meniscus tear. *Id.*

Following surgery, Petitioner performed physical therapy at the Orthopedic Center of Southern Illinois for a period of April 14, 2015 through July 13 2015. (PX4 4/14/15 – 7/13/15).

Petitioner testified at trial that he had no prior injuries to his right knee or right foot.

Petitioner testified that on January 4, 2015, he was playing basketball with other officers on his lunch break when he "came down on another officer's leg" which resulted in injury to his right foot and knee. Petitioner stated that he is not allowed to leave the premises during his lunch break. Petitioner was not the gym officer on the date of his accident. Petitioner testified that he was paid during his lunch break and that he was a salaried employee. Petitioner testified he had been working at Centralia Correctional Center for six months, and that he had been playing basketball for at least two months. Petitioner testified that he had never gotten in trouble for playing basketball. Petitioner testified that Respondent provides both the court and the basketballs for the use of the Correctional Officers during their break hours. Petitioner testified that he had to stay in good physical shape to be able to perform his job duties. Although he testified that he had to take and pass a physical to secure employment with the State of Illinois approximately three and a half years prior, he had not undergone any physical testing for fitness since then. On cross-examination Petitioner admitted that there was no official mandate or memorandum asking correctional officers to work out or play basketball on their lunch periods. Petitioner testified that he did not receive any kind of monetary bonus or incentive to work out or play

basketball on his lunch break. Petitioner testified that he did not have to report to anyone that he was working out on his lunch break, and agreed that the facility would not know whether he was eating lunch or working out.

Former Warden, Julius Flagg, testified on behalf of Respondent. Mr. Flagg testified that correctional officers are paid for seven and a half hours, and that they are not paid for their lunch break. Mr. Flagg agreed that what correctional officers do on their lunch was their own time "per contract". Mr. Flagg testified that there was no mandate from the Department of Corrections, or Centralia Correctional Center, requiring the Petitioner to do any type of physical activities to stay in shape for his job. Mr. Flagg testified that over the course of his career at the Department of Corrections there had never been a mandate requiring a correctional officer to perform physical activities to stay in shape for their job. Mr. Flagg testified that there were correctional officers who were overweight and who were physically fit, and that it was their own choice. Mr. Flagg testified that although the officers were allowed to use them, the basketballs were provided by Leisure Time Service (LTS) and bought by the Inmate Benefit Fund for inmate use, not Centralia Correctional Center

CONCLUSIONS

Issue (C): Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

The Petitioner bears the burden of proving each and every element of his case in order to recover under the Illinois Workers' Compensation Act. *Shelton v. Indus. Com'n*, 267 Ill. App. 3d 211, 221, 641 N.E.2d 1216, 1224 (5th Dist.). In order to satisfy the "arising out of" portion of the Act, the Petitioner must show that the injury was derived from some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury. Sisbro, Inc. v. Indus. Comm'n, 207 Ill.App.3d 193, 203, 797 N.E.2d 665, 672 (3rd Dist.). The "in the course of requirement speaks to the time, place, and circumstances of the injury". *Orsini v. Indus. Com'n*, 117 Ill. 2d 38, 45, 509 N.E.2d 1005. "An injury is received in the course of employment where it occurs within a period of employment, at a place where the worker may reasonably be in the performance of his duties, while he is fulfilling those duties or engaged in something incidental thereto." *Scheffler Greenhouses, Inc. v. Indus. Com'n*, 66 Ill. 2d 361, 367, 362 N.E.2d 325.

Petitioner did not allege a defect on the employer's premises, or more specifically the basketball court, that caused or contributed to his fall and lead to his injury. In fact, Petitioner testified, and Respondent's Exhibits 1, 4, and 5 corroborate, that his fall was due to the fact that he came down on another player's foot while playing a game of basketball. Therefore, the issue then becomes whether Petitioner's participation in a purely voluntary recreational activity during an authorized unpaid lunch break is compensable under the Illinois Workers' Compensation Act.

The Arbitrator finds that Petitioner's activities in this case fell outside the protections of the Act. The Arbitrator finds Petitioner was engaged in a voluntary recreational activity as outlined under Section 11 of the Act. Section 11 provides:

> 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 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.

If Petitioner's participation in the basketball game was deemed to be involuntary he would be entitled to benefits under the Act, however, in this instance Petitioner's participation in the basketball game on January 4, 2015, was purely voluntary. Petitioner admitted that on the day of his injury that he was not assigned to be the gym officer. Petitioner admitted that there was no official mandate or memorandum asking correctional officers to work out or play basketball on their lunch periods. Petitioner testified that he did not receive any kind of monetary bonus or incentive to work out or play basketball on his lunch break. Petitioner testified that he did not have to report to anyone that he was working out on his lunch break, and agreed that the facility would not know whether he was eating lunch or working out.

Additionally, Petitioner admitted on cross-examination that the basketballs and basketball court were actually there for the inmates use. Petitioner agreed that the facility allowed him to use the basketballs and basketball court on his lunch break as a courtesy. Respondent's witness, Mr. Julius Flagg, later testified that the basketballs were provided by Leisure Time Service (LTS) and bought by the Inmate Benefit Fund, not Centralia Correctional Center. Mr. Flagg testified that the Inmate Benefit Fund purchased things for inmate use.

On cross-examination Petitioner admitted that, while he had to take a physical to get his job approximately three and a half years prior, he had not undergone any physical testing for fitness since then. Petitioner testified that the Department of Corrections did not test his physical fitness throughout his career, just at his time of hire. Petitioner testified that his current height was 6"3 and his current weight was 265 pounds. Therefore, Respondent did not require Petitioner to maintain a certain level of fitness.

Mr. Flagg testified that correctional officers are paid for seven and a half hours, and that they are not paid for their lunch break. Mr. Flagg testified that correctional officers are paid for 37.5 hours. Mr. Flagg agreed that what correctional officers do on their lunch was their own time "per contract". Therefore, Petitioner's injury while participating in the basketball game occurred during his unpaid lunch break.

Mr. Flagg testified that there was no mandate from the Department of Corrections, or Centralia Correctional Center, requiring the Petitioner to do any type of physical activities to stay in shape for his job. Mr. Flagg testified that over the course of his career at the Department of Corrections, which was thirty two years, there had never been a mandate requiring a correctional officer to perform physical activities to stay in shape for their job. Mr. Flagg testified that there were correctional officers who were overweight and correctional officers who were physically fit, and that it was their own choice.

The Arbitrator finds that there was no compulsion on the part of the Respondent to have Petitioner use or participate in the playing of basketball. There were no factors introduced at trial to indicate that Respondent offered the recreational facilities as anything other than on a completely voluntary basis as a courtesy to Respondent's employees.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds that Petitioner has failed to prove that he sustained an accident that arose out of and in the course of his employment with Respondent on January 4, 2015. Benefits are, therefore denied.

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

Petitioner testified at trial that he had no prior injuries to his right knee or right foot. "A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." *International Harvester v. Industrial Comm'n*, 93 Ill.2d 59, 63–64, 66 Ill.Dec. 347, 442 N.E.2d 908 (Ill.,1982)). The Arbitrator notes that Petitioner suffered an immediate injury and symptoms. Therefore, the Arbitrator relies on the medical records and the credible testimony of Petitioner, who stated at trial that prior to his accident he had no right knee or foot injuries. The Arbitrator finds that this evidence establishes a causal nexus between the accident and the employee's injury. However, based upon the Arbitrator's finding with regard to Issue C, benefits are denied.

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?

Issue (K): Is Petitioner entitled to any prospective medical care?

The Arbitrator finds that all medical services provided to Petitioner have been reasonable and necessary. Petitioner had x-rays and MRIs which revealed objective findings of a 3 fractures in his right foot, a torn ACL, and a torn meniscus. Petitioner wore a boot for his foot and underwent an appropriate surgery for his knee injury. Following surgery Petitioner completed physical therapy. However, based upon the Arbitrator's finding with regard to Issue C, benefits are denied.

Issue (L): What temporary benefits are in dispute?

The Arbitrator finds Petitioner was temporarily and totally disabled beginning 1/12/15 through the date of hearing. However, based upon the Arbitrator's finding with regard to Issue C, benefits are denied.

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 Accident	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Helen Brooks,
Petitioner,

vs.

No. 14 WC 4973

Kankakee School District 111,
Respondent.

17IWCC0518

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 accident, medical expenses, temporary disability and permanent partial disability, and being advised of the facts and law, finds Petitioner did not prove her accident arose out of and in the course of her employment with Respondent, and reverses the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Petitioner testified she worked for Respondent as a Head Cook II, preparing food for four different schools in the "Co-Op Building." Her usual hours at this job were 7:00 am to 1:30 pm. In January 2014, she also worked a second job as part of the "Fresh Fruit and Vegetable Program" at the Lincoln Cultural Center ("LCC"), a Montessori school in Respondent's district, bagging vegetables and preparing food for that school. She volunteered for that job, which was unrelated to her head cook job. She began that job at 2:00 pm, after driving there from the Co-Op Building.

At her primary job as a head cook in the Co-Op Building, Petitioner parked her car in the same spot in the lot every day, in an area where other employees typically parked. Although she was not aware of anyone from the general public who parked in that area of the lot, Petitioner was not required to park there and the space was not designated to her.

On January 14, 2014, after finishing her shift as head cook in the Co-Op Building and signing out, Petitioner slipped and fell in the icy parking lot walking to her car. She landed on her right side striking her shoulder, wrist, elbow, hip and knee. Petitioner was treated at St. Mary's, where she was x-rayed, authorized off work and referred to Dr. Eddie Jones. She saw Dr. Jones on January 16, 2014; he released her to work on January 20, 2014 although she continued receiving treatment and therapy after that date. On March 11, 2014, Petitioner returned to the emergency room because she had dropped a pan of pizza after her right arm became stiff and weak. She received more x-rays and was given a sling. Dr. Jones released her from his care a few days after that. Petitioner sought care from nurse practitioner Rebecca Carter in April and May 2014 due to persistent symptoms. Ms. Carter took Petitioner off work from April 2, 2014 to May 15, 2014. Following a right shoulder MRI, Ms. Carter released Petitioner to work without restrictions on May 16, 2014.

On cross-examination, Petitioner admitted that neither the Co-Op Building nor the adjacent parking lot in which she fell were owned by the school district; they were owned by the Co-Op. Other educational districts in addition to Respondent School District used the Co-Op Building: R.A.A.C.; S.A.L.T., and IMPACT. Students from school districts in Clifton, Herscher, St. Anne and Momence also used the Co-Op Building. Petitioner admitted: she did not know who maintained the parking lot; Respondent did not direct its employees to park in the lot, and other workers not employed by Respondent also parked in the lot.

While working at her head cook job, Petitioner had no need to go to her car in the lot at any time before her shift ended. Immediately prior to her fall, Petitioner was planning to drive to the LCC Building to begin working her second job. Respondent did not require her to go to the LCC Building for any reason. Although she typically started her second job at 2:00 pm, she could stop at home or run errands in between the jobs.

Cathy Breeck, Petitioner's supervisor and Director of Food Service for the Kankakee School District, testified on behalf of Respondent that the parking lot in which Petitioner fell was neither owned nor maintained by Respondent, but rather, it was owned and maintained by the Cooperative. Although Petitioner parked in the same space in the lot every day, Respondent did not require her to do so. Petitioner's duties in her Fruit and Vegetable Program job were different than her head cook duties. At a meeting for employees in the Fruit and Vegetable Program, they were made aware that that job was separate from their primary jobs and were reminded to "clock out" of their primary jobs when their shifts ended and to "clock in" at their Fruit and Vegetable Program jobs.

Records from St. Mary's Hospital show that on January 14, 2014 Petitioner was treated for a right wrist sprain, right elbow sprain and right knee/hip contusion. Petitioner saw Dr. Eddie Jones two days later; he considered her disability status to be temporary and her prognosis, good. He released her to her regular work with no restrictions on January 20, 2014. ATI Physical therapy records showed Petitioner completed 11 therapy sessions by March 13, 2014, and was discharged having met all short term and long term goals. A right shoulder MRI taken at that time showed no significant tear; only mild supraspinatus tendinopathy.

The Arbitrator found Petitioner did prove a compensable accident even though she had "clocked out" of her head cook job, because her accident occurred in a parking lot provided by Respondent. Citing *Vill v. Industrial Comm'n, 365 Ill.App.3d 906 (1st Dist., 2006),* the Arbitrator noted the general rule that injuries from slip and falls off an employer's premises while traveling to or from work are ordinarily not compensable under the Workers' Compensation Act. However, the Arbitrator found that the facts herein placed Petitioner's claim within the "parking lot exception" to the general rule noted in *Vill*: such injuries are compensable if the fall occurred in a lot provided by and under the control of the employer. In those circumstances, the rationale for awarding workers' compensation benefits is that the "employer-provided parking lot is considered part of the employer's premises." *Mores-Harvey, 345 Ill.App.3d at 1038; Suter v. Ill. Workers' Comp. Comm'n, 2013 IL App (4th) 130049WC (4th Dist., 2013).*

The Commission finds Petitioner failed to prove Respondent provided or controlled the lot where she fell, both of which were required in order for the parking lot exception to apply.

There is no evidentiary basis for the arbitrator's conclusions that, "The parking lot in which Petitioner was injured constitutes a part of Respondent's premises," or that the lot, "was implicitly provided by Respondent for Petitioner and other employees to use..." No documentary evidence or testimony established that Respondent *provided* the subject parking lot to its employees. To the contrary, both Petitioner and witness Breeck testified the lot was provided by the Co-Op for use by employees of multiple employers in addition to Respondent.

None of the "facts" cited by the Arbitrator as proof that Respondent provided the lot establish that it did. In particular, the Arbitrator's finding that the general public was not allowed to park in the subject parking lot is unsupported by evidence. Petitioner's testimony that, as far as she knew, no one from the general public parked in the area of the lot where she and her co-workers did, is, without more, insufficient proof that the public was prohibited from parking in the lot. Petitioner offered no other evidence which proved Respondent provided the lot.

The Commission finds nothing in the record which proved that Respondent *controlled* the parking lot. Petitioner's testimony that she never saw the general public park in the lot is similarly insufficient to establish control of the lot by Respondent. The only evidence tending to show who controlled the lot was the testimony of Ms. Breeck – and she testified that the lot was maintained by the Co-Op, not by Respondent. Petitioner admitted she did not know who controlled the lot when she was asked, and she offered no other evidence to refute Ms. Breeck's credible testimony.

While the Commission acknowledges that a Petitioner may be able to prove who controlled a parking lot by establishing facts other than showing who maintained it, no such facts are present here. The evidence supports a conclusion that the Co-Op, not Respondent, controlled the lot where Petitioner fell.

The Commission decision in *Jenkins-Kress v. Gateway Health Care, Ltd. 10 WC 14080, 13 IWCC 110; 2013 Ill. Wrk. Com. LEXIS 70 (January 31, 2013)* is distinguishable from the facts in this case. In *Jenkins-Kress*, the Petitioner testified she was told to park in one of two parking lots, and there was a written policy instructing employees where to park hanging on a window in the building. Here, Petitioner admitted she was not directed by Respondent to park where she did. No other facts demonstrate Respondent provided or controlled the lot. The Commission finds Petitioner failed to prove the parking lot exception applies to the facts in this case.

The Commission has also considered theories of recovery in addition to the *Vill* parking lot exception, and finds none support an award in favor of Petitioner.

In *Vill*, a second exception was noted to the general rule of non-compensability for injuries off the employer's premises while traveling to or from work, but it also does not apply here. The second exception permits recovery when an employee is injured at a place where he or she was required to be in the performance of his or her duties *and* was exposed to a risk to a greater degree than the general public.

At the time of her fall, Petitioner was not required to be in the parking lot to perform any duties, and she was not exposed to a risk to a greater degree than the general public. Her head cook duties required her presence in the Co-Op Building, not in the parking lot. She had not been directed to park in the lot in question for any reason. Petitioner's risk of walking through an icy parking lot was not incidental to her employment. A risk is incidental to employment where it belongs to or is connected with what an employee must do in fulfilling their duties. *Steak 'n Shake v. Illinois Workers' Compensation Commission, 2016 IL App. (3d) 150500WC; 67 N.E.3d 571 (3rd Dist., 2016).*

The facts in this case are similar to those in *Wal-Mart Stores, Inc. v. Industrial Commission, 326 Ill.App.3d 438 (4th Dist., 2001).* There, after leaving work, the Petitioner slipped and fell in an icy parking lot which, as in this case, was not restricted to employees only. The court found that Petitioner's injuries not compensable, and that Petitioner's accident to not be the result of a hazard arising out of her employment or a risk greater than faced by the general public.

Nor was Petitioner herein a traveling employee at the time of her fall. She had clocked out of her head cook job, which did not require her to travel. She was not in the furtherance of any job duties at Respondent when she fell. She was not bringing anything from her head cook job to her second job. She was not directed by her employer to go to her second job, or to take a particular route. She was not paid for her time or her mileage after leaving her head cook job. The Commission finds Petitioner did not prove her accident arose out of or in the course of her employment by Respondent. It is unnecessary to address the remaining issues.

IT IS THEREFORE ORDERED BY THE COMMISSION that the January 15, 2016 Decision of the Arbitrator in this matter is hereby vacated and all benefits to Petitioner are 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.

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

DATED: AUG 18 2017

o-06/21/17
jdl/mcp
68

Joshua D. Luskin

Charles J. DeVriendt

L. Elizabeth Coppoletti

STATE OF ILLINOIS)
)SS.
COUNTY OF KANKAKEE)

- ☐ 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

Helen Brooks
Employee/Petitioner

v.

Kankakee School District 111
Employer/Respondent

Case # 14 WC 4973

Consolidated cases: N/A

17IWCC0518

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 **Barbara N. Flores**, Arbitrator of the Commission, in the city of **Kankakee**, on **November 16, 2015**. After reviewing all of the evidence presented, the undersigned 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

17IWCC0518

FINDINGS

On January 14, 2014, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $23,920.00; the average weekly wage was $460.00.

On the date of accident, Petitioner was 47 years of age, *single* with no dependent children.

Petitioner *has* received all reasonable and necessary medical services as explained *infra*.

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

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 $3,643.60 under Section 8(j) of the Act. *See* AX1.

ORDER

As explained in the Arbitration Decision Addendum, the Arbitrator finds that Petitioner has established that she sustained a compensable accident at work as well as causal connection between her current condition of ill-being and her injury at work.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $306.67/week for 7 & 1/7th weeks, commencing January 15, 2014 through January 19, 2014 and April 2, 2014 through May 16, 2014, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from January 14, 2014 through November 16, 2015, and shall pay the remainder of the award, if any, in weekly payments.

Medical Benefits

Respondent shall pay reasonable and necessary medical services totaling $19,002.03 as reflected in Petitioner's Exhibits that remain unpaid pursuant to the medical fee schedule as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit of $3,643.60 for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Permanent Partial Disability

Respondent shall pay Petitioner permanent partial disability benefits of $276.00/week for 6.45 weeks, because the injuries sustained caused the 3% loss of use of the right leg/hip, as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $276.00/week for 5.06 weeks, because the injuries sustained caused the 2% loss of use of the right arm/elbow, as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $276.00/week for 5 weeks, because the injuries sustained caused the 1% loss of use of the right shoulder pursuant to §8(d)2 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

January 12, 2016
Date

JAN 15 2016

17IWCC0518

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION *ADDENDUM*

Helen Brooks
Employee/Petitioner

v.

Kankakee School District 111
Employer/Respondent

Case # 14 WC 4973

Consolidated cases: N/A

FINDINGS OF FACT

The issues in dispute at this hearing include accident, causal connection, Respondent's liability for certain unpaid medical bills, Petitioner's entitlement to a period of temporary total disability benefits commencing on commencing January 15, 2014 through January 19, 2014 and April 2, 2014 through May 16, 2014, and the nature and extent of the injury. Arbitrator's Exhibit[1] ("AX") 1. The parties have stipulated to all other issues. AX1.

Background

Petitioner testified that she started working for Respondent in June of 2000 as a Cafeteria Supervisor and was ultimately promoted to Head Cook II. Her duties included preparing and cooking food and making associated purchase orders. She worked in the co-op building where food was prepared for four schools from 7:00 a.m. to 1:30 p.m. and she always reported to this building for her work as a Head Cook II. Petitioner testified that there are other educational entities (i.e., "RAAC," "SALT" and "IMPACT") that used the co-op building. She worked in the co-op building with Respondent's employees and employees of other entities. Petitioner worked at the co-op Monday through Friday.

Petitioner also worked at the Lincoln Cultural Center (LCC), located in a different Kankakee School District building preparing fruits and vegetables. Petitioner testified that she went to the LCC building to do work under the fruit and vegetable program, which was different from her Head Cook II position at the co-op building. Petitioner explained that this was a special program to which Respondent's employees could apply and that the program ended last year.

Petitioner acknowledged that she was not required to do the work for the fruit and vegetable program under her Head Cook II position, but chose to work in that separate program. She also acknowledged that she did not take any items with her from her Head Cook II work at the co-op building when she went to the LCC building. Petitioner signed separate time sheets for both jobs and testified that she was not required by Respondent to go directly from the co-op building to the LCC building to perform fruit and vegetable program work. However, Petitioner also testified that her paycheck showed a separate line on the check for payment of her co-op and LCC building work. Both jobs were paid by the Kankakee School District from different funding sources.

Petitioner testified that she worked at LCC beginning at 2:00 p.m. and worked varied hours each day from Monday through Thursday until her work at LCC was done. Petitioner testified that LCC is located approximately a 10-15 minute drive from the co-op building. Petitioner drove between the two buildings and

[1] The Arbitrator similarly references the parties' exhibits herein. Petitioner's exhibits are denominated "PX" and Respondent's exhibits are denominated "RX" with a corresponding number as identified by each party. Joint exhibits are denominated with "JX."

parked in the employee parking lot by the co-op building. Photographs of the parking lot in which Petitioner parked in front of the co-op building, as well as the side entrance which she used to enter the building, were offered into evidence. JX1a & JX1b; RX1. The photographs show a sign that says "Iroquois-Kankakee SALT Regional Alternative Attendance Center[.]" JX1a; RX1.

To Petitioner's knowledge, the parking lot in which she was injured is not owned by the school district and it is used by other educational institutions including "RAAC," "SALT" and "IMPACT" from District 111 and other school districts. Petitioner explained that she used the sidewalk to go from her car to the side entrance of the co-op building. See JX1a-JX1b; RX1. Petitioner testified that there was no way for her to get from her vehicle to the co-op door other than through the icy parking lot on the date of accident. She could not have performed her job anywhere other than in the co-op building.

Petitioner testified that she parked in the same spot every day, and explained that all of the employees parked in the same spots every day. She acknowledged that she was not directed to park in the particular parking spot in which she did by Respondent. Petitioner also testified that the general public could not park in this parking lot and students had separate entrances to enter the co-op building from the food service door entrance that she used.

January 14, 2014

On January 14, 2014, Petitioner testified that she parked her car in the usual spot. She explained that she could not see the sidewalk because it was covered in snow plowed up against the building. Petitioner testified that the parking lot was icy, but she made it into the co-op building that morning. At the end of her day, she locked up the co-op building and she slipped and fell as she was walking through the parking lot. Petitioner testified that she fell on her right side and hit her shoulder, wrist, elbow, hip, knee and ankle and felt pain. Petitioner testified that she slid herself to the car and pulled herself up by the door handle then went to the SALT building to get help.

Medical Treatment

On January 14, 2014, Petitioner then went to St. Mary's Hospital for emergency medical treatment. PX1. The hospital records document Petitioner's right-sided symptoms and reported history of fall in the parking lot at work. *Id.* At the time, x-rays could not exclude a shoulder separation and the emergency room physician placed Petitioner off of work. *Id.* Petitioner was referred to Dr. Jones at Orthopedic Associates of Kankakee. *Id.*

Petitioner first saw Dr. Jones on January 16, 2014. PX2. Dr. Jones noted Petitioner's history of accident and her reported pain in the right elbow, right wrist, right knee, right ankle, right thigh and right hip. *Id.* He diagnosed right knee, ankle, shoulder and wrist pain. *Id.* He also released her to return to full duty work effective January 20, 2014. *Id.* On cross examination, Petitioner acknowledged that she did not report right elbow pain at this time. She also testified that she returned to her regular job duties until April 2, 2014.

Petitioner followed up with Dr. Jones on February 6, 2014. PX2. Dr. Jones noted that he'd recently seen Petitioner to treat extensor tendinitis of the right wrist and Petitioner's report that she'd also injured her hip with continued pain which was worse when sitting down. *Id.* Dr. Jones diagnosed right knee, shoulder, ankle and wrist pain as well as hip abductor tendonitis and he ordered three weeks of physical therapy. *Id.*

Thereafter, Petitioner began a course of physical therapy at ATI Physical Therapy on February 14, 2014. PX3. The therapy focused on the right hip. *Id.* Petitioner testified that physical therapy focused on the hip and shoulder and that the therapy went well—she had some improvement. The physical therapy records reflect that Petitioner remained in therapy until March 7, 2014. *Id.*

Petitioner then returned to the emergency room at St. Mary's on March 11, 2014. PX1. Petitioner testified that she was at work and her right elbow and arm got stiff. Then she felt weakness and dropped a pan of pizza. The emergency room records reflect that Petitioner's main complaint was related to "[right] arm pain injury on 1/14/14." *Id.* The physician noted a positive Tinel's sign and a possible chip fracture in the right elbow. *Id.* Petitioner was diagnosed with right elbow pain and cubital tunnel syndrome on the right. *Id.*

Thereafter, Petitioner returned to Dr. Jones on March 13, 2014 at which time he released her from his care. PX2. Petitioner reported that her right his was doing well and Dr. Jones diagnosed resolved right hip pain, abductor tendonitis. *Id.* She remained released to full duty work. *Id.*

Petitioner testified that although she felt better at this time, she was not 100%. She continued to work although her right hip and right elbow continued to bother her. Consequently, she decided to seek additional medical treatment.

Petitioner then came under the care of a nurse practitioner, Rebecca Carter, N.P. (Ms. Carter), at Riverside Medical Center on April 2, 2014. PX4. Petitioner testified that she was still in a little pain at this time and that she reported the accident. Ms. Carter noted Petitioner's report of an accident at work on January 14, 2014 and aching pain to the entire right side. *Id.* She reported continued right hip, right knee, right elbow and right shoulder tenderness as well as numbness and tingling in her right fingers. *Id.* Ms. Carter recommended x-rays and a right shoulder MRI. *Id.* She also placed Petitioner off work and prescribed medication. *Id.* Petitioner testified she turned in the off work slip to Carol Goodridge at work.

Petitioner followed up with Ms. Carter on April 9, 2014. PX4. She reported that the pain medications helped control her pain somewhat, but Ms. Carter continued to restrict Petitioner from work. *Id.* She also continued to recommend a right shoulder MRI. *Id.*

Petitioner returned to Riverside Medical Center on April 16, 2014. PX4. She reported that she still had not undergone the MRI due to lack of insurance approval. *Id.* Ms. Carter continued to note Petitioner's right shoulder and elbow pain and she diagnosed cervical radiculopathy, right shoulder pain and right elbow pain. *Id.*

Petitioner ultimately underwent the recommended MRI on May 9, 2014. PX4. It revealed mild supraspinatus tendinopathy. *Id.* Petitioner testified that she did not follow up with Ms. Carter after discussing the MRI results of May 9, 2014 with her over the phone. She understood that Ms. Carter released her back to work effective May 16, 2014 and that no additional treatment was recommended. Petitioner testified that she has worked for Respondent since that time.

Cathy Breeck

Ms. Breeck testified that was employed by Respondent until her retirement on June 30, 2013 as the Food Service Director. Ms. Breeck explained that Petitioner called her to report that she fell at work on January 14, 2014 after 1:30 p.m. and described the area in which she fell. Ms. Breeck directed Petitioner to fill out an accident report.

Ms. Breeck also testified that the parking lot is owned and maintained by the co-op. Petitioner parked in the same spot every day. She also used the food entrance door along with one other employee. Ms. Breeck also testified about the relationship between the co-op building and SALT program. She explained that the SALT program is run by the regional office of education, which is not the same as the Kankakee School District, as well as the Kankakee School District. Employees of SALT are not employed by the Kankakee School District.

Ms. Breeck also testified that the Kankakee School District has a grant for a fresh fruit and vegetable program and the food is prepared at the LCC building. She explained that Kankakee School District employees could sign up to perform work for the fresh fruit and vegetable program twice per year if they so chose. Petitioner and other employees also worked this program. Ms. Breeck testified that employees working the fresh fruit and vegetable program only prepared packaged fruits and vegetables. Employees were required to clock in and clock out of each job. Ms. Breeck testified that Petitioner was not working as a Head Cook II in her role at the LCC for the fresh fruit and vegetable program. She also testified that Petitioner would only work the LCC program when there was need and she would sign in on a separate timesheet. Ms. Breeck testified that there was no requirement for Petitioner to go directly from the co-op building to the LCC building.

However, on cross examination Ms. Breeck testified that the when the fresh fruit and vegetable program started, employees were told that the work would start at 2:00 p.m. or earlier if the employees could come there earlier. Once per semester, a schedule was sent out and the individual employee would fill out the days they could work at the LCC building and employees had to stick to the schedule. Ms. Breeck testified that there were other food services programs at the LCC building, but those depended on available grants. Ms. Breeck supervised Petitioner at both the co-op and LCC.

Additional Information

Petitioner testified that prior to her accident at work, she had no injury to the right hip, right elbow, right wrist, right knee or right shoulder. She also testified that she has not had any injury to these body parts after her accident.

Regarding her current condition, Petitioner testified that her right shoulder feels heavy sometimes and stiff every couple of months. She testified that she puts a heating pad on the right shoulder and takes Naproxen as prescribed by Nurse Carter. Regarding her right hip, Petitioner testified that if she sits or lays down too long she feels stiffness every six months or so. These symptoms are improved with walking. Regarding her right elbow, Petitioner testified that she takes pain medication if she feels pain. Petitioner understands that there is a chip in her right elbow and that she feels pain there two-to-three times per month. Regarding her right knee, Petitioner testified that the knee is fine. Petitioner testified that she experiences the most problems with her hip.

ISSUES AND CONCLUSIONS

The Arbitrator hereby incorporates by reference the Findings of Fact delineated above and the Arbitrator's and parties' exhibits are made a part of the Commission's file. After reviewing the evidence and due deliberation, the Arbitrator finds on the issues presented at trial as follows:

In support of the Arbitrator's decision relating to Issues (C) and (D), whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent and the date of the accident, the Arbitrator finds the following:

The parties' dispute regarding accident stems primarily from three theories of compensability. First, whether Petitioner's injury is compensable under either an increased risk analysis, second whether the injury is compensable under a "parking lot exception" analysis and finally whether the injury is compensable under a traveling employee analysis. In light of the facts adduced at trial, the Arbitrator finds that Petitioner has established that she sustained a compensable injury at work under the parking lot exception theory of recovery.

An employee's injury is compensable under the Act only if it "arises out of" and occurs "in the course of" the employment. 820 ILCS 305/2 (LEXIS 2011). A claimant must prove both elements were present. *University of Illinois v. Industrial Comm'n*, 365 Ill. App. 3d 906, 910 (1st Dist. 2006); *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203-04 (2003). There is an entire line of cases addressing employee injuries sustained in parking lots, the substance of which is summarized in *Suter v. Ill. Workers' Comp. Comm'n*:

> "When an employee slips and falls, or is otherwise injured, at a point off of the employer's premises while traveling to or from work, her injuries are ordinarily not compensable under the Act." *Vill v. Industrial Comm'n*, 351 Ill. App. 3d 798, 803, 814 N.E.2d 917, 921, 286 Ill. Dec. 691 (2004). Under such circumstances, the accident occurs outside "the course of" the employment. *Northwestern University v. Industrial Comm'n*, 409 Ill. 216, 221, 99 N.E.2d 18, 21 (1951).
>
> However, Illinois courts have recognized two exceptions to this "general premises rule." *Mores-Harvey v. Industrial Comm'n*, 345 Ill. App. 3d 1034, 1038, 804 N.E.2d 1086, 1090, 281 Ill. Dec. 791 (2004). First, "recovery has been permitted for off-premises injuries when 'the employee's presence at the place where the accident occurred was required in the performance of his duties and the employee is exposed to a risk common to the general public to a greater degree than other persons.'" *Id.* (quoting [*Illinois Bell Tel. Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 484, 546 N.E.2d 603, 605 (1989)]).
>
> Second, there is a "parking lot exception" where courts have allowed recovery when the employee is injured in a parking lot provided by and under the control of the employer. *Vill*, 351 Ill. App. 3d at 803, 814 N.E.2d at 922. This exception applies in circumstances where the employee's injury is caused by some hazardous condition in the parking lot. *Id.*

Suter v. Ill. Workers' Comp. Comm'n, 2013 IL App (4th) 130049WC, P19-P22, 376 Ill. Dec. 261, 266-267 (4th Dist. 2013). Similar to the facts in *Suter*, the evidence presented here clearly requires an analysis under the parking lot exception case law. Aside from the traveling employee theory of recovery, the parties' dispute centers on whether Respondent's premises extends to the parking lot in which Petitioner was injured.

> The rationale for awarding workers' compensation benefits when an employee is injured because of the conditions of an employer-provided parking lot is that the "employer-provided parking lot is considered part of the employer's premises." *Mores-Harvey*, 345 Ill. App. 3d at 1038, 804 N.E.2d at 1090. In applying the parking lot exception, Illinois courts have held that so long as the employer has provided a

parking lot for use by its employees, the fact that the employer does not own the lot is immaterial. *C. Iber & Sons, Inc. v. Industrial Comm'n*, 81 Ill. 2d 130, 135, 407 N.E.2d 39, 42, 40 Ill. Dec. 808 (1980). In addition, once the parking lot is considered part of the employer's premises, any injury on the parking lot is compensable if it would be compensable on the employer's main premises. *Mores-Harvey*, 345 Ill. App. 3d at 1038, 804 N.E.2d at 1090-91.

Suter, 2013 IL App (4th) 130049WC at P23, 376 Ill. Dec. at 266-267. Similar to the circumstances in *Suter*, the relevant facts in this case are established either through Petitioner's testimony, which is corroborated by the testimony of Ms. Breeck, or wholly uncontroverted evidence. The following facts are undisputed.

Petitioner worked as a Head Cook II for Respondent. She could only perform her work in the co-op building. Petitioner had been employed by Respondent for years before her injury during which time she parked in a parking lot located directly adjacent to the co-op building. Petitioner parked in the same parking space in this parking lot as did other employees who habitually parked in the same parking spaces every day.

Petitioner generally used a sidewalk to walk from her car to the food service entrance of the co-op building. However, on the date of accident snow was plowed up against the side of the co-op building over the sidewalk so Petitioner walked through the parking lot to reach the food service entrance. Petitioner successfully walked through the parking lot in the morning, worked throughout the day and completed her work as a Head Cook II on January 14, 2014. She then locked up the co-op building and exited toward her car through the parking lot because the sidewalk remained covered in snow. While walking through the parking lot to her car Petitioner slipped and fell on ice causing injury to the right side of her body.

No one directed Petitioner to park in the particular space or in the parking lot in which she parked on the date of accident. The general public and students did not park in the parking lot. Neither Petitioner nor Ms. Breeck knew who owned or maintained the parking lot.

Whether Respondent owned the parking lot in which Petitioner fell is of no consequence in determining whether her injury is compensable. See *Suter*, 2013 IL App (4th) 130049WC at P23-P25; see *C. Iber & Sons, Inc. v. Industrial Comm'n*, 81 Ill. 2d 130, 135 (1980); see *De Hoyos v. Industrial Comm'n*, 26 Ill. 2d 110, 113-114 (1962). The inquiry requires a determination of whether Respondent provided the parking lot to Petitioner who was injured thereon due to a hazardous condition. *Suter*, 2013 IL App (4th) 130049WC at P25 (citing *De Hoyos*, 26 Ill. 2d at 114); *Mores-Harvey v. Indus. Comm'n*, 345 Ill. App. 3d 1034, 1038 (3rd Dist. 2004). "If this is the case, then the lot constitutes part of the employer's premises," and "[t]he presence of a hazardous condition on the employer's premises that causes a claimant's injury supports the finding of a compensable claim." *Mores-Harvey*, 345 Ill. App. 3d at 1040.

Petitioner was walking from the co-op building to a parking lot provided by Respondent for her and other employees to use. The general public was not allowed into the parking lot. Petitioner was injured when she slipped and fell on ice walking through the parking lot because the sidewalk she normally used to reach the co-op building was covered with plowed snow. The parking lot in which Petitioner was injured constitutes a part of Respondent's premises, was implicitly provided by Respondent for Petitioner and other employees to use and it was in a hazardous condition given the ice on which Petitioner slipped and fell. Based on all of the foregoing, the Arbitrator finds that Petitioner has established that she sustained a compensable accident at work on January 14, 2014[2].

[2] Given that Petitioner established that she sustained a compensable accident under the parking lot exception analysis, no conclusion regarding the alternative theories is required.

17IWCC0518

In support of the Arbitrator's decision relating to Issue (F), whether the Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds the following:

The Arbitrator finds that Petitioner's current condition of ill-being is causally related to the injury sustained at work on January 14, 2014. Petitioner had no injury or pre-existing condition in any of the body parts affected on the right side of the body until after her accident at work. Her testimony is consistent with the medical records submitted into evidence, and she contemporaneously reported symptoms on the right side of the body in the in the right shoulder, arm, wrist, hip, knee and ankle immediately after her accident throughout a short period of medical treatment lasting four months. No medical opinion was offered into evidence to controvert Petitioner's reported onset of symptoms after her January 14, 2014 accident at work throughout this period of treatment. Based on all of the foregoing, the Arbitrator finds that Petitioner's claimed current condition of ill-being is related to the injury sustained at work.

In support of the Arbitrator's decision relating to Issue (J), whether the medical services that were provided to Petitioner were reasonable and necessary, whether Respondent has paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds the following:

"Under section 8(a) of the Act (820 ILCS 305/8(a) (West 2006)), a claimant is entitled to recover reasonable medical expenses, the incurrence of which are causally related to an accident arising out of and in the scope of her employment and which are necessary to diagnose, relieve, or cure the effects of the claimant's injury." *Absolute Cleaning/SVMBL v. Ill. Workers' Compensation Comm'n*, 409 Ill. App. 3d 463, 470 (4th Dist. 2011) (citing *University of Illinois v. Industrial Comm'n*, 232 Ill. App. 3d 154, 164 (1st Dist. 1992)).

As explained more fully above, the Arbitrator finds that Petitioner has established that she sustained a compensable accident at work affecting the right side of her body as well as a causal connection between her current condition of ill-being and her injury at work. In addition, the medical bills incurred by Petitioner are related to treatment of pain and symptoms manifesting in the right shoulder, arm, wrist, hip, knee and ankle only after her accident to alleviate her of the effects of her injury at work. Thus, the Arbitrator finds that the medical bills submitted into evidence that remain unpaid shall be paid by Respondent as provided in Sections 8(a) and 8.2 of the Act.

In support of the Arbitrator's decision relating to Issue (K), Petitioner's entitlement to temporary total disability benefits, the Arbitrator finds the following:

In light of the accident and causal connection analyses explained above, the Arbitrator addresses Petitioner's claim that she is entitled to temporary total disability benefits for the disputed period beginning January 15, 2014 through January 19, 2014 and April 2, 2014 through May 16, 2014.

"The period of temporary total disability encompasses the time from which the injury incapacitates the claimant until such time as the claimant has recovered as much as the character of the injury will permit, i.e., until the condition has stabilized." *Gallentine v. Industrial Comm'n*, 201 Ill. App. 3d 880, 886 (2nd Dist. 1990). The dispositive test is whether the claimant's condition has stabilized, i.e., reached MMI. *Sunny Hill of Will County v. Ill. Workers' Comp. Comm'n*, 2014 IL App (3d) 130028WC at *28 (opinion filed June 26, 2014); *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 760 (4th Dist. 2003).

As explained above, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to her

injury at work. Moreover, Petitioner was placed off work by treating physicians or a nurse practitioner for symptoms in the affected body parts after her injury at work. No contrary medical evidence was submitted at trial.

Based on all of the foregoing, the Arbitrator finds that Petitioner is entitled to temporary total disability benefits as claimed from January 15, 2014 through January 19, 2014 and April 2, 2014 through May 16, 2014.

In support of the Arbitrator's decision relating to Issue (L), the nature and extent of Petitioner's injury, the Arbitrator finds the following:

Section 8.1b of the Illinois Workers' Compensation Act ("Act") addresses the factors that must be considered in determining the extent of permanent partial disability for accidents occurring on or after September 1, 2011. 820 ILCS 305/8.1b (LEXIS 2011). Specifically, Section 8.1b states:

> For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the following criteria:
>
> (a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.
>
> (b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors:
>
> (i) the reported level of impairment pursuant to subsection (a);
> (ii) the occupation of the injured employee;
> (iii) the age of the employee at the time of the injury;
> (iv) the employee's future earning capacity; and
> (v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order. *Id.*

Considering these factors in light of the evidence submitted at trial, the Arbitrator addresses the factors delineated in the Act for determining permanent partial disability.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report was offered into evidence. As a result, the Arbitrator assigns no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that Petitioner was employed as a full time Head Cook II. As a result, the Arbitrator gives significant weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 47 years old at the time of the accident. As a result, the Arbitrator gives significant weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that Petitioner was released back to full duty work and has continued to work as a Head Cook II for Respondent earning the same pay. As a result, the Arbitrator gives significant weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator finds that Petitioner's testimony was credible because it was corroborated by the medical records as well as the testimony of Ms. Breeck. Petitioner credibly testified about her conservative medical treatment and ongoing symptoms, which waxed and waned, over a short four month period of time. The medical records also reflect that Petitioner underwent conservative medical treatment including several weeks of physical therapy focused primarily on the right hip as well as other treatment including bracing of the right elbow and right knee and prescribed pain medication to manage her right-sided symptoms. Petitioner was initially released back to full duty work days after her accident and then placed off work for a short period of time after a flare-up in right elbow and right shoulder symptoms prompted emergency room care and later follow up at Riverside Medical Center. Petitioner credibly testified about her limited ongoing symptoms in the right hip, right shoulder and right elbow. As a result, the Arbitrator gives significant weight to this factor.

Based on all of the foregoing, and in consideration of the factors enumerated in Section 8.1b, which does not simply require a calculation, but rather a measured evaluation of all five factors of which no single factor is conclusive on the issue of permanency, the Arbitrator finds that Petitioner has established permanent partial disability to the extent of 3% loss of use of the right leg/hip and 2% loss of use of the right arm/elbow pursuant to §8(e) of the Act and 1% loss of use of the right shoulder pursuant to §8(d)2 of the Act.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Robert Watson,
Petitioner,

vs. NO: 14 WC 28608

17IWCC0519

Wal-Mart Associates, Inc.,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) has been filed by Respondent herein and notice given to all parties. The Commission, after considering issues including causal connection, temporary total disability, medical expenses, and prospective medical, and being advised of the facts and law, hereby reverses the February 8, 2016 decision of Arbitrator Granada, as stated below. The Arbitrator's decision is attached hereto.

The Arbitrator found that Petitioner proved a compensable injury in the form of an aggravation, sustained on July 22, 2014, to the preexisting arthritis in his knees. The Arbitrator awarded total temporary disability benefits, medical expenses, and prospective treatment, including bilateral total knee replacement as recommended by Dr. Steven Sclamberg. The Commission, after reviewing the entire record, views the evidence differently from the Arbitrator. In particular, the Commission finds that Petitioner has failed to prove that his condition of ill-being was caused by the asserted workplace accident. Accordingly, the Commission reverses the Arbitrator's decision and vacates all awards of benefits.

FACTUAL BACKGROUND

Petitioner, Robert Watson, 63 years old, was employed as a maintenance worker by Respondent for 13 years as of July 22, 2014. In the year prior to the date of asserted accident, he moved from a full-time position to part-time, working three days per week. On occasion, he would be directed by his supervisor to collect carts in the parking lot at the end of the day. (Tr. 9-10, 24-25). According to his testimony, on the evening of Tuesday, July 22, 2014, he hurt his knees while pushing 4 to 6 carts. He was attempting to maneuver the carts to avoid hitting a parked car when he felt a painful pulling or stretching in the back of both knees. The right knee hurt worse than the left. He attested that, while past episodes of knee pain would subside with Aleve and rest, this time the pain persisted. (Tr. 11-13).

On July 29, 2014, Petitioner sought attention from his primary care physician, Dr. Roman Dreyer. Dr. Dreyer's notes indicated that Petitioner "has pain bilateral knees, posterior area;" that the pain was "ongoing x 4 months;" and the pain was "possibly triggered by pushing carts at work." (PX 1). No prior treatment was noted. Bilateral knee x-rays showed moderate bilateral medial and patellofemoral compartment degenerative changes, worse on the right. (PX 1). About a week later, Petitioner presented to a chiropractor, who placed Petitioner off-work, prescribed physical therapy, and ordered MRIs of his knees. (PX 3). The right knee MRI, done on August 15, 2014, revealed extensive degenerative disease primarily in the medial compartment; Grade IV chondromalacia (complete cartilage loss) at the patella; and Grade III meniscus tear. (PX 6). A left knee MRI done a month later yielded the same findings of degenerative disease, chondromalacia, and meniscus tear in that knee as well. (PX 6).

On August 20, 2014, Petitioner was evaluated by Dr. Arpan Patel of Chicago Pain & Orthopedic Institute. Petitioner was prescribed pain medications. On September 10, 2014, Petitioner followed up with Dr. Patel's colleague, Dr. Christos Giannoulias, who administered an intraarticular injection in the right knee. Dr. Giannoulias, noting the severity of Petitioner's arthritis, believed that an arthroscopy would not be of benefit. On October 8, 2014, Dr. Giannoulias referred Petitioner to orthopedic surgeon Dr. Steven Sclamberg for consultation regarding knee replacement. (PX 4).

On November 14, 2014, Petitioner presented to Dr. Sclamberg. Contrary to what he told his primary care physician, Petitioner told Dr. Sclamberg that he did not have any prior problems or prior pain in his knees. (PX 5 at 7). After reviewing x-rays, Dr. Sclamberg's impression was that Petitioner had "fairly severe" tricompartmental osteoarthritis, right knee greater than the left. (PX 5 at 10). Dr. Sclamberg recommended staged bilateral total knee replacement. Petitioner followed up with Dr. Sclamberg on four more occasions (December 1, 2014; February 6, 2015; April 24, 2015 and August 17, 2015). At each of these visits, the treatment plan for a total knee replacement remained the same and Petitioner was kept off-work.

MEDICAL TESTIMONY

Dr. David Garelick, Section 12 examiner

Petitioner was examined at Respondent's request by orthopedic surgeon Dr. David Garelick on October 10, 2014. Dr. Garelick authored a written report and testified via evidence deposition on January 7, 2015. (RX 1). His impression was that Petitioner had symptomatic osteoarthritis in both knees, right worse than left. He opined that this osteoarthritis was longstanding and had developed over years (that is, clearly the work incident did not cause this condition). He noted that the medial meniscal tears in both knees were of the "extruded" type, which is consistent with chronic degenerative tearing as opposed to acute tearing. (RX 1 at11-12).

Regarding whether the workplace incident, as described, "aggravated" the preexisting condition or otherwise represented an event that caused Petitioner to be disabled from work and to need the subsequent treatment, Dr. Garelick opined that it did not. Dr. Garelick pointed out that Petitioner was already symptomatic before that date, citing to Dr. Dreyer's July 29, 2014 note, wherein it is indicated that Petitioner's bilateral knee pain had been ongoing for four months. Further, Dr. Garelick felt that the alleged mechanism of injury whereby Petitioner hurt his knees through pushing shopping carts represented a "minimal" amount of force, and was not descriptive of an acute injury. In Dr. Garelick's opinion, getting hurt through such a trivial incident was "more consistent with a chronic, ongoing, and lingering condition." (RX 1 at 25-26).

Dr. Steven Sclamberg, Treating Physician

Dr. Sclamberg testified via evidence deposition on October 26, 2015. Dr. Sclamberg agreed that Petitioner's osteoarthritis was advanced and was not caused by his employment. (PX 5 at 20). However, Dr. Sclamberg believed that the workplace incident of July 22, 2014 represented an aggravation that caused Petitioner's preexisting condition to become symptomatic, and constituted a compensable injury under the Act.[1] (PX 5 at 13-14). Dr. Sclamberg based this opinion solely on the history Petitioner provided of having no symptoms prior to the date of accident. (PX5 at 20-21). Dr. Sclamberg had not reviewed Petitioner's prior treatment records -- including Dr. Dreyer's notes -- prior to forming this opinion. He testified that his causation opinion would change if records suggested Petitioner did in fact have prior knee pain. (PX 5 at 21-22).

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[1] Generally speaking, a preexisting condition does not prevent recovery under the Act if that condition was aggravated or accelerated by the claimant's employment. An exception to that rule is articulated in *County of Cook v. Industrial Commission*, 69 Ill.2d 10, 370 N.E.2d 520 (1977): "Where it is shown the employee's health has so deteriorated that any normal daily activity is an overexertion, or where it is shown that the activity engaged in presented risks no greater than those to which the general public is exposed, compensation will be denied." *Id.* at 18. The first of these exceptions has been phrased alternatively as "where the employee's health has so deteriorated that any normal, daily activity could have caused the injury[.]" *General Refractories v. Industrial Commission*, 255 Ill.App.3d 925 at 931 (1994).

DISCUSSION

There is no question that Petitioner's arthritis in both knees preexisted the workplace incident that is asserted to be the accident. The degree of degeneration was advanced by that time. Both Dr. Garelick and Dr. Sclamberg agree on this point. However, the two doctors disagreed as to whether the current condition of Petitioner's knees – insofar as that condition may warrant restriction from working and total knee replacement – arose from that workplace incident.

The Arbitrator cited the opinion of Dr. Sclamberg in his decision in favor of Petitioner. However, Dr. Sclamberg based his opinion solely on the history related to him by Petitioner, who told Dr. Sclamberg that he had no pain in his knees pre-dating the accident. As noted above, the evidence shows that this history is inaccurate. As noted above, a few days after the accident, Petitioner complained to his primary care physician of knee pain that had been ongoing for four months. Dr. Sclamberg testified that his opinion would change if medical records indicated that Petitioner had knee pain before the accident.

The Commission finds that Dr. Sclamberg's opinion is flawed and that Dr. Garelick's opinion is more persuasive. The Commission concludes that Petitioner's preexisting arthritis was symptomatic before the asserted date of accident, and that the asserted accident is not causally related to the current condition of ill-being in his knees. The evidence shows that the current condition of his knees reflects the natural progression of his already-advanced arthritis, and is not due to any compensable "aggravation."

IT IS THEREFORE ORDERED BY THE COMMISSION that the decision of the Arbitrator filed February 8, 2016, is hereby reversed as discussed above. Benefits denied.

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

DATED: AUG 18 2017

Joshua D. Luskin

Charles J. DeVriendt

L. Elizabeth Coppoletti

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jdl/ac
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STATE OF ILLINOIS)
)SS.
COUNTY OF DU PAGE)

☐ 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)

Robert Watson
Employee/Petitioner

v.

Wal-Mart Associates, Inc.
Employer/Respondent

Case # 14 WC 028608

Consolidated cases: ___

17IWCC0519

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 **Gerald Granada**, Arbitrator of the Commission, in the city of **Wheaton**, on **January 26, 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 **Prospective medical treatment**

FINDINGS

On the date of accident, **July 22, 2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$18,494.87**; the average weekly wage was **$355.67**.

On the date of accident, Petitioner was **63** years of age, ***married*** 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 directly to Petitioner temporary disability benefits of **$253.00/week** for **77 weeks**, commencing **8/6/2014** through **1/26/2016**, as provided in Section 8(b) of the Act.

Respondent shall pay directly to Petitioner reasonable and necessary medical services of **$15,915.55**, subject to the fee schedule as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall authorize and pay for the surgeries and all incidental treatment thereto consistent with the current recommendations of Dr. Sclamberg.

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

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

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

Signature of Arbitrator

2/4/16
Date

FEB 8 - 2016

17IWCC0519

FINDINGS OF FACT

This case involves a Petitioner who alleges he was injured while working for the Respondent on July 22, 2014, resulting in injuries to both legs. (See Arb. Exh. 1 & 2) Respondent is disputing Petitioner's claim based on the following issues: 1) accident, 2) causation, 3) medical expenses, 4) TTD, and 5) prospective medical care.

Petitioner testified that on July 22, 2014, he had been employed by Respondent for nearly 13 years. On the date in question, Petitioner was employed by Respondent in the maintenance department. That day, Petitioner was tasked with collecting shopping carts from the parking lot. Petitioner testified that his main job duties with the maintenance department involved cleaning up around the store, but from time to time he would collect shopping carts as well. He testified that he had collected several shopping carts stacked together and attempted to turn the stack of carts to the right. Petitioner further testified that the stack of carts got stuck and started to lift up rather than continue to move forward, and he felt a stretching behind both knees. Specifically, Petitioner testified that it felt like balloons were stretching behind his knees, and that the right was worse than the left because he was turning to his right.

Petitioner testified that he switched to part time work in 2013 and worked three days a week. Petitioner further testified that prior to July 22, 2014 he would occasionally have soreness in his legs that he attributed to his age, but would be resolved after his days off. Petitioner denied any medical treatment for knee pain prior to July 22, 2014. Following the incident of July 22, 2014, the pain did not resolve and Petitioner presented to his primary care physician, Dr. Dreyer, on July 29, 2014. Dr. Dreyer noted bilateral pain in the knees, triggered by pushing 4-6 carts at work. Dr. Dreyer noted that pain was ongoing for four months but did not note any prior treatment. Dr. Dreyer recommended x-ray imaging and a follow up in 6 months. (PX 1).

Petitioner testified that he reported the injury to "Dennis," a supervisor at work, following his evaluation by Dr. Dreyer, and was referred for a drug test. Petitioner presented to MedSpring Urgent Care on July 31, 2014 for an occupational health drug screen. Petitioner was also evaluated by Dr. Gillis for complaints of bilateral knee pain after pushing 5-6 shopping carts. Dr. Gillis noted a history of a pulling sensation at the time of the injury and Petitioner reported the right knee hurt more than the left. Dr. Gillis diagnosed Petitioner with a knee strain and advised that a course of therapy was likely needed. (PX 2).

Petitioner testified that he next presented to Dr. Bodem at Rehab Dynamix on August 6, 2014. Dr. Bodem recorded a history of pushing 5-6 shopping carts on July 22, 2014 and a "painful pulling sensation" when making a turn with the carts. Pain was noted in the posterior distal thighs near the knee. The right knee was noted to be worse than the left. Dr. Bodem recommended a course of 6 therapy visit and took Petitioner off work for 2 weeks. (PX 3).

Dr. Bodem referred Petitioner to Imaging Centers of America for an MRI of the right knee on August 15, 2014. The radiologist noted degenerative disease of the knee, predominantly in its medial compartment with small joint effusion. Also noted was grade IV chondromalacia at the patella, medial femoral condyle and medial tibial plateau. A small ganglion cyst was noted, as well as a complex grade III tear in the posterior horn and the body of the medial meniscus. (PX 6).

At an August 19, 2014 follow up visit, Dr. Bodem reviewed the MRI results and referred Petitioner to an orthopedist to evaluate the right knee and continued Petitioner off work for four weeks. Petitioner continued to treat for therapy with Rehab Dynamix through November 11, 2014 (PX 3).

On August 20, 2014, Petitioner presented to Chicago Pain & Orthopedic Institute for evaluation with Dr. Arpan Patel. Dr. Patel noted complaints of right knee pain and a history of onset after pushing and turning six or seven carts at work. Dr. Patel prescribed Mobic and Teracin cream for pain, as well as tramadol for severe breakthrough pain. Dr. Patel continued Petitioner off work and referred him for an orthopedic evaluation. (PX 4).

On September 10, 2014, Petitioner next followed up with Dr. Christos Giannoulias at Chicago Pain & Orthopedic with complaints of bilateral knee pain, right worse than left. Petitioner gave a history of trying to lift and turn shopping carts at work. Dr. Giannoulis diagnosed Petitioner with a meniscus tear and severe arthritis. Dr. Giannoulias did not believe that an arthroscopy would be of benefit due to the severity of the arthritis. An intraarticular injection was administered with instructions for a three to four week follow up. (PX 4).

On September 22, 2014, Petitioner presented to Imaging Centers of America on the referral of Dr. Bodem for an MRI of the left knee. The radiologist noted degenerative disease of the knee, predominantly in its medial compartment with joint effusion. Also noted was grade IV chondromalacia at weight bearing surface of the medial femoral condyle, posterior aspect of the lateral femoral condyle, femoral trochlea, and medial tibial plateau. A grade III horizontal tear in the posterior horn and the body of the medial meniscus was also noted. (PX 6).

Petitioner followed up with Dr. Giannoulias on October 8, 2014 with bilateral knee pain. Dr. Giannoulias repeated his recommendation that with the condition of Petitioner's knee, arthroscopic repair was not indicated. He referred Petitioner to Dr. Sclamberg for consultation and evaluation for a possible knee replacement. (PX 4).

On October 10, 2014, Petitioner presented for Respondent's Section 12 examination with Dr. David Garelick. In his report following the evaluation, Dr. Garelick noted that Petitioner arrived on time and participated fully. Dr. Garelick noted a history of bilateral knee pain after turning a stack of five or six grocery carts from the parking lot. After physical examination and review of the medical records, Dr. Garelick opined that there was no pathology in either knee that was causally related to the July 22, 2014 incident. His opinion was that at most, Petitioner experienced a temporary exacerbation of a pre-existing condition that resolved within six to twelve weeks. Dr. Garelick found Petitioner to be at maximum medical improvement as of the date of the Section 12 examination. (RX 1).

Petitioner presented for an initial evaluation with Dr. Sclamberg on November 14, 2014. Dr. Sclamberg noted complaints of bilateral knee pain with a history of pushing shopping carts and straining the knee while trying to turn them when they stopped moving. After physical examination and reviewing a history of therapy and injections, Dr. Sclamberg recommended a total right knee arthroplasty. Dr. Sclamberg opined that the injury aggravated the underlying condition. (PX 4). Petitioner followed up with Dr. Sclamberg on December 1, 2014; February 6, 2015; April 24, 2015; and August 17, 2015. At each of these follow up visits, the treatment plan for a total knee arthroplasty remained the same and Petitioner was kept off of work. At the April 24 office visit, Dr. Sclamberg injected the right knee with lidocaine. (PX 4).

The evidence deposition of Dr. David Garelick, Respondent's Section 12 examiner, was completed on January 7, 2015. Dr. Garelick testified that at the time of the examination he had not reviewed records from Dr. Giannoulias. Dr. Garelick's report also indicated he had not reviewed records from Dr. Bodem and Rehab Dynamix. During the Section 12 evaluation, Dr. Garelick testified that he performed a physical evaluation and noted Petitioner was limping, favoring his right leg. Dr. Garelick took X-rays on the date of his evaluation and reviewed the MRI studies of each knee. Dr. Garelick testified that the meniscus tears were "extruded...consistent with chronic degenerative tears as opposed to acute tearing, typically." Based on a record review and physical examination, Dr. Garelick testified that his impression was of symptomatic degenerative arthritis in both knees, right worse than left. When asked for his opinion on causal connection, Dr. Garelick testified that he "felt that it was a chronic problem that had been ongoing." Dr. Garelick further testified that no further treatment was needed as it related to the incident and that Petitioner is not temporarily disabled as a result of the incident. With respect to medical treatment, Dr. Garelick testified that an injection was appropriate, while chiropractic treatment was not. Dr. Garelick further testified on cross-examination that he did not know what area of the knee prior pain was in or the frequency of the pain. Dr. Garelick also testified that with an exacerbation of degenerative arthritis, a knee replacement would be reasonable if after an exacerbation the patient did not return to the pre-exacerbation baseline. (RX 1 at 30).

The evidence deposition of Petitioner's treating physician, Dr. Steven Sclamberg was completed on October 26, 2015. Dr. Sclamberg testified that after nine months of treatment, his diagnosis was osteoarthritis of both knees, end-stage, symptomatic more in the right knee. Dr. Sclamberg further testified that the work injury did not cause the osteoarthritis, but that it did aggravate or accelerate the osteoarthritis. It was Dr. Sclamberg's testimony that it is possible for a person to have severe osteoarthritic findings and be asymptomatic. Dr. Sclamberg testified that Petitioner required staged bilateral knee replacements. (PX 5).

Petitioner testified that his right knee remains painful and that he has not worked since July 22, 2014. He is limited in household chores. Petitioner further testified that despite his fear of surgery, he does want the procedures so that he can try to work again.

CONCLUSIONS OF LAW

1. With regard to the issue of accident, the Arbitrator finds that the Petitioner has met his burden of proof. This finding is supported by the Petitioner's unrebutted testimony and the medical records. Petitioner credibly testified that he felt pain in his knees, more so in his right knee on July 22, 2014, as he was attempting to push a number of shopping carts. There was no evidence presented to the contrary by Respondent. Accordingly, the Arbitrator concludes that the Petitioner sustained an accident while working for the Respondent on July 22, 2014.

2. Regarding the issue of causation, the Arbitrator finds that the Petitioner has met his burden of proof. In support of this finding, the Arbitrator relies on the Petitioner's credible testimony and the medical evidence. This is the primary issue in dispute, upon which the Respondent relies on the opinion of its IME, Dr. Garelick to support its denial of this claim. Dr. Garelick relies on a medical report from one of Petitioner's treating physicians, Dr. Dreyer, who indicated that the Petitioner had been complaining of knee pain for four months before the alleged accident date. Dr. Garelick further opined that the Petitioner's incident of July 22, 2014 only presented a temporary aggravation of the Petitioner's pre-exisitng arthritis in his knees. On the other hand, Petitioner's treating physician, Dr. Sclamberg believed

that the Petitioner's incident on July 22, 2014 was an aggravation of the Petitioner's pre-existing osteoarthritis. Petitioner himself admitted that prior to the alleged accident date, he would experience soreness in his legs that would go away by the next day. However, he did not undergo any medical treatment for his knees prior to the alleged date of accident. Given the Petitioner's credible presentation at trial, the fact that Dr. Garelick did not review all of the Petitioner's treating medical records, and the fact that there is no evidence of Petitioner receiving medical treatment for his knees prior to the alleged accident date - the Arbitrator gives more weight to the opinions of Dr. Sclamberg. The evidence clearly shows that the July 22, 2014 incident was not a temporary aggravation of Petitioner's osteoarthritis, as Dr. Garelick described, because the Petitioner's condition has clearly progressed to the point where knee replacement surgery has been recommended by all his treating physicians. As such, the Arbitrator concludes that the Petitioner's current condition of ill-being in his knees are causally related to his July 22, 2014 work accident.

3. Based on the Arbitrator's findings with regard to the issues of accident and causation, the Arbitrator finds that the Petitioner's medical expenses related to treatment of his bi-lateral knee conditions were both reasonable and necessary in treating his work-related conditions. Accordingly, the Arbitrator awards the following expenses to the Petitioner subject to the fee schedule in accordance with Sections 8(a) and 8.2 of the Act:

$435.83 – Dreyer Medical Clinic
$10,471.32 – Rehab Dynamix
$1,658.40 - Chicago Pain & Orthopedic Institute
$3,350.00 - Imaging Centers of America

$15,915.55 – TOTAL

Respondent shall receive a credit for any of these expenses it may have already paid, either through workers compensation or through group insurance.

4. Based on the Arbitrator's findings with respect to the issues of accident and causation, the Arbitrator further finds that Petitioner's request for the prospective medical care as recommended by his treating physician Dr. Sclamberg, is reasonable, related and necessary in the treatment of Petitioner's work-related knee conditions. This would include the recommendation for total knee replacement surgery. Accordingly, the Respondent shall authorize and pay for additional reasonable and necessary treatment for Petitioner consistent with the current recommendations of Dr. Sclamberg including bilateral staged arthroplasty for the knees and any other related medical services.

5. With regard to the issue of TTD, the Arbitrator finds that the Petitioner has met his burden of proof. This finding is based on the Arbitrator's findings regarding accident and causation. Petitioner is entitled to temporary total disability benefits totaling $19,481.00 for the period of 77 weeks beginning August 6, 2014 through the trial date January 26, 2016. The Arbitrator notes that a physician did not place Petitioner off of work until Dr. Bodem's August 6, 2014 evaluation, and that the Petitioner has not been released to return to work as of the date of this hearing.

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JAMES GRIFFETH,

Petitioner,

vs. NO: 15 WC 12818

R.W. DUNTEMAN CO.,

Respondent.

17IWCC0485

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses and prospective medical care, 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).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner is a Machine Operator running highway construction machinery. On April 2, 2015 he was working on an asphalt plant getting it ready to fire up for the year. While working, a pipe cap exploded in his face, knocking out some of his teeth.

17IWCC0485

2. The pipe cap is the cap of an AC tank. The bottom of the tank has coal tar and there are pipes filled with oil. There is a heater which heats the oil, which causes pressure, and ultimately forced the cap to explode.

3. After the explosion, Petitioner's mouth was bleeding profusely. He covered his mouth with his hand and spit out some teeth. He claimed he had two teeth out and three teeth chipped. He admitted to having some discolored teeth prior to the accident.

4. Petitioner was taken to the hospital and received stitches and pain medication. It was noted that he had suffered two broken front teeth. An examination of the photos taken that day reveal that these two teeth are on Petitioner's bottom row. Further examination reveals that there was a small, but still noticeable chip on one of Petitioner's teeth on the upper row (Tooth #9). None of the remaining upper row teeth visible in the photos appear to show any trauma-related disfigurement.

5. Petitioner then visited with an oral surgeon who removed a couple of his teeth. He was then referred to another dentist who recommended extraction of four teeth because they had a good chance of dying. The surgeon then recommended dental implants.

6. Petitioner had not seen a dentist in quite some time prior to the accident in question. After the accident he was told that there was significant decay in his mouth that was unrelated to the accident.

7. Dr. Bargamian examined Petitioner's records and opined that teeth #'s 7 and 10 were not damaged periodontally.

The Commission affirms the Arbitrator's causal connection opinion in relation to tooth #9 on Petitioner's upper row. However, the Commission reverses the Arbitrator's finding of causal connection in relation to teeth #'s 7, 8 and 10. Petitioner had pre-existing tooth decay on the top row of teeth which accounted for the majority of his disfigurement. As noted by Dr. Bargamian, if Petitioner's current upper teeth conditions were the result of the accident related trauma, there would be injury to the adjacent soft tissue, of which there is little to none present in the photos. For perspective, photos show that Petitioner's lower lip is clearly damaged, which is consistent with the (stipulated) trauma-induced structural damage to teeth #22-27 on the bottom row.

The Commission agrees with the Arbitrator's finding with relation to tooth #9. Despite Dr. Bargamian's argument, it cannot be denied that there is a noticeable chip on tooth #9, which does not seem to show any real evidence of decay. The Commission concludes that this chip is the result of the work related accident. Accordingly, the Commission affirms the Arbitrator's causal connection finding, but only with respect to tooth #9.

17IWCC0485

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's chipped tooth #9 is causally related to the work accident.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is liable for all reasonable and necessary medical expenses related to treatment for tooth #9, under §8(a) of the Act.

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

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

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 $5,600.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: AUG 3 - 2017
O: 6/8/17
DLG/wde
45

David L. Gore

Stephen Mathis

Deborah L. Simpson

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

James Griffeth
Employee/Petitioner

v.

R.W. Dunteman Company
Employer/Respondent

Case # 15 WC 12818

Consolidated cases:

17IWCC0485

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Springfield**, on **9/29/2016**. 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 _____

FINDINGS

On the date of accident, **4/2/2015**, 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 $**Reserved**; the average weekly wage was $**Reserved**.

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

Petitioner has not received all reasonable and necessary medical services.

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

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

ORDER

Respondent shall pay reasonable and necessary medical services, as provided in Sections 8(a) and 8.2 of the Act and per the stipulation of the parties, subject to any credit pursuant to Section 8(j).

Petitioner was successful in proving his current condition of ill-being in the disputed teeth #7, #8, #9, and #10 are causally related to his work accident, and that the extraction of teeth #7 and #10 were reasonably required to cure or relieve the effects of his work accident. The past and prospective treatment of Teeth #22-27 were stipulated as causally related by the parties prior to trial.

Respondent shall authorize and pay for prospective medical treatment including, but not limited to, the proposed implants/bridges for teeth #6-8 and #9-11 as well as teeth #22-27 proposed by Dr. Matthew Lynch.

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

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

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

Edward Lee
Signature of Arbitrator

11/5/16
Date

ICArbDec19(b)

NOV 10 2016

17IWCC0485

Pre-Trial note

Pursuant to an agreement of the Parties Petitioner made an oral motion to amend their Application for Adjustment of Claim and changed the name of the identified Respondent from "Du-Kane Asphalt" to "R.W. Dunteman Company."

Statement of Facts

Mr. James Griffeth was employed by the Respondent on April 2, 2015. During that time he testified he was struck in the face by a silver cap pictured in Petitioner's Exhibit 1. The Petitioner testified that immediately after being struck he noticed blood and spit out pieces of broken teeth. Petitioner denied any prior teeth pain and never had a dentist recommend removal of any of his teeth prior to April 2, 2015. Petitioner did admit that prior to the April 2, 2015 accident had not seen a dentist for a very long time. Petitioner also admitted that his teeth were decayed prior to the accident but suffered no pain or discomfort in them but that after the accident all of his teeth were in a great deal of pain.

Petitioner then treated medically at Pana Community Hospital on April 2, 2015. The nurse's note from his visit noted; "Ambulatory with cloth and pressure to mouth. States he was at work and a pipe came up hitting me in the mouth, knocking my teeth out. Broken teeth X2 front middle noted laceration to chin..." (PX-2) Respondent entered in pictures of Petitioner teeth taken at Pana hospital. The multiple pictures of his mouth show the two top teeth being black and decayed but broken to some extent and the bottom teeth broken in half. It was also noted that the Petitioners' front tooth had a chip out of it that Petitioner claimed was a result of the trauma.

Petitioner was instructed to follow up with Dr. Harrington on April 2, 2015. The record from Dr. Harrington's office was difficult to read but instructed Petitioner to see an oral surgeon. Petitioner testified that he did not return to Dr. Harrington because his office insisted he pay on the date of treatment out of his own pocket and upfront. The bill from Dr. Harrington's office in Petitioner's Exhibit 7 collaborates this testimony.

Petitioner followed up with Dr. David Fisher at Springfield Maxillofacial on May 19, 2015. It was noted that the Petitioner came in for an evaluation and extraction of teeth #24 &25. The patient states significant discomfort in the lower anterior teeth, but also occasional radiating pain in the upper anterior as well. It was noted that he suffered severe decay on multiple teeth. Under the assessment/plan portion of the record it noted that the Petitioner is a 45-year old male status post blunt trauma on April 2, 2015, suffering sublaxation and concussion of teeth #s 6 through 11 and 22 through 27 with also a fracture of teeth #'s 24 &25. Dr. Fisher recommends that he follow up with Dr. Harrington office to formulate a plan to restore the teeth in question. But he would need vitality testing on teeth #'s 6 through 11 and the lower anterior teeth in the near future. (PX 4)

Petitioner then followed up with a second dentist, Dr. Matthew Lynch, on May 20, 2015 who noted that the Petitioner had a work accident and discussed option for repair. Dr. Lynch noted that

teeth #23-26, #7 and 10 was due to a possible loss of vitality/cracks from trauma and suggested bridges to replace missing teeth. Petitioner was then to follow up with an oral surgeon.

Respondent then requested a record review from a Dr. Bargamian. (RX-2) It was noted by the Arbitrator that this was a record review and Dr. Bargamian did not personally see the Petitioner or exam his mouth in person. Dr. Bargamian agreed that the extraction and rehabilitation of teeth #23, #24, #25, and #26 was causally related to this claim. However, regarding teeth #7 and #10, Dr. Bargamian noted that Petitioner suffered from severe multi-surface tooth decay in the pictures and surrounding teeth and agreed that teeth #7 and #10 should have been removed but it was due to their advanced decay not the accident in question. Dr. Bargamian further opined that he did not believe teeth #7 and #10 were damaged as a result of the trauma. He based this opinion on the fact that the teeth adjacent to teeth #7 and #10 were not damaged.

Dr. Matthew Lynch then noted that the Petitioners' teeth #7-10 were carious and broken. Teeth #7-10 were recommended for extraction due to severe carious, percussion sensitivity, loss of tooth structure, and long term prognosis of endodontic were performed. Dr. Lynch recommended bridges for #6-8, and #9-11 to strengthen and stabilize the teeth adjacent to trauma in addition to replacing teeth. He also offered implants as an alternative. Dr. Lynch concludes that while the Petitioner's teeth were carious and would require treatment at some point, he had no pain in his teeth prior to the accident. (PX-6)

Petitioner submitted a photo which he estimated was 6 months to a year prior to the accident but could not give a date showing his teeth. Petitioner testified that his teeth did not have any change to from the time of the picture to the date of the accident. The picture is not up close and it is difficult to tell if there was decay present or not.

Petitioner did not allege any time loss due to the accident and is currently employed.

Conclusions of Law

The Arbitrator finds in favor of the Petitioner and order that the Respondent provide prospective and already incurred dental care in regarding to teeth #6-#8 and #9-11 to be causally related to his injury. As per the stipulation of the parties, the Arbitrator further orders that the Respondent pay for teeth the repair, past/present, and restoration of teeth #22-27 and makes no findings of law regarding these teeth as they were stipulated to as causally related at the time of trial. The findings of law are in regards to the treatment and prospective care of teeth #6-8 and #9-11.

To be entitled to compensation for an injury, Petitioner need not prove that the injury was the sole causative factor in his subsequent treatment and disability, but only that it was a causative factor. If a pre-existing condition is aggravated, exacerbated, or accelerated by an accidental injury, the employee is entitled to benefits. Rock Road Construction v. Industrial Commission, 37 Ill.2d 123,227 N.E.2d 65, 67-8 (1967) It was undisputed at the time of trial that the Petitioner's teeth were decayed prior to the date of injury but the Petitioner had no pain or never sought treatment for his teeth prior to being struck in the face. Post injury, Petitioner complained of pain in both parts of his mouth and it was

noted by the Arbitrator that the pictures of his mouth taken immediately post injury showed that the teeth in question were damaged structurally. Petitioner's un-rebutted testimony was that those teeth were whole prior to his injury.

The Arbitrator does recognize the arguments of Dr. Bargamian; the treatment in question is not likely related to trauma due to the fact that those teeth were not struck in the accident but due solely to the fact that the Petitioner suffered from advanced dental decay. However, the Arbitrator finds that argument to be unpersuasive. Dr. Bargamian did not exam Petitioner's mouth and there is enough medical documentation that the Petitioner suffered injury to the upper part of his mouth to dispute the assertion he suffered no trauma to that portion of his mouth. The ER records from Pana hospital noted that Petitioner suffered two broken upper teeth upon arrival. Also Petitioner testified that the chip in his front tooth was a result of the accident showing that the upper portion of his mouth did suffer trauma as a result of this accident. The pictures of the Petitioner's mouth taken the same day as the injury demonstrates a fair amount of decay but it also demonstrates a noticeable loss of tooth structure which Petitioner claimed came about as a result of his work injury. Further, Dr. Lynch did recognize that the Petitioner suffered from severe decay in his teeth and he recommended treatment for that in addition to damage secondary to trauma. Dr. Lynch also felt it was relevant that the Petitioner suffered no pain complaints prior to the accident and part of his treatment plan relied on Petitioner's continued pain complaints.

Accordingly, the Arbitrator concludes that the Petitioner's April 2, 2015 accident aggravated, accelerated a pre-existing condition of ill-being to Petitioner's upper teeth which resulted in the need for treatment after that date and future treatment to correct his dental 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 COOK)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
		☐ PTD/Fatal denied
	☒ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MARK SCHMIDT,

Petitioner,

vs. NO: 14 WC 3252

CHICAGO TRANSIT AUTHORITY,

Respondent.

17IWCC0521

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of nature and extent, 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 Arbitrator found that Dr. Shah had recommended additional injections but these were not approved. Respondent argues that there is no evidence for this finding because Respondent's hearsay objections relating to Petitioner's testimony regarding the lack of approval for the injections were sustained by the Arbitrator. We agree and hereby strike the references to the injections not being approved. (Dec. at 4 and 5).

The Arbitrator wrote, "It is undisputed that Petitioner was off work from March 18, 2013 to May 5, 2014." (Dec. at 5). However, this is a typographical error since it was stipulated that Petitioner was off work from March 18, 2014 to May 5, 2014. We hereby correct the decision to reflect that Petitioner's first day off work was March 18, 2014, not 2013.

On the issue of nature and extent, we find that the weighing of the five factors in §8.1b(b) of the Act results in a permanency award of 20% loss of use of the right leg.

For the first factor, the Arbitrator found that "no permanent partial disability impairment report and/or opinion was submitted into evidence" and gave no weight to this factor. (Dec. 4). Respondent argues that this is incorrect because, on May 5, 2014, Dr. Shah wrote, "At this point he can return to work full duty. He is at maximum medical improvement as of 05/05/14.

Impairment rating is zero." The Commission finds that this statement by Dr. Shah is not a "report" as contemplated under §8.1b(a) nor is there any indication that this impairment rating "opinion" was determined based upon "[t]he most current edition of the American Medical Association's 'Guides to the Evaluation of Permanent Impairment'" as required under that section. We also note that, even if Dr. Shah's statement on May 5, 2014 was intended to be an AMA impairment rating, it was not contained within a written AMA impairment report as required by the Act. Furthermore, Petitioner returned to Dr. Shah in September 2014 and August 2016 with additional complaints and for further treatment, after which a new impairment rating was not given. We find that Dr. Shah's statement does not constitute an AMA impairment rating under 8.1b(a). Therefore, the Arbitrator properly gave no weight to this under the first factor.

Regarding the second factor, the "occupation of the injured employee," the Arbitrator wrote that Petitioner was employed as a "lineman/electrician 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." (Dec. at 4). The Commission corrects the decision to reflect that Petition was a bus and truck mechanic and not a lineman/electrician at the time of the accident. (T.8). We also note that Petitioner testified that when he returned to work at his previous job his right knee affected his ability to perform his work. Petitioner testified that he had pain going up and down ladders, squatting, and kneeling. His work partner would perform tasks that required kneeling or stooping down and Petitioner would do more of the "standing" tasks. (T.24-25). Petitioner testified on cross-examination that, approximately one year prior to the hearing, he received a promotion to assistant foreman, which involves more office work and walking. He no longer physically uses his tools to repair buses but he testified that he could be "put back on the floor" at any time. (T.33-34). On redirect examination, Petitioner testified that if Respondent determines that more mechanics are needed on the floor, he would have to perform those duties. He testified that "walking is good" but his current position requires a lot of stair climbing to get the repair orders and climbing ladders to go into the buses to make sure the mechanics are doing their jobs. Petitioner testified that his knee feels better going up stairs or ladders than going down. He uses the handrail because his knee feels tender and he's cautious about it. (T.37-39). We find Petitioner credible that, although he was returned to work full duty in his previous position, he did so with some difficulty and self-imposed work modifications due to his continued symptoms. We agree with the Arbitrator's finding that this factor deserves greater weight.

For the third factor, we note that the Arbitrator did not specify Petitioner's age in this section. We hereby correct this omission by finding that Petitioner was 60 years old at the time of the injury. We affirm the remainder of the analysis of this factor.

The Commission affirms the Arbitrator's analysis of the fourth factor ("future earning capacity").

Regarding the fifth factor ("evidence of disability corroborated by the treating medical records"), we find that the Arbitrator gave too much weight to this factor. Petitioner's testimony regarding complaints of popping, grinding, and pain with certain activities is corroborated by Dr. Shah's records. On September 22, 2014, Dr. Shah documented Petitioner's complaints of patellar clunking with painful popping. On August 1, 2016, Dr. Shah wrote that Petitioner felt about 85-90% better compared to prior to the surgery but "continued to have pain, kneeling pain, pain deep to the kneecap." Petitioner's examination was positive for clicking and he did have some popping that was occasionally painful with crepitus in the patellofemoral joint, but he had no instability or giving out episodes. Although Petitioner testified about having pain with certain activities and being cautious, we find that he did not specifically testify about having any

17IWCC0521

strength or range of motion issues. Even if he had, and to the extent that his testimony could be interpreted as such, we find that these complaints are not corroborated by the medical records. On May 5, 2014, Dr. Shah noted that Petitioner had full range of motion and full strength and significantly improved pain, although he had occasional soreness and swelling which was improving. The subsequent visits to Dr. Shah do not support a finding that his range of motion or strength had diminished. We find that many of the considerations discussed by the Arbitrator under this factor are also elements of the second factor relating to his occupation. We find that Petitioner has some evidence of disability corroborated by the medical records but not to the degree that the Arbitrator found. Accordingly, we give this factor some weight.

We hereby modify the permanency award to 20% loss of use of the right leg. The decision is further modified to reflect the corrections noted above. All else is affirmed and adopted.

IT IS THERFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $712.55 per week for a period of 43 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the 20% loss of use of the right leg.

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.

DATED: AUG 21 2017

Charles J. DeVriendt

Joshua D. Luskin

L. Elizabeth Coppoletti

CJD/se
O:7/26/17
49

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 SCHMIDT,
Employee/Petitioner

v.

CHICAGO TRANSIT AUTHORITY,
Employer/Respondent

Case # 14 WC 3252

Consolidated cases: ____

17IWCC0521

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 **MARIA BOCANEGRA**, Arbitrator of the Commission, in the city of **CHICAGO** on **October 20, 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 **February 20, 2013**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$89,772.80**; the average weekly wage was **$1,726.40**

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*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$8,057.00** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$8,057.00**. Respondent is entitled to a credit of **$n/a** under Section 8(j) of the Act.

ORDER

Based on the §8.1b factors and the record taken as a whole, the Arbitrator finds that Respondent shall pay Petitioner permanent partial disability benefits of **$712.55/week** for **54.825 weeks**, because the injuries sustained caused the **25.5%** loss of the **right leg**, as provided in Section **8(e)**.

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

1-4-2017
Date

JAN 6 - 2017

FINDINGS OF FACT

It is undisputed that on February 20, 2013, Mark Schmidt ("Petitioner") suffered a traumatic injury to his right knee that arose out of and in the course of his employment with the Chicago Transit Authority ("Respondent"). Petitioner testified that on February 20, 2013, he was working as a mechanic at the Chicago Transit authority and was assigned to work on the diesel engine and replace a muffler on a Chicago Transit Authority bus. Petitioner testified that his job duties included kneeling down to repair bus engines and climbing ladders and stairs. Petitioner testified that during his work, on February 20, 2013, he knelt down to work on the engine. Petitioner testified that his knee twisted, felt a pop and felt an immediate onset of pain in his right knee, stemming from inside his knee. Petitioner testified that he had never felt this type of pain in his knee prior to February 20, 2013. Petitioner testified that he reported the incident to his supervisor on the same day.

Petitioner testified that he did not seek immediate medical treatment because he hoped his knee would improve. He testified that his knee did not improve and then sought medical treatment. He testified that on March 6, 2013, he treated with Dr. Nirav Shah at Parkview Orthopeadics and complained of right knee pain. Px1. He indicated that he was injured while working when he felt a "pop" in his knee while performing his duties. *Id.* Petitioner further indicated that he felt a grinding noise as well as pain. *Id.* He testified that his knee felt unstable at that time. He further testified that he continued to work at this time. Dr. Shah ordered the Petitioner to begin physical therapy and prescribed pain medication. Px7. He testified that the doctor ordered him to wear a knee brace while working. *Id.* Petitioner testified that he underwent 11 visits of physical therapy at Parkview Orthopaedics. Petitioner testified that the therapy provided temporary relief, but that his knee continued to feel weak and unstable.

Petitioner testified that he returned to Dr. Shah on August 6, 2013. Px1:40. Dr. Shah recommended and administered a cortisone injection in Petitioner's right knee. *Id.* Dr. Shah recommended further physical therapy. Petitioner testified that the injection provided temporary pain relief, but that his knee continued to feel unstable. Petitioner testified that his knee pain returned and he once again presented to Dr. Shah on October 30, 2016. Dr. Shah ordered an MRI of his right knee, which showed a partial tear of the anterior cruciate ligament near the tibial attachment, and a tear of the posterior horns of the lateral and medial menisci.

Following the diagnostic testing, Petitioner followed-up with Dr. Shah on December 30, 2013. Dr. Shah noted a meniscus tear, partial ACL tear, and patellar tendinopathy. *Id.* Dr. Shah further noted that Petitioner's symptoms had not improved and that Petitioner continued to have pain while stair climbing and kneeling. *Id.* On said date, Dr. Shah recommended arthroscopic surgery. *Id.*

On March 18, 2014, Dr. Shah performed a right knee arthroscopy with partial medial meniscectomy, abrasion arthroplasty of the patellofemoral joint and femoral trochlea, patellar tendon debridement, arthrotomy, and excision of the Hoffa fat pad. Px1:60. The post-operative diagnosis was right knee patellofemoral chondromalacia, right knee medial meniscus tear, right knee patellar tendinitis and tendinosis, and right knee Hoffa fat pad syndrome. *Id.* Petitioner returned to Dr. Shah on March 19, 2016. The doctor recommended Petitioner start therapy and remain off work. Petitioner underwent 9 therapy sessions at Parkview Orthopaedic Group between March 31, 2014 and April 24, 2014. Petitioner testified that therapy improved his symptoms but his knee continued to feel weaker than its pre-injury state.

On May 5, 2014, Dr. Shah released Petitioner to work full duty. Petitioner testified that his knee felt better but felt weaker and sorer compared to his pre-injury state. Petitioner testified that his right knee affected his ability to perform his work. Petitioner testified that he relies on help from his work partners to complete a job. Petitioner further testified that he also had a difficult time climbing ladders or kneeling down. Petitioner testified that he also would perform his work more slowly than prior to his injury. Petitioner testified that his

knee would be sore and painful after a day of work and that he would take over the counter pain medication to address the pain.

Petitioner testified that his knee would periodically click and feel unstable. Petitioner testified that he returned to Dr. Shah on September 22, 2014, for this issue. Petitioner complained of clunking and popping in his knee. Dr. Shah suspected scar tissue involvement and ordered a new MRI. Dr. Shah recommended further injections but these were ultimately not approved. On August 1, 2016, Petitioner saw Dr. Shah one final time. He continued to feel periodic pain and clicking in his right knee. Petitioner reported that his knee felt 85% improved since his pre-surgery condition. The doctor again recommended injections, which were not approved.

Petitioner testified that he suffered a sprained knee during high school football, sometime in the 1970s. Petitioner testified that this injury was of a soft-tissue nature and that the injury resolved within four to six weeks. From this point up until February 20, 2013, Petitioner testified that he did not suffer any injury to his right knee. Petitioner testified that, prior to February 20, 2013, he did not have any pain or other problems with his right knee after his high school football injury. Petitioner testified that he did not re-injure his right knee after February 20, 2013. Petitioner testified that his knee currently hurts him when kneeling down, climbing stairs and ladders, and descending stairs and ladders. Petitioner testified that he received a promotion and currently holds the job title of supervisor and team leader. Petitioner testified that his current position does require him to continue to perform mechanics duties. Petitioner testified that his right knee continues to affect his ability to perform his work. Petitioner testified that climbing and descending ladders, as well as kneeling down continue to bother him. Petitioner testified that he continues to ice his knee and take ibuprofen after a full day of work. It is undisputed that Petitioner was off work from March 18, 2013 to May 5, 2014.

CONCLUSIONS OF LAW

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

The sole issue in dispute is the nature and extent of Petitioner's right knee injury. It is undisputed that Petitioner was diagnosed with traumatic right knee patellofemoral chondromalacia, right knee medial meniscus tear, right knee patellar tendinitis and tendinosis and right knee Hoffa's fat pad syndrome, which has left the Petitioner permanently partially disabled. Px1:60. Dr. Shah performed a partial medial meniscectomy, abrasion and arthroplasty of the patellofemoral joint and femoral trochlea, patellar tendon debridement, arthrotomy and excision of the Hoffa fat pad. *Id.* Petitioner averred he remains symptomatic and continues to suffer from pain, soreness and clicking in his right knee, in which additional injections were recommended. *Id.* at 105. Petitioner last saw Dr. Shah in August 2016 and was released to full duty work in May 2014. Petitioner has worked full duty since May 2014 and last treated with Dr. Shah in August 2016. Therefore, his claim for permanency, if any, is ripe for adjudication. In considering the required factors, the Arbitrator notes the following:

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the Petitioner was employed as a lineman/electrician 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 that Petitioner testified credibly that he struggles to complete his duties due to right knee pain and weakness. The Arbitrator notes that Petitioner testified that he still struggles to bend his knee, kneel down, and climb and descend stairs and ladders. The Arbitrator notes that kneeling down and climbing stairs and ladders are part of Petitioner's job duties. The Arbitrator notes that the Petitioner testified that he completes his job duties more slowly and that he requests assistance from other workers more often. Because of heavy labor job duties and the fact that Petitioner

continues to have right knee pain and weakness while completing his job duties, which is corroborated by follow-up visits to his orthopedic physician and a full-duty release, the Arbitrator therefore gives *greater* weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was years old at the time of the accident, meaning he will continue to work with the effects of his injuries and may feel those effects to a greater degree than a younger person. In this regard, Petitioner's testimony as to those effects and difficulties were credible and bear out in his medical records. The Arbitrator therefore gives *lesser* weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that the Petitioner has maintained his earning capacity and 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 that the medical records corroborates the Petitioner's disability. Medical records include positive objective findings of structural damage, limited range of motion in Petitioner's right knee. Petitioner testified that he has marked deficit with respect to his right knee strength and motion. He also testified that his right knee affects the performance of his job duties and his activities of daily living. Petitioner also testified that he currently has difficulties performing current job duties that require physical work that includes kneeling and climbing stairs and ladders. He also testified that when he needs to perform physical work, he performs the work more slowly and often requires help from other employees. Petitioner testified that he continues to take medication after completing work throughout the week. Kneeling, climbing ladders and stairs, and bending his knee are all part of the full performance of Petitioner's job duties and the medical records accurately describe Petitioner's current functioning, limitations and disabilities. Petitioner's complaints, which highlight impaired motion and strength, are corroborated by medical records, which also noted that he was recommended for injections but those were never approved. The Arbitrator therefore gives *greatest* weight to this factor.

Based on the above factors and the record taken as a whole, the Arbitrator finds that Respondent shall pay Petitioner permanent partial disability benefits of **$712.55/week** for **54.825 weeks**, because the injuries sustained caused the **25.5%** loss of the **right leg**, as provided in Section **8(e)**.

Signature of Arbitrator

1-4-2017
Date

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 Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

James Zielinski,

Petitioner,

vs. NO: 07 WC 29995

Cerami Construction,

Respondent.

17IWCC0594

DECISION AND OPINION ON REVIEW

A Section 19(h)/8(a) Petition having been filed by the Respondent herein, and notice given to all parties, the Commission, after considering Respondent's request for modification from a Section 8(d)(1) award to a Section 8(d)(2) award, and being advised of all facts and law, hereby denies Respondent's Petition for the reasons stated below:

FACTUAL BACKGROUND

On May 10, 2007 Petitioner was employed by Respondent as a Cement Mason. On said date he was carrying his tool bag up a two-story ladder. As he reached the top, he felt a pop in his shoulder. He looked down and saw that his right biceps had "come off and was flopping." Petitioner underwent conservative treatment, work conditioning, and ultimately arthroscopic surgery in 2008. However, in 2009 he complained of increased pain again, and was diagnosed with a torn rotator cuff.

By 2012, Petitioner had been permanently restricted from working as a Cement Mason. Medical professionals opined that his condition was livable as long as he avoided stressing his arm. Petitioner was limited to lifting up to fifty pounds. A vocational rehabilitation assessment found

17IWCC0594

Petitioner's post-accident earning capacity to be between $12-$15/hr. Petitioner, however, was unable to secure employment at this wage level.

In 2016, Respondent received notice from a Claims Examiner that Petitioner had been working as a Cement Mason. Respondent's 19(h)/8(a) Petition was presented for hearing before Commissioner Gore. At hearing, Mr. Michael Dynowski, the current VP of Elliott Construction Corporation testified that, in 2015, he held the position of Flat Work Supervisor, and hired Petitioner as a Cement Finisher for one day from Local Union Number 502. Petitioner was hired to pour a floor and the daily work log indicates that he worked eleven hours. Mr. Dynowski testified that pouring a floor requires the use of a ten-pound bull float to smooth concrete, but that he did not recall which arm Petitioner used to operate the float.

To operate a bull float, a Cement Finisher floats it across concrete until it gets to the desired distance, then twists the handle a quarter turn to cock it back towards him or herself, smoothing the concrete as it returns.

Mr. James Ornelas owns Ornelas Construction. He hired Petitioner for two days of work on October 29th and 30th of 2015. There was testimony that a Cement Finisher entailed several duties, some more intense than others. Petitioner worked sixteen hours on the 29th and one hour on the 30th as a Concrete Finisher. Mr. Ornelas was not on site on the days Petitioner worked, and thus did not know if Petitioner actually operated a bull float or simply used a rake the entire time. A garden rake would be used to make sure perforated plastic did not get covered up while concrete was being poured.

Mr. Michael Pirron owns DeGraf Concrete Construction. He hired Petitioner for two and-a-half days to pave cement. Petitioner was one of fifty employees paving cement, which entails numerous duties, including carrying a spray can around with water in it to mist the concrete so that it does not dry out before it has been properly smoothed. Mr. Pirron acknowledged that the person performing this duty could fill up the can at his or her discretion.

Petitioner testified that he is still incapable of lifting over fifty pounds and cannot climb ladders. The aforementioned four and-a-half days of work are the only days he has worked since the 2012 award was entered. When he worked for DeGraf Construction, Petitioner testified that the first day everyone was sent home due to a machine breaking down. The remainder of his time he spent spraying mist over concrete. He kept the five gallon spray can two-thirds full.

Petitioner testified that when he worked for Elliott construction he simply walked the bull float forward and back, he did not sling it out, twist and cock it back towards himself. This prevented any stress on his shoulder.

Petitioner testified that he only used the garden rake while working for Ornelas Construction.

17IWCC0594

Being older, Petitioner stated that he was allowed to choose the duties he wanted to perform while working for the above employers, because older workers usually performed the easier jobs.

Petitioner stated that he only worked these four and-a-half days because he lost his insurance due to unemployment. Being a diabetic, he had to pay out of pocket for medical expenses, and his blood work costs $1,300.00 every three months. In 2016 Petitioner's pension began, thus he no longer has a need to earn money via employment.

Petitioner's treating physician testified that the vast majority of his opinions regarding Petitioner were in reference to his general health. He acknowledged that in 2016 he indicated that Petitioner could lift over 50 pounds, but noted that this did not necessarily mean he could lift this weight with his right upper extremity. The treating physician also noted that he was unaware of the specific duties performed by a Cement Finisher, and he never specifically treated Petitioner's right shoulder, thus he was not qualified to opine whether or not Petitioner's shoulder had improved to the point he could perform as a Cement Finisher.

ORDER

The Commission finds that there is no objective evidence supporting Respondent's §19(h)/8(a) claim. Petitioner has not worked as a Cement Finisher subsequent to the September 4, 2012 arbitration Decision. He did not work at all in 2013 and 2014. He worked a total of four and-a-half days in 2015, but did not perform any duties that required him to lift over fifty pounds or use his right shoulder. Petitioner's treating physician clarified his medical records, stating that he was not qualified to render an opinion on Petitioner's ability to return to work with regards to his right shoulder, and only opined about Petitioner's ability to work with respect to his diabetic condition.

Petitioner's "return" to the workforce had nothing to do with any improvement in his condition, and everything to do with his need for funds to keep up with his health regimen. Four and-a-half days of work between 2013 and 2017 cannot realistically be categorized as a return to the workforce, and Petitioner's testimony makes it understandable why such a "return" was necessary.

Respondent cannot use the records of Petitioner's treating physician to prove that Petitioner is capable of returning to work, as the treating physician himself admitted he did not know for sure what the duties of a Cement finisher entailed, thus he could not say whether or not Petitioner was capable of performing the physical requirements necessary. He also stated that he examined Petitioner generally, and was in no position to render an opinion regarding the vocational functionality of his right shoulder.

17IWCC0594

Based on the totality of testimony and evidence, the Commission finds no sufficient evidence of a material change in Petitioner's condition, and therefore denies Respondent's Petition.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent's Section 19(h)/8(a) Petition be denied.

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

SEP 28 2017

DATED:
DLG/wde
O: 8/31/17 (Discussion)
45

David L. Gore

Stephen Mathis

Deborah L. Simpson

17IWCC0594

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

James Zielinski
Employee/Petitioner

v.

Cerami Construction
Employer/Respondent

Case # **07** WC **029995**

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 **July 25, 2012**. 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 **May 10, 2007**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$86,905.00**; the average weekly wage was **$1,671.25**.

On the date of accident, Petitioner was **56** 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 **$243,862.03** for TTD, **$0** for TPD, **$0** for maintenance, and **$3,137.04** (advance against PPD) for other benefits, for a total credit of **$246,999.07**. Arb Exh 1.

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

ORDER

Respondent shall be given a credit of **$243,862.03** for TTD, **$0** for TPD, **$0** for maintenance, and **$3,137.04** for other benefits, for a total credit of **$246,999.07**.

Respondent shall pay Petitioner temporary total disability benefits of $1,114.17/week for 192.86 weeks, commencing May 11, 2007 through January 20, 2011, as provided in Section 8(b) of the Act and as more fully explained in the attached conclusions of law.

Respondent shall pay Petitioner permanent partial disability benefits of $785.75 per week from January 21, 2011 through May 31, 2012 and permanent partial disability benefits of $799.92 per week from June 1, 2012 forward and through the duration of his disability as provided in Section 8(d)1 of the Act and as more fully explained in the attached conclusions of law.

Respondent shall pay reasonable and necessary medical services of $1,638.40, as provided in Sections 8(a) and 8.2 of the Act and as more fully explained in the attached conclusions of law.

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 Molly Mason

September 4, 2012
Date

SEP - 4 2012

17IWCC0594

James Zieliniski v. Cerami Construction
07 WC 29995

Arbitrator's Findings of Fact

Petitioner, who was sixty-one years old as of the hearing, testified he began working as a cement mason at age thirteen. T. 14. As of May of 2007, he worked as a cement mason for Respondent. He was a member of the Cement Masons' Union, Local 502. T. 14.

As a cement mason, Petitioner's duties included preparing the sub-base, framing, pouring concrete and smoothing the poured surface. T. 12. He used a variety of hand tools, including a 20-pound sledge hammer. His tool bag weighed about 30 or 35 pounds. T. 13. He had to lift not only his tool bag but also lumber and machines. During a pour, he would stand and walk in wet concrete for an extended period. He regularly climbed ladders and sometimes climbed scaffolding.

Petitioner testified he was required to work 8 ½ hours per day while employed by Respondent. Once the masons started to pour concrete, they had to continue working until the job was finished. Otherwise, "part of the structure [would] not bind to the other part." They would work through their half hour lunch. Per their union contract, they received double time for that half hour period. T. 15. Petitioner characterized that half hour of work as "mandatory." If he had refused to work through lunch, and had taken the allotted half hour, he would have been let go. T. 16.

Petitioner testified that the work week in his trade consisted of five days. He had to make himself available to work on each of those five days. Because he was required to work 8 ½ hours per day, his work week consisted of 42 ½ hours. T. 17-18.

Petitioner offered into evidence a document from Respondent entitled "employee time history." PX 8, p. 2. This document reflects that Petitioner worked a total of four days (April 5, 2007, May 1, 2007, May 2, 2007 and May 4, 2007) and thirty-five hours for Respondent during the year preceding his undisputed accident of May 10, 2007. The document also reflects total gross earnings of $1,451.60 (including .50 hours of double time on April 1, May 1 and May 2 and 1.50 hours of double time on May 4, 2007). Petitioner testified he was required to work 9 ½ hours on May 4, 2007 because cement was poured that day. T. 17.

Respondent did not object to the "employee time history." T. 80. Nor did Respondent offer any evidence contradicting Petitioner's wage-related testimony.

Petitioner testified that, on May 10, 2007, he arrived at the jobsite early, as was his custom, and learned he would have to carry his cooler and tool bag up a ladder by hand. T. 19. The ladder was almost two stories long. He came back down, put his tool bag over his right shoulder and headed back up. Just as he got to the top of the ladder, he "felt something pop" in his shoulder. T. 19. After climbing two other ladders, he looked at his right upper arm and

saw that his biceps had "come off and was flopping." T. 20. He reported the injury and went to the Emergency Room at Glenbrook Hospital. T. 20-21.

The Emergency Room triage note sets forth the following history: "Pt states was climbing ladder this AM when felt a painful pop in R biceps area." Dr. Wahl described Petitioner's right biceps tendon as "tense." He also noted deformity and laxness proximal to the tendon, "consistent with proximal rupture." He obtained X-rays [no X-ray report is in PX 4], applied a sling to the affected arm and instructed Petitioner to follow up with an orthopedic surgeon close to his home. PX 4.

Petitioner saw Dr. Rhode, an orthopedic surgeon, the following day, May 11, 2007. Petitioner completed a patient information form indicating that his primary care physician referred him to Dr. Rhode.

Dr. Rhode's note of May 11, 2007 reflects that Petitioner experienced an abrupt onset of right shoulder pain while climbing a ladder at work the previous day. Petitioner complained of a "bulging mass in the biceps area." He denied having previously injured his shoulder. On examination of Petitioner's right shoulder, Dr. Rhode noted a positive impingement sign, specifically with internal rotation, "representing the posterior (infraspinatus) rotator cuff." He also noted "evidence of biceps rupture with a bulbous biceps mass." He prescribed Feldene and Tylenol #4 and took Petitioner off work. PX 5.

Petitioner returned to Dr. Rhode on May 25, 2007 and again complained of right shoulder pain. Dr. Rhode's examination findings were unchanged. He refilled Petitioner's Tylenol #4 prescription, recommended a right shoulder MRI and indicated Petitioner would require a primary biceps repair. He took Petitioner off work. PX 5.

In an addendum dated June 27, 2007, Dr. Rhode noted that he talked with Petitioner "about the mechanism of injury," with Petitioner indicating he felt his arm give way while he was pulling on the rung of a ladder with his tool belt strapped to his back. Based on this description, Dr. Rhode opined that "the concentric load of pulling up on a ladder rung with the affected extremity could rupture a proximal biceps tendon." PX 5. The Arbitrator notes that causal connection is not in dispute. Arb Exh 1.

An adjuster authorized the recommended MRI and surgery via facsimile on July 13, 2007. Based on entries in several records (RX 2 and 3), it appears that Petitioner underwent the MRI on July 30, 2007. The report concerning this MRI is not in evidence.

Petitioner testified he subsequently came under the care of Dr. Ho, an orthopedic surgeon affiliated with the University of Chicago.

Petitioner first saw Dr. Ho on October 1, 2007. A handwritten note bearing that date reflects that Petitioner "had MRI" but "did not bring." Dr. Ho obtained a consistent history of the work accident and noted that Petitioner was continuing to work but having difficulty

swinging a sledge hammer overhead and reaching behind his back. On examination of Petitioner's right shoulder, Dr. Ho noted a full and painless range of motion and normal strength on Jobe's testing but a "classic Popeye muscle deformity of the right biceps tendon." He prescribed physical therapy and instructed Petitioner to return to him in six weeks. He indicated he "would like to review the MRI more so to study the rotator cuff than the bice{ps." PX 1.

Petitioner underwent an initial physical therapy evaluation at AthletiCo on October 3, 2007. The therapist recommended he undergo therapy two to three times a week for four to six weeks.

Petitioner returned to Dr. Ho on October 29, 2007 and indicated he had "noted increased right shoulder pain over the past week with physical therapy." On examination of the right shoulder, Dr. Ho again noted the "Popeye's deformity" of the biceps. He also noted positive Neer's, Hawkin's, Jobe's and Speed's tests. He reviewed the MRI and interpreted it as showing a partial thickness bursal tear of the supraspinatus with impingement and AC joint arthritis. He offered an injection but Petitioner declined, saying he wanted to try Feldene first. Dr. Ho updated Petitioner's therapy prescription to include a rotator cuff program. He instructed Petitioner to return to him as needed. PX 1.

Dr. Ho issued a correction on November 2, 2007 indicating there was an error in his October 1, 2007 note and that Petitioner had actually been off work since May 11, 2007. Dr. Ho indicated Petitioner should remain off work until his next office visit, scheduled for December 3, 2007.

On November 12, 2007, Petitioner's therapist issued a note indicating Petitioner was not making any progress, despite having attended fourteen sessions, and complained of constant pain. PX 1.

Petitioner returned to Dr. Ho on December 3, 2007 and reported no relief with either the therapy or the Feldene. Dr. Ho injected the subacromial bursa with Kenalog and instructed Petitioner to continue therapy and remain off work. PX 1.

At the next visit, on January 14, 2008, Petitioner reported "75% improvement" to Dr. Ho but expressed concern about being able to resume his cement finishing duties. Dr. Ho described this concern as "reasonable." He noted a full range of right shoulder motion and good strength on Jobe's testing. He prescribed work conditioning but indicated Petitioner might require surgery if his symptoms returned or worsened. PX 1.

At Respondent's request, Petitioner saw Dr. Tonino for a Section 12 examination on February 4, 2008. [The Arbitrator notes that RX 2 and RX 3 appear to be identical documents concerning this examination, although RX 2 is dated July 26, 2007 and RX 3 is dated February 4, 2008]. Dr. Tonino is chief of sports medicine at Loyola University Medical Center. He described Petitioner as right-handed. He indicated he reviewed various records, including a MRI report of

July 30, 2007 describing a paralabral cyst, a posterior labral tear and a biceps tendon "within normal limits." He noted that Dr. Ho had offered Petitioner an injection because he believed the MRI to show a partial-thickness rotator cuff tear.

Dr. Tonino noted complaints of right arm weakness and pain with overhead activities. On examination of Petitioner's right shoulder, Dr. Tonino noted external rotation to 30 degrees versus 60 on the left, internal rotation to L5, versus to T12 on the left, and weakness with both resisted palmar abduction and resisted external rotation.

Dr. Tonino, like Dr. Ho, believed Petitioner to have a partial-thickness rotator cuff tear. Based on Petitioner's lack of improvement with conservative care, he recommended an arthroscopy. He indicated Petitioner might also need a subacromial decompression and rotator cuff repair. He also indicated Petitioner would need to undergo therapy postoperatively. RX 2, 3.

On February 11, 2008, Petitioner called Dr. Ho and indicated he was experiencing increased pain with work conditioning and wanted to undergo surgery. Dr. Ho instructed Petitioner to discontinue work conditioning and return to him. Petitioner returned to Dr. Ho on February 20, 2008 and indicated his pain had been aggravated by work conditioning. Petitioner also told Dr. Ho that he had seen Dr. Tonino at the carrier's request and that the doctor had suggested surgery. On examination, Dr. Ho noted pain on Jobe's, Neer's and Hawkin's testing. He prescribed Vicodin, told Petitioner to continue his rotator cuff strengthening program, either on his own or in formal therapy, and scheduled Petitioner for a rotator cuff repair. PX 1.

On May 1, 2008, Dr. Ho performed arthroscopic surgery consisting of a rotator cuff repair and biceps tendon debridement. In his operative report, he noted a 50% partial-thickness tear of the supraspinatus and infraspinatus and a tear of the biceps tendon near the bicipital groove. He described the labrum as "frayed but intact." He also noted Grade 3 chondromalacia of the glenoid, a type 3 acromion and a prominent distal clavicle. Following the surgery, he instructed Petitioner to keep his right arm in a sling at all times and start passive range of motion exercises. Dr. Ho removed the sutures on May 12, 2008 and instructed Petitioner to begin weaning out of the sling and continue therapy. Petitioner returned to Dr. Ho on June 16, 2008 and reported only occasional twinges of right shoulder pain. Petitioner expressed a desire to "start formal therapy and ride his motorcycle." On examination, Dr. Ho noted a near full range of motion, active elevation of 175 degrees and 4/5 strength with Jobe's testing. He instructed Petitioner to begin a rotator cuff strengthening program in therapy. He cautioned Petitioner that, due to the nature of cement finishing, it might take up to six months for him to be able to resume working. He did not comment on motorcycle usage. PX 1.

A therapy note dated August 13, 2008 reflects that Petitioner reported "riding his bike since surgery" and denied having any pain while doing so. The therapist cautioned Petitioner against riding his bike "as frequently as he should [sic] due to muscle weakness and chance of re-injury," with Petitioner purportedly stating he was going to continue riding since it "was not his bike that was causing him pain." Petitioner complained of severe pain when raising his arm

and related this pain to exercises performed in therapy. The therapist described Petitioner as exhibiting both subjective and objective inconsistencies. At the end of her report, the therapist attributed Petitioner's pain to either "too much activity outside of therapy or from condition of shoulder joint." RX 6.

Petitioner returned to Dr. Ho on August 18, 2008 and described "an episode where he hyper-extended the shoulder in therapy." Petitioner indicated his shoulder had been sorer since this episode. On examination, Dr. Ho noted an essentially full range of motion and good strength. He renewed Petitioner's Vicodin ES prescription and instructed Petitioner to continue his strengthening program. He indicated Petitioner was not ready to return to work. PX 1.

On September 8, 2008, Petitioner went back to Dr. Ho and reported experiencing a sharp onset of pain while performing an "internal rotation move" during therapy three or four weeks earlier. Petitioner indicated he had taken four or five days off therapy. On examination, Dr. Ho noted a full range of motion in forward flexion, abduction and external rotation but pain with cross-over. He prescribed Naprosyn and additional therapy and instructed Petitioner to remain off work. PX 1.

A physical therapy note dated October 24, 2008 reflects that Petitioner reported having fallen and fractured his right ankle on October 18, 2008. Petitioner was wearing a cast and ambulating with crutches. Petitioner continued attending therapy thereafter through November 7, 2008, at which time he reported having increased pain and being unable to lift his right arm past 90 degrees. Therapy was placed on hold a week later. PX 3.

Petitioner testified that Respondent discontinued his temporary total disability benefits in October of 2008 because he allegedly missed an appointment to be re-examined by Dr. Tonino. Petitioner testified he did not receive notice of the re-examination because he was in the process of moving and had his mail held until the move was completed. It was not until he retrieved his mail that he learned of the appointment. T. 26. He saw Dr. Tonino in November of 2008, about two weeks after he retrieved his mail. Dr. Tonino did not release him to work. After the November 2008 re-examination, Respondent resumed paying him benefits. T. 27-28. Respondent did not offer into evidence any report from Dr. Tonino concerning a November 2008 re-examination.

Petitioner returned to Dr. Ho on November 10, 2008 and reported having seen Dr. Tonino. Petitioner told Dr. Ho that Dr. Tonino recommended an MR arthrogram. On examination, Dr. Ho noted pain with overhead activity with positive Neer's and Hawkin's signs as well as pain with cross over. Dr. Ho recommended an MR arthrogram "to evaluate for possible rotator cuff pathology versus labral pathology." He directed Petitioner to return to him following the MR arthrogram. PX 1.

Dr. Tonino re-examined Petitioner on February 23, 2009 and indicated Petitioner had not yet undergone the MR arthrogram that both he and Dr. Ho had recommended. Dr. Tonino indicated he had last examined Petitioner on November 3, 2008 and had recommended an MR

arthrogram on that date. When Dr. Tonino re-examined Petitioner on February 23, 2009, he noted elevation of 160 degrees on the right, compared with 180 on the left, external rotation to 45 degrees on the right, compared with 60 on the left, internal rotation to L3 on the right, compared with T12 on the left, and pain with both resisted palmar abduction and resisted external rotation. With respect to the intervening ankle injury, he stated: "I do not believe the fact that the patient was ambulating on crutches led to any further damage in the shoulder." He again recommended an MR arthrogram and found it likely that Petitioner would require more surgery based on the calcification shown on his X-rays. He found Petitioner capable of light duty with no lifting over 5 pounds, no overhead work and no repetitive use of the right arm. He characterized the treatment to date as reasonable and necessary and stressed that Petitioner "will not reach maximum medical improvement until he has had his MR arthrogram and determination has been made whether further surgery is indicated." RX 4.

On April 6, 2009, a NovaCare therapist issued a discharge summary explaining Petitioner's discharge from physical therapy as follows: "Progress has plateaued. Non-compliance. Stopped coming, hasn't been seen in 147 days, case is pending litigation." RX 7.

Petitioner finally underwent the recommended MR arthrogram on May 11, 2009. The radiologist noted a "recurrent complete tear of the supraspinatus tendon with underlying rotator cuff tendinopathy," degenerative changes of the posterior aspect of the bony glenoid, thinning of the long head of the biceps tendon over the superior surface of the humeral head, with a tear at this site suspected, and post-operative changes from the previous rotator cuff repair. PX 1.

On August 3, 2009, Petitioner complained of increased pain to Dr. Ho and indicated he was experiencing difficulty adducting his arm across his body. On examination, Dr. Ho noted minimal tenderness to palpation over the AC joint, a negative Jobe's test, "exquisite pain localized to the shoulder with resisted forward flexion" and internal rotation only to the upper lumbar/lower thoracic spine. Dr. Ho reviewed the arthrogram report and recommended a right rotator cuff repair. PX 1.

At Respondent's request, Dr. Tonino examined Petitioner again on July 29, 2010. Dr. Tonino noted that Dr. Ho had recommended a revision rotator cuff repair on August 3, 2009. Dr. Tonino also noted that Petitioner had not seen a physician since August 3, 2009 and continued to complain of right shoulder pain. Dr. Tonino found Petitioner to be a candidate for a right rotator cuff repair. He indicated Petitioner should undergo a functional capacity evaluation if he opted not to proceed with this surgery. He characterized the treatment to date as reasonable. He indicated he could not determine whether Petitioner would require permanent restrictions until after the functional capacity evaluation. RX 5.

Petitioner testified he declined to undergo additional surgery because he "went through a lot of pain" following the first surgery and no one could guarantee a good result. T. 28-29.

Petitioner testified he became employed on January 21, 2011. On that date, he started driving a cab taking problem students to school. He continued performing this work until late May 2011. He denied performing any other jobs in 2011. T. 30. His 2011 tax return reflects he derived a net profit of $8,577.00 in 2011. He has looked for work in 2012 but has not worked. He looked for jobs as a parts driver or tow truck driver. The parts driver job paid $8.00 per hour. He did not receive any calls asking him to interview for either of these jobs. T. 31.

Petitioner underwent a functional capacity evaluation at ATI on April 10, 2012. T. 32-33. The evaluator, James Lemley, described the evaluation as valid. He found Petitioner's physical capabilities consistent with a medium physical demand level, meaning Petitioner could occasionally lift 55 pounds. He noted that Petitioner's cement finisher job is typically considered a heavy physical demand level position by the Dictionary of Occupational Tables. He also noted he had not been given a job-specific description. He indicated Petitioner complained of pain with side to side arm movements "which are consistent with the movements he performs on the job." He recommended Petitioner follow up with his physician. PX 2.

On March 22, 2012, Susan Entenberg, a certified rehabilitation counsel, evaluated Petitioner at the request of Petitioner's counsel. Entenberg issued a report concerning her evaluation on May 29, 2012. Entenberg described Petitioner as "very pleasant and cooperative" throughout her evaluation. She noted that Petitioner's temporary total disability benefits were terminated on December 25, 2011 and that Petitioner denied any current source of income. She noted Dr. Ho's and Dr. Tonino's recommendation of a revision rotator cuff repair and indicated Petitioner did not want to undergo more surgery. She characterized Petitioner's previous cement mason job as heavy and noted a valid functional capacity evaluation placed Petitioner at medium duty.

Entenberg described Petitioner's most recent work experience as follows:

> "Mr. Zielinski did work as a cab driver during 2011 and indicated that his gross income was $8,577.00 for the year. He states he also worked in 2012 for Arctic Snow & Plow doing snow removal this past winter and earned around $600 for the winter season. He states he also attempted a finishing job recently. An 11' by 16" area was filled with concrete by truck and no finishing was done. He states he spent 45 minutes smoothing the concrete and was in severe pain the next morning from the repetitive activity."

PX 7, p. 3.

Entenberg found Petitioner to be an appropriate candidate for vocational rehabilitation. She found Petitioner's prognosis for job placement to be "fair," given his age, work history and

restrictions. She found Petitioner's present earnings capacity to be approximately $12.00 to $15.00 per hour. PX 7, p. 4.

Petitioner returned to Dr. Ho on May 14, 2012 and indicated his shoulder had not really changed since his last visit in 2009. Petitioner indicated that his shoulder was essentially pain free with rest. He also reported being able to ride his motorcycle. He told the doctor he did not want to undergo any additional surgery. Dr. Ho reviewed the functional capacity evaluation and the May 2009 MRI. He addressed Petitioner's work capacity as follows:

> "Based on his recent functional capacity evaluation and the findings of his post-operative MRI, I agree with the patient being permanently restricted from his prior job duties. If he were to be re-employed, it would have to be at the medium physical demand level unless the patient were willing to undergo a repeat repair of his rotator cuff."

PX 1.

At the request of his attorney, Petitioner saw Dr. Rubinstein for an evaluation on May 21, 2012. T. 33-34. PX 6. Dr. Rubinstein is associated with the Illinois Bone and Joint Institute. In his addendum of May 24, 2012, Dr. Rubinstein opined that Petitioner had a "re-tear of his rotator cuff following an initial workplace accident where he injured his rotator cuff, which was previously asymptomatic." Based on the valid functional capacity evaluation and Petitioner's description of his cement finisher duties, Dr. Rubinstein further opined that Petitioner was unable to resume his former trade. He found Petitioner capable of medium duty within the lifting-related abilities identified at the functional capacity evaluation. He also found Petitioner to be at maximum medical improvement, based on Petitioner's decision to forego further surgery. He suggested a home exercise program and either placement in an alternative job or early retirement. He concurred with Drs. Ho and Tonino concerning causation. PX 6.

On May 30, 2012, Entenberg issued a brief report indicating she reviewed Dr. Ho's report of May 14, 2012 and the report did not prompt her to change any of the opinions expressed in her report of May 29, 2012. PX 7, p. 5.

Petitioner testified he has been unable to find any jobs at the wage level, i.e., $12.00 to $15.00 per hour, identified by Entenberg. T. 32. Petitioner further testified that no doctor who has treated or examined him has indicated he can resume working as a cement mason. T. 34. Respondent's carrier has never offered him vocational rehabilitation or job search assistance. T. 34.

Petitioner testified that Local 502 cement masons currently work 42.5 hours per week. If he had been able to work as a union cement mason between January of 2011 and May of 2012 his base pay would have been $41.85 per hour. As of June 1, 2012, union cement masons began earning $42.35 per hour. T. 35-36.

Petitioner testified he is right-handed. T. 36. His current pain level varies depending on his activities and whether or not he inadvertently sleeps on his right side. His right arm "feels halfway decent" if he avoids all activities. Out of every ten days, he will have one day when he experiences no pain and two or three days when he feels slight pain. He takes Aleve when his pain increases. T. 36, 38. He continues to ride his motorcycle because, ironically, that activity "doesn't hurt at all." T. 37. If he rakes leaves or shovels snow, he will "feel it the next day." T. 37. He still does not want to undergo the second surgery that Dr. Ho offered. T. 37. Had the accident not occurred, he "absolutely" would have continued working as a cement mason. T. 37-38. Shortly before the hearing, his right arm unexpectedly flared up for five to seven days. The flare-up subsequently resolved. T. 38.

Under cross-examination, Petitioner testified he was subject to weather-related layoffs when he worked as a cement mason. The layoffs had no set pattern. He has poured cement in the rain and snow. If he was working on a high-rise, he would be sent home if the winds got high. T. 41. After looking at his 2011 tax return, Petitioner acknowledged his gross receipts totaled $18,312.00 in 2011. T. 44-45. Between January and May of 2011, he worked for R & E Taxi as a specialized cab driver, taking children to and from school. T. 48. During this time, he paid gas and lease expenses daily. The owner of R & E Taxi deducted these expenses from Petitioner's fares each day and paid Petitioner the remainder in cash. T. 52. Petitioner testified it was "too difficult" to estimate how much he received in cash each day because, if a student was suspended from school or failed to show up, he would receive no pay. T. 53. Petitioner denied receiving any tips during this period. T. 53. Petitioner quit this job in May of 2011, when the school year ended. T. 45, 49. In October or November of 2011, the owner of R & E Taxi asked if he would work as a conventional cab driver. Petitioner agreed but the job proved to be not worth his time. He was driving in a "very poor neighborhood." He received very few tips and earned very little. The cab ended up sitting in his driveway. T. 46-49, 54. During this period, the owner of R & E Taxi did not charge him a set lease each day. The lease could be as low as $5.00 on a day when Petitioner received few fares. T. 55. He drove a cab for about 31 weeks in 2011. During this period, he received $1,018.67 per week in temporary total disability benefits. T. 50. He never told anyone he was continuing to receive these benefits while working. He is diabetic and was "freaking out" because his insurance coverage was running out. T. 69. He also operated a snow plow for Arctic Snow Removal during the winter of 2011-2012 but earned only about $600 because the winter was so mild. The hourly rate of pay was about $23.75. T. 56.

Petitioner testified that his motorcycle is a Harley Davidson with a 1564 cc motor. The motor is 96 cubic inches in size. His motorcycle weighs 730 pounds "dry" and close to 900 pounds when it is full of gas and oil. He has to support the motorcycle with his legs while riding. His motorcycle is a "touring bike," meaning that the handlebars are about even with his elbows. When he rides, he holds his arms straight forward at about elbow level. T. 58. He rides as much as he can, weather permitting. T. 69. He received permission from Dr. Ho to resume riding his motorcycle about six weeks after his May 1, 2008 surgery. T. 59. Dr. Ho asked him if it was painful to ride and he said "no." The doctor then said, "go at it." T. 60.

Petitioner recalled a female physical therapist telling him he should not be riding. He told this therapist his doctor gave him permission and he was going to ride. T. 59. He denied being discharged from therapy due to non-compliance. T. 61-62. He discontinued therapy on Dr. Ho's orders. T. 62. He underwent no active care between August of 2009 and his functional capacity evaluation in 2012. T. 62-63. When he met with Susan Entenberg, he told her he can use a computer to check his E-mails, use Facebook and surf the Internet. T. 63. He has been on Facebook for about a year. He is starting to acquire basis computer skills. T. 64. He acquired an E-mail address in March of 2012. T. 64.

Petitioner testified that cement masonry can involve overhead work. When cement masons do "patching," they use their hands to hold a grinder above shoulder level. T. 65. He worked as a foreman for about two years. During 99% of that two-year period, he was a "working" foreman. He would perform the usual tasks of a cement mason during the day and complete his foreman tasks, i.e., paperwork, each night at home. T. 67. Three months ago, he registered with the Illinois Department of Employment to look for jobs. T. 67. He has also looked for work online. He has yet to find a posted job for which he is qualified. T. 68.

On redirect, Petitioner testified he obtained assistance preparing his 2011 tax return. T. 69-70. Before 2011, he had never filed a tax return based on self-employment. T. 70. As far as he knows, his 2011 tax return is accurate. T. 70. He made a "bad choice" in continuing to receive temporary total disability benefits while working. He made this choice because his diabetes medication costs about $1,000 per month and he was not going to have health insurance in 2011. He called the State but was unable to obtain any assistance. T. 71. It was not until 2012 that he started operating the snowplow. T. 72. He never injured his right arm while operating his motorcycle. T. 72-73. Since the work accident, he has aggravated his right arm during therapy and on those occasions when he slept "wrong." T. 72. He underwent a repeat MRI in May of 2009. In August of 2009, Dr. Ho offered him the option of additional surgery. Dr. Ho did not prescribe more therapy at that time. T. 74. He believes the therapy made him worse. T. 74. He has never held a job where he sat at a desk and operated a computer. T. 74-75. He is "self-taught" when it comes to computers. He never had to use a computer when he worked as a cement mason. T. 75.

Arbitrator's Credibility Assessment and Conclusions of Law

Was Petitioner credible?

In its proposed decision, Respondent describes Petitioner as "evasive" and "inconsistent," pointing to Petitioner's testimony concerning his work hours, motorcycle usage and therapy attendance.

The Arbitrator views this testimony in a different light. Petitioner testified in a detailed and convincing manner concerning the demands of his trade and consequent work schedule. Respondent did not offer any contradictory evidence. Petitioner never attempted to hide his motorcycle usage. On June 16, 2008, only six weeks after his surgery, Petitioner told Dr. Ho he

was "anxious to ride his motorcycle," with the doctor expressing no negative reaction. PX 1. Petitioner's initial therapist at NovaCare did react negatively but, even then, did not tell Petitioner to completely avoid riding. This therapist also noted inconsistencies in Petitioner's behavior. RX 6. However, Dr. Ho, who presumably reviewed the therapy notes, did not note any inconsistencies. Neither did Respondent's examiner, Dr. Tonino, who specifically referenced the NovaCare records in his reports. RX 4-5. A NovaCare discharge summary (RX 7) reflects that Petitioner was non-compliant and "stopped coming to therapy" in November of 2008 (RX 7) but the last NovaCare treatment note, dated November 7, 2008, reflects that a therapist instructed Petitioner to return to Dr. Ho for re-assessment because pain was limiting his progress. As discussed more fully below, Dr. Tonino had recommended an MR arthrogram only four days earlier, on November 3, 2008 [see Dr. Tonino's report of February 23, 2009 [RX 4] which reflects he last saw Petitioner on November 3, 2008], but this arthrogram was not performed until May of 2009. On this record, with Respondent having failed to offer Dr. Tonino's report of November 3, 2008 into evidence, the Arbitrator cannot find Petitioner to be "non-compliant."

This is not to suggest that Petitioner was 100% believable on all issues. Petitioner was not completely forthcoming with respect to his post-accident employment and continued to cash Respondent's temporary total disability checks while engaging in that employment, so as to be able to afford his expensive diabetes medication. T. 69.

What is Petitioner's average weekly wage?

Petitioner claimed an average weekly wage of $1,671.25 while Respondent claimed an average weekly wage of $1,528.00. Arb Exh 1.

Petitioner testified he was required to work through his half-hour lunch each day due to the demands of his trade. T. 16. Petitioner also testified he was required to work extra hours on May 4, 2007 because a cement pour took place that day. T. 17. Respondent did not offer any evidence contradicting this testimony. Petitioner offered into evidence an "employee time history." This document appears to have been generated by Respondent. PX 8. PX 8 reflects that Petitioner earned $38.20 per hour and worked four days for Respondent during the year prior to his undisputed May 10, 2007 accident. On three of those days, he earned 8 hours of regular pay and ½ hour of double time. On the fourth day, May 4, 2007, he earned 8 hours of regular pay and 1 ½ hours of double time. Respondent did not offer any other evidence concerning Petitioner's pre-accident hours or earnings.

Based on Petitioner's testimony, PX 8 and Arcelor Mittal Steel v. IWCC, 2011 Ill.App. LEXIS 1154, the Arbitrator includes the double time earnings reflected on PX 8, at straight time rate, in her calculation of Petitioner's average weekly wage. Based on Section 10 and Sylvester v. Industrial Commission, the Arbitrator arrives at an average weekly wage of $1,671.25 by dividing Petitioner's total earnings of $1,337.00 (with double time reduced to straight time) by 4 days, or .8. This average weekly wage gives rise to a temporary total disability rate of $1,114.17.

Is Petitioner entitled to temporary total disability benefits from October 10, 2008 through November 2, 2008?

Petitioner claims he was temporarily totally disabled from May 11, 2007 through January 20, 2011. Respondent takes issue only with the period running from October 10, 2008 through November 2, 2008. Arb Exh 1. Respondent claims Petitioner is not entitled to benefits during this period because he failed to appear for a Section 12 re-examination by Dr. Tonino. Petitioner testified he missed the re-examination because Respondent provided less advance notice than with the original examination and he had his mail held while he changed residence. T. 25-26. Petitioner further testified his benefits resumed after he submitted to the re-examination.

Section 12 provides, in relevant part, that if an employee "refuses to submit himself to examination or unnecessarily obstructs the same, his right to compensation payments shall be temporarily suspended until such examination shall have taken place and no compensation shall be payable under this Act for such period."

The Arbitrator finds no evidence in the record suggesting Petitioner either "refused to submit" to a re-examination or "unnecessarily obstructed" a re-examination. Petitioner's testimony about the short notice is unrebutted. Respondent did not offer into evidence the letter it sent to Petitioner requesting the re-examination. Nor did Respondent offer any evidence indicating it complied with Section 7110.70 of the Rules Governing Practice Before the Illinois Workers' Compensation Commission in suspending the payment of benefits on October 9, 2008. The Arbitrator finds credible Petitioner's testimony that he had his mail held while moving and attended the re-examination once he learned of the missed appointment. Dr. Ho's note of November 10, 2008 reflects Petitioner saw Dr. Tonino, with the doctor recommending an MR arthrogram. Dr. Ho concurred with Dr. Tonino's recommendation. PX 1. Dr. Tonino's report of February 23, 2009 reflects he last examined Petitioner on November 3, 2008, and recommended an MR arthrogram on that date. The Arbitrator finds it significant that Respondent failed to offer into evidence Dr. Tonino's report concerning his November 3, 2008 re-examination.

Based on the foregoing, and because Petitioner's condition was clearly unstable pending the MR arthrogram, which was not performed until May of 2009, the Arbitrator includes the disputed period, October 10, 2008 through November 2, 2008, in her award of temporary total disability benefits. Petitioner is entitled to temporary total disability benefits at the rate of $1,114.17 per week from May 11, 2007 through January 20, 2011, with Respondent receiving credit for the benefits it paid prior to arbitration, pursuant to the parties' stipulation. Arb Exh 1.

Is Petitioner entitled to reasonable and necessary medical expenses?

Petitioner offered into evidence the following unpaid medical bills:

Provider	Date of Service	Orig. Charges	Charges per F/S	TOTAL
ATI	4/10/12, FCE	$2,613.96	$1,024.02	$1,024.02
North Shore Univ.	5/10/07	$ 480.00	$ 346.80	$ 346.80
North Shore Univ. Physicians	5/10/07	$ 199.00	$ 199.00	$ 199.00
University of Chgo. (Dr. Ho)	5/15/12	$ 143.00	$ 68.58	$ 68.58
	TOTALS:	**$ 3,435.96**	**$1,638.40**	**$1,638.40**

PX 11. Respondent stipulated to causation (Arb Exh 1) and did not object to any of these medical expenses. T. 80. Respondent's examiner, Dr. Tonino, consistently described Petitioner's treatment as reasonable and necessary. RX 2-5. Accordingly, the Arbitrator awards Petitioner the foregoing outstanding fee schedule charges of $1,638.40.

Did Petitioner establish entitlement to wage differential benefits?

Petitioner seeks an award of wage differential benefits under Section 8(d)1 of the Act while Respondent seeks an award under 8(d)2. The Arbitrator finds that Petitioner qualifies for a wage differential award.

Section 8(d)1 of the Act provides, in relevant part:

> "If, after the accidental injury has been sustained, the employee as a result thereof becomes partially incapacitated from pursuing his usual and customary line of employment, he shall . . . receive compensation for the duration of his disability . . . equal to 66 2/3% of the difference between the average amount he would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident."

The record supports the conclusion that Petitioner became "partially incapacitated from pursuing his usual and customary line of employment" as a result of his work accident. Accident and causation are not in dispute. Arb Exh 1. Petitioner was diagnosed with a rotator cuff re-tear following his initial surgery. Petitioner elected not to undergo a second surgery. Dr. Ho agreed with this election, noting that Petitioner's condition was livable so long as he avoided stressing his arm. PX 1. The valid functional capacity evaluation of April 10, 2012 showed that Petitioner is limited to medium duty, with occasional lifting of 55 pounds, and that Petitioner is thus not capable of resuming his former trade. Dr. Ho reviewed the functional capacity evaluation on May 14, 2012 and agreed that Petitioner should be permanently

restricted from resuming work as a cement finisher. PX 1. Dr. Rubinstein, Petitioner's selected examiner, agreed. PX 6. Respondent did not offer any contrary opinion from its examiner, Dr. Tonino.

Respondent maintains that, despite his partial incapacity, Petitioner is not entitled to wage differential benefits because he failed to conduct an appropriate job search. Petitioner correctly points out that "there is no affirmative requirement under Section 8(d)1 that [he] even conduct a job search." Rather, he need only demonstrate an impairment of earnings. Gallianetti v. Industrial Commission, 315 Ill.App.3d 721, 731 (2000). Petitioner also correctly points out that Respondent failed to provide vocational rehabilitation. Respondent also failed to prepare a written assessment in accordance with Section 7110.10(a) of the Rules Governing Practice Before the Illinois Workers' Compensation Commission. Ill. Admin. Code Tit. 50, Sec. 7110.10 (2004). In Ameritech Services, Inc. v. IWCC, 389 Ill.App.3d at 191, 207 (1st Dist. 2009), the Appellate Court held that such assessments must be prepared and periodically updated even when it appears that vocational rehabilitation is unnecessary.

In the instant case, only Petitioner offered any evidence concerning his employability. On direct examination, Petitioner testified he derived taxable income of $8,577.00 in 2011 from driving a cab (in two different capacities) for R & E Taxi. Petitioner indicated his first stint with R & E, during which he drove individual students to and from school, lasted only until May of 2011, when the school year ended, and his second stint, as a conventional cab driver, was unsuccessful due to a lack of customers in the economically depressed neighborhood to which he was assigned. Petitioner denied working in 2012. T. 31. Under cross-examination, however, Petitioner acknowledged earning $600.00, at the rate of $23.75 per hour, from driving a snow plow in 2012. T. 56. Petitioner offered into evidence a report from Susan Entenberg, a certified vocational rehabilitation counselor. Entenberg found Petitioner's present earning capacity to be approximately $12.00 to $15.00 per hour based on his work history and restrictions. PX 7.

Petitioner requests that the Arbitrator use the figure at the lowest end of Entenberg's range, i.e., $12.00 per hour, in calculating his wage differential benefits. The Arbitrator instead uses the figure at the highest end of the range, i.e., $15.00 per hour. Based on Petitioner's employment-related testimony, lengthy work history (albeit in one trade) and supervisory experience, the Arbitrator finds this figure to be a more realistic estimate of Petitioner's earning capacity.

PX 9, the wage scale for members of Petitioner's union, Local 502, shows that Petitioner would have earned $41.85 per hour in the full performance of his cement finisher journeyman duties from January 21, 2011 through May 31, 2012 and $42.35 per hour beginning June 1, 2012. The Arbitrator relies on PX 8 and Petitioner's credible testimony in finding a 42.5-hour work week.

From January 21, 2011 through May 31, 2012, the Arbitrator awards Petitioner wage differential benefits of $785.75 per week. The Arbitrator arrives at $785.75 by multiplying

$41.85 per hour by 42.5 hours, arriving at $1,778.63, subtracting $600.00 per week ($15.00 per hour multiplied by 40 hours), arriving at $1,178.63, and multiplying $1,178.63 by 2/3.

From June 1, 2012 forward, and for the duration of his disability, the Arbitrator awards Petitioner wage differential benefits of $799.92 per week. The Arbitrator arrives at $799.92 by multiplying $42.35 per hour by 42.5 hours, arriving at $1,799.88, subtracting $600.00 per week, arriving at $1,199.88, and multiplying $1,199.88 by 2/3.

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 Jurisdiction	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

William Gilmartin (Janet Gilmartin, widow),
Petitioner,

v.

NO: 09 WC 16579

17IWCC0660

Kipin Industries, Inc., and the State Treasurer as *ex-officio* custodian of Illinois Injured Workers' Benefit Fund,
Respondent.

DECISION AND OPINION ON REVIEW

This matter comes before the Commission pursuant to Petitioner's timely Petition for Review of Arbitrator Kane's November 2, 2016 decision. Therein the Arbitrator found Decedent did not sustain an accidental injury arising out of and in the course of his employment and denied all benefits. On review, Petitioner requests the Commission find Decedent sustained a compensable accident and award benefits accordingly. However, as the alleged injury occurred in West Virginia, a jurisdictional determination is necessary before the merits of Petitioner's claim can be reached.

Findings of Fact

The evidence deposition of William Gilmartin (hereinafter referred to as "Decedent") was taken on two dates. Direct examination was completed on September 19, 2014 (admitted as Petitioner's Exhibit 2); the deposition resumed, starting with cross-examination, on November 7, 2014 (Petitioner's Exhibit 3).

Decedent suffers from type 2 diabetes, high cholesterol, high blood pressure, coronary artery disease and peripheral vascular disease, smoked a pack-and-a-half per day from 1972 until he had his first heart attack in 1995, and has undergone multiple angioplasties with placement of heart stents. PX3, p. 28-30. In 2000, he underwent a right iliac artery angioplasty. PX3, p. 30.

Decedent testified he began working as a project manager for Kipin Industries in 1998. PX2, p. 34, 8. Kipin performs environmental services in coke plants as well as environmental demolitions, soil excavating, tank removal, and plant closures; the company is headquartered in Pennsylvania and handles projects in multiple states. PX3, p. 6-7. As project manager, Decedent's job duties included operating heavy equipment, paperwork, and supervising crews. PX2, p. 34-35. The first four years of his employment with Kipin, Decedent worked a project in Chicago. PX2, p. 9. Thereafter, he worked at out-of-state job sites. PX2, p. 9.

In October or November of 2008, Decedent was assigned to a project in West Virginia. PX3, p. 8. His job title remained project manager but as John Sigler oversaw this site, Decedent operated the heavy equipment. PX3, p. 8, 18.

Decedent alleged an accidental injury while working at the West Virginia job site on December 16, 2008. He described his activities that morning: "I was operating a Track hoe excavator, loading a hopper, which would separate soil and heavy debris would stay into the hopper. And once the hopper was full, no more material would come out, [the supervisor] would have me go in there and clean it out by hand, concrete blocks, bricks, steel plates, rail ties, any kind of debris." PX2, p. 13-14. Decedent stated the weights of the debris ranged from five to 50 pounds, with one piece feeling like it was 100 pounds. PX2, p. 14. He testified he "[w]asn't feeling good and I talked to my immediate supervisor for that job site, told him I wanted to go to the doctor." PX2, p. 11-12.

On further questioning, Decedent stated he informed Mr. Sigler he was not feeling well in the early morning. PX3, p. 9. Decedent denied having a traumatic accident or injury to his right leg or groin then testified he had experienced similar symptoms/pain "a couple days prior." PX3, p. 10. Decedent was next asked to confirm the sequence of events, and he explained he first told Mr. Sigler he was not feeling well on December 15, 2008 then he again mentioned not feeling well after working two to three hours on December 16, 2008. PX3, p. 13-15. As to his specific activities that day: he started working at 7:00 a.m. performing the required routine check of the excavator to make sure it was in working order; he then began processing material, moving it into the hopper; he estimated the first time he climbed into the hopper to clean it out was 8:30 or 9:00 a.m., and it was between 9:00 and 10:00 a.m. that Decedent advised Mr. Sigler he was not feeling well. PX3, p. 38-41. Decedent estimated he was cleaning the hopper for 30 to 45 minutes of the two to three hours he worked that morning. PX3, p. 16.

Decedent testified he left the job site and went to a clinic next to the motel where he was staying. When he saw the doctor, "I told him I wasn't feeling good, my groin was hurting, lower back, he checked it out and stated that I had an aneurysm in the right side of my groin." PX2, p. 15. Decedent testified the doctor advised him he "needed to go home ASAP and see my own doctors because if I was his patient I'd be in the hospital right then and there prepping for surgery." PX2, p. 16.

The records from Wedgewood Family Practice in Morgantown, West Virginia reflect Decedent was evaluated by Dr. William Mitchell on December 16, 2008. Dr. Mitchell documented

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Decedent's complaints as increased frequency of urination the last few days, a little bit of pain in his groin, as well as low back discomfort. His past medical history was notable for noninsulin-dependent diabetes, hypercholesterolemia, peripheral vascular disease, and coronary artery disease with stenting in 2002. On examination, Dr. Mitchell observed the "inguinal area had no hernias present...No inguinal hernias." PX6, p. 159. The doctor's assessment was possible early prostatitis. Noting the symptoms of increased frequency of urination at night and pain especially in the groin area, Dr. Mitchell recommended a seven-day trial of Levaquin; if Decedent did not improve, he was to return for further evaluation and treatment. PX6, p. 159.

Decedent testified he phoned his supervisor and reported the doctor had directed he go home immediately to address an aneurysm. PX2, p. 17-18. When he returned from West Virginia, Decedent was evaluated by Dr. Savio Manatt, who has been his physician for 22 years. PX3, p. 21. Decedent testified he advised Dr. Manatt of what the West Virginia physician had stated and showed him his groin; Dr. Manatt reportedly discussed the matter with another physician then directed Decedent to the hospital for an ultrasound. PX2, p. 19-20. Decedent testified the ultrasound was completed that day, and he was informed surgery would be scheduled once the necessary pre-operative tests were completed. PX2, p. 20-21.

On December 30, 2008, Dr. Manatt conducted a pre-operative history and physical. Dr. Manatt recorded Decedent was to be admitted for repair of the aortofemoral bypass and noted Decedent "came to my office complaining that he had a lump on his right inguinal area. The patient was referred to Dr. Lamba and workup showed that the patient had a pseudoaneurysm." PX8, p. 234. Significantly, Dr. Manatt's examination findings include "a lump on the right inguinal area." PX8, p. 234.

On January 2, 2009, Decedent presented to his treating cardiologist, Dr. Narayan Mulamalla, to obtain cardiac clearance. PX2, p. 26. Dr. Mulamalla noted Decedent was scheduled for a resection of the right iliac artery aneurysm by Dr. Aswath Subram. PX4, p. 69. Decedent's "Problem List" included coronary artery disease major vessels; status post stenting of the right coronary artery and left anterior descending artery; status post aortobifemoral bypass graft; large right iliac artery aneurysm; severe peripheral vascular disease of both lower extremities without symptoms of claudication; old inferolateral wall myocardial infarction in 1995; hyperlipidemia; hypertension; and diabetes mellitus. PX4, p. 69. On examination, Dr. Mulamalla noted a four-by-four centimeter pulsatile mass directly above the right inguinal area. PX4, p. 70. Dr. Mulamalla's impression was severe coronary artery disease, stable; severe peripheral vascular disease, stable; and right iliac artery aneurysm; he directed Decedent to continue beta blockers for the perioperative period and cleared him for surgery. PX4, p. 70.

On January 5, 2009, Decedent was admitted to St. James Hospital for repair of his pseudoaneurysm on the aortofemoral bypass graft. Prior to the anticipated surgery, Decedent was diagnosed with bilateral hydronephrosis and underwent cystoscopy, bilateral ureteral catheterization, and bilateral retrograde pyelogram. PX8, p. 247. On January 8, 2009 Dr. Subram performed the pseudoaneurysm surgery: repair of pseudoaneurysm right limb aortofemoral bypass with new right iliac limb of the right to profunda femoris bypass graft and second graft to

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superficial femoral artery. PX8, p. 245-246. Decedent was discharged on January 13, 2009. The final diagnoses were pseudoaneurysm of the aortofemoral bypass; iliofemoral obstruction; bilateral ureteral constriction; coronary artery disease; hypertension; hypercholesterolemia; noninsulin dependent diabetes mellitus; history of smoking. PX8, p. 233.

Conclusions of Law

The threshold issue a petitioner must establish is the Illinois Workers' Compensation Commission possesses jurisdiction over the claim. The Act confers Illinois jurisdiction over "persons whose employment is outside of the State of Illinois where the contract of hire is made within the State of Illinois, persons whose employment results in fatal or non-fatal injuries within the State of Illinois where the contract of hire is made outside of the State of Illinois, and persons whose employment is principally localized within the State of Illinois, regardless of the place of the accident or the place where the contract of hire was made...." *820 ILCS 305/1(b)2.* Kipin Industries, Inc. is a Pennsylvania corporation, and Decedent, who was assigned to job sites in various states over his tenure with Kipin, alleges an accidental injury while working in West Virginia. As such, for the Commission to possess jurisdiction over this claim, the contract of hire must have been made in Illinois. See *Mahoney v. Industrial Commission*, 218 Ill. 2d 358, 374, 843 N.E.2d 317 (2006) ("the place of the contract of hire is the sole determining factor for the existence of jurisdiction over employment injuries occurring outside this state"). A contract of hire is made where the last act necessary for the formation of the contract occurs. *Cowger v. Industrial Commission*, 313 Ill. App. 3d 364, 370, 728 N.E.2d 789 (2000).

The Commission emphasizes there is no evidence in the record regarding the situs of Decedent's contract of hire with Kipin. The totality of the evidence on Decedent's start of employment with Kipin is as follows:

Q. And best you can recall did you begin working for that company around 1998?

A. Yes.

Q. Where did you first work for that company?

A. Acme Steel Coke Plant in Chicago. PX2, p. 8.

Decedent testified he worked for Kipin in Chicago for three or four years then began working at projects out-of-state. PX2, p. 9.

Certainly, a subsequent transfer to an out-of-state job site does not defeat jurisdiction so long as the original contract of hire remains in force (*Mahoney*); here though, there is nothing in the record to establish the situs of the original contract of hire. The Commission notes Decedent was deposed on two occasions. Despite the need to establish Illinois jurisdiction over an injury occurring in West Virginia, there was absolutely no testimony elicited, by either party, as to the hiring process, *i.e.*, where Decedent applied or interviewed, what steps were involved, or how he

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was informed he was hired. In other words, there is no evidence as to what the "last act necessary to the formation of the contract" was or where that event occurred, and therefore, no direct evidence regarding the situs of the contract of hire. As such, to find jurisdiction rests in Illinois, the Commission would have to infer the contract of hire was made in Illinois based solely on the fact Decedent's initial assignment was in Chicago. While the Commission has the authority to make reasonable inferences from the evidence, "[w]here the evidence allows for the inference of the nonexistence of a fact to be just as probable as its existence, the conclusion that the fact exists is a matter of speculation, surmise, and conjecture, and the inference cannot be reasonably drawn. [citations omitted]." *First Cash Financial Services v. Industrial Commission*, 367 Ill. App. 3d 102, 106, 853 N.E.2d 799 (2006). Even assuming *arguendo* such inference is reasonable, we are unwilling to rely on an inference to find Illinois jurisdiction over an extraterritorial injury.

The Commission must find its jurisdiction over this claim within the provisions of Illinois Workers' Compensation Act, and it cannot be found in this record without resorting to speculation or conjecture. The Commission finds the claim should be dismissed for lack of jurisdiction.

The Commission further notes, assuming *arguendo* Illinois jurisdiction exists, it would find Decedent failed to prove he sustained an accidental injury arising out of and in the course of his employment on December 16, 2008 and similarly failed to prove his condition of ill-being was causally related to the alleged accident. The Commission finds Petitioner's arguments on the issues unavailing and emphasizes the following facts.

Contrary to Petitioner's assertion in brief, Decedent did not testify he "worked 'several hours' on this date constantly lifting objects weighing up to 100 pounds." Decedent in fact testified he worked for only two to three hours on December 16, 2008, and of that time, he estimated he was cleaning the hopper for 30 to 45 minutes. PX3, p. 16. He reiterated this timeline later in his testimony when he provided a more detailed description of his activities that morning: he started work at 7:00 a.m.; he first performed the daily maintenance check, then he climbed into the excavator and began moving material into the hopper; Decedent estimated the first time he climbed into the hopper to clean it out was 8:30 or 9:00 a.m. PX3, p. 38-39. It was between 9:00 and 10:00 a.m. that he told Mr. Sigler he was not feeling well. PX3, p. 41. The claim that Decedent was constantly lifting heavy objects for several hours is simply not supported by the record.

The Commission additionally notes Decedent started feeling ill days before his alleged accident. The December 16, 2008 record from the West Virginia clinic documents Decedent reported symptoms "the last few days." PX6, p. 159. This is consistent with Decedent's testimony he first felt symptoms "a couple days prior" (PX3, p. 10) and told Mr. Sigler he was not feeling well on December 15, 2008. PX3, p. 13. The Commission also finds it significant the December 16, 2008 physical examination revealed "inguinal area had no hernias" (PX6, p. 159), yet Decedent described his aneurysm as a lump the size of a golf ball. PX2, p. 21.

The Commission further finds Dr. Mulamalla's opinions to be unpersuasive. Dr. Mulamalla specifically denied knowing what either medical causation or legal causation is, then agreed he would not be able to offer a causation opinion because "I don't know exactly what

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happened to him that whole period, I have no idea." PX5, p. 35. Moreover, Dr. Mulamalla was not involved in diagnosing or treating Decedent's aneurysm: "He didn't come to me with the aneurysm. Basically he came to me whether he will be able to go through the surgery. That was issue for us, what is the heart status, can he go through the surgery. So obviously somebody else already has done that testing and confirmation." PX5, p. 36. The "somebod[ies] else" were Dr. Manatt and Dr. Subram, the physicians who treated the aneurysm, yet neither doctor provided a causation opinion.

The evidence shows Decedent had a long-standing history of severe cardiovascular problems, including coronary artery disease, history of aortobifemoral bypass graft, severe peripheral vascular disease of both lower extremities, history of myocardial infarction, hyperlipidemia, hypertension, and diabetes mellitus. He did not suffer a traumatic aneurysm on December 16, 2008. Rather, the evidence established it was pre-existing and growing naturally because of the atherosclerosis of the artery. PX5, p.48. While Dr. Mulamalla testified stress such as lifting "can" increase blood pressure and thereby increase the risk of more enlargement, the Commission finds this is insufficient to meet the burden of proof in light of Decedent's complaints of symptoms in the days before as well as the lack of objective examination findings on December 16, 2008.

IT IS THEREFORE ORDERED BY THE COMMISSION that the claim is dismissed for lack of jurisdiction.

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 bond requirement in Section 19(f)(2) is applicable only when "the Commission shall have entered an award for the payment of money." *820 ILCS 305/19(f)(2)*. Based upon the denial of compensation herein, no bond is set by the Commission.

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

DATED: OCT 18 2017

LEC/mck

O: 8/30/17

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Is/ Elizabeth Coppoletti

Is/ Charles J. DeVriendt

Is/ Joshua D. Luskin

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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

William Gilmartin,
Employee/Petitioner

v.

Kipin Industries, Inc., and the Illinois State Treasurer, as *ex-officio* Custodian of the Injured Workers' Benefit Fund
Employer/Respondent

Case # **09** WC **16579**

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 **August 25, 2016, September 28, 2016 and October 26, 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

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FINDINGS

On **6/20/08**, 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 not*** 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 **$50,000.00**; the average weekly wage was **$961.54**.

On the date of accident, Petitioner was **54** 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 **$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 did not sustain an accident that arose out of and in the course of his employment. Petitioner's request for benefits is denied.

The Illinois State Treasurer, as *ex-officio* custodian of the Injured Workers' Benefit Fund, was named as a co-Respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under §4(d) of the Act. In the event of the failure of the Respondent-Employer to pay the benefits due and owing the Petitioner, the Respondent-Employer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of the Respondent-Employer that are paid to the Petitioner from the Injured Workers' Benefit Fund.

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 G. Kane
Signature of Arbitrator

November 2, 2016
Date

NOV 2 - 2016

STATE OF ILLINOIS)
) 17IWCC0660
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

William Gilmartin,
Employee/Petitioner,

Case # **09** WC **16579**

v.

Kipin Industries, Inc.,
and the State Treasurer, as *ex-officio* Custodian
of the Injured Workers' Benefit Fund,
Employers/Respondents.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. FINDINGS OF FACT

This action was pursued under the Illinois Workers' Compensation Act by the Petitioner and sought relief from the Respondent Employer-Kipin Industries, and Respondent Injured Workers' Benefit Fund (the "IWBF").

On December 16, 2008, the alleged date of the Petitioner's work-related accident, Kipin Industries, Inc. did not maintain workers' compensation insurance. [Pet. Ex. 1b]

On August 25, 2016, a hearing was held before Arbitrator David Kane in Chicago, Illinois. The Petitioner gave notice of the hearing to Kipin Industries by U.S. certified mail. [Pet. Ex. 1a] Kipin Industries was not represented by an attorney and did not appear at the arbitration proceedings.

The Illinois Attorney General previously filed an appearance on behalf of the Illinois State Treasurer, as *ex-officio* custodian of the IWBF, and participated in the arbitration proceedings.

Petitioner testified he began working for Kipin Industries in 1998. On the date of accident he was working as a project manager making $50,000 per year.

Petitioner testified that in the middle of December 2008 he informed his supervisor, John Sigler, that he wasn't feeling well. Mr. Sigler told him to go to the nearby clinic. He was in West Virginia.

Petitioner presented to the clinic and was diagnosed with an aneurysm in the right side of the groin area.

Petitioner recalled telling Mr. Sigler that he needed to take care of the aneurysm.

On January 5, 2009, Petitioner underwent surgery consisting of cystoscopy, bilateral ureteral catheterization, and bilateral retrograde pyelogram.

Petitioner was released to work full duty on March 14, 2009.

Petitioner testified he was let go from Kipin after his injury because they did not have any work for him. Petitioner, with the help of his wife, began applying for jobs after being released to full duty work.

The parties took the evidence deposition of Dr. Mulamalla. He is a cardiologist and only performed the screening to make sure Petitioner was healthy enough to undergo surgery. Dr. Mulamalla does not treat groin pseudoaneurysms as part of his practice. Dr. Mulmalla did not evaluate Petitioner's pseudoaneurysm in this case. He did no testing to confirm the diagnosis. Dr. Mulmalla was not able to draw a causal connection between

Petitioner's work activities and the injury. Dr. Mulmalla testified that he did not evaluate the injury and could not say whether it was trauma induced.

CONCLUSIONS OF LAW

With regard to issue "A", was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act, the Arbitrator finds as follows:

The Arbitrator finds that Respondent-Employer was operating under and subject to the Illinois Workers' Compensation Act.

With regard to issue "B", was there an employee-employer relationship, the Arbitrator finds as follows:

The Arbitrator finds that the evidence establishes that there was an employee-employer relationship.

With regard to issue "C", whether Petitioner's accident arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds as follows:

The Arbitrator finds that Petitioner did not sustain an accident that arose out of and in the course of his employment. Petitioner was diagnosed with a pseudoaneurysm of the right groin. There was no traumatic accident that led to his injury. Dr. Mulmalla could not say that this type of work could lead to this injury. Petitioner failed to present any evidence proving that he sustained an accident that arose out of and in the course of his employment.

With regard to issue "D" what was the date of the accident, the Arbitrator finds as follows:

The Arbitrator finds that the evidence establishes that the date of the injury was December 16, 2008.

With regard to issue "E" was timely notice of the accident given to Respondent, the Arbitrator finds as follows:

The Arbitrator finds that timely notice was not given to Respondent-Employer. The Act requires notice to the employer within 45 days. Here, Petitioner told his supervisor that he was not feeling well and needed to go to the doctor. Petitioner did not tell his employer within 45 days that he was alleging this injury was a work-related accident.

With regard to issue "F", whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds as follows:

The Arbitrator finds that Petitioner is currently deceased due to reasons not related to his alleged accident. Petitioner failed to present any evidence proving that his current condition of ill-being was causally related to his injury. The evidence establishes that Petitioner's current condition of ill-being is not causally related to this injury.

With regard to issue "G", what were Petitioner's earnings, the Arbitrator finds as follows:

The Arbitrator finds that the evidence establishes that Petitioner's earnings during the year preceding the injury were $50,000.00 and his average weekly wage was $961.54.

With regard to issue "H", what was Petitioner's age at the time of the accident, the Arbitrator finds as follows:

The Arbitrator finds that the evidence establishes that the Petitioner was 54 years old at the time of the injury.

With regard to issue "I", what was Petitioner's marital status at the time of the accident, the Arbitrator finds as follows:

The Arbitrator finds that the evidence establishes that the Petitioner was married at the time of the accident.

With regard to issue "J", whether the medical services provided to Petitioner were reasonable and necessary and whether Respondent has paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds as follows:

Given the Arbitrator's finding that Petitioner did not sustain a compensable accident, the issue of whether the medical services provided were reasonable and necessary is moot.

With regard to issue "K", what temporary benefits are in dispute, the Arbitrator finds as follows:

Given the Arbitrator's finding that Petitioner did not sustain a compensable accident, temporary total disability is not awarded.

With regard to issue "L", what is the nature and extent of the injury, the Arbitrator finds as follows:

Given the Arbitrator's finding that Petitioner did not sustain a compensable accident, permanent partial disability is not awarded.

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

Juan Espino,

Petitioner,

vs. NO: 09WC 48261

MLV Construction, and Illinois State Treasurer as Ex-Officio Custodian of the Injured Workers' Benefit Fund,

17IWCC0662

Respondents.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent IWBF herein and notice given to all parties, the Commission, after considering the issues of accident, employment relationship, temporary disability, benefit rates, wage calculations, permanent disability, and proof of no insurance, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 24, 2017 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Illinois State Treasurer as *ex-officio* custodian of the Injured Workers' Benefit Fund was named as a co-Respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under §4(d) of the Act, in the event of the failure of Respondent-Employer to pay the benefits due and owing the Petitioner. Respondent-Employer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent-Employer that are paid to the Petitioner from the Injured Workers' Benefit Fund.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent-Employer 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: OCT 2 0 2017
SJM/sj
o-8/31/2017
44

Stephen J. Mathis

David L. Gore

DISSENT

I respectfully dissent from the opinion of the majority. I would vacate the Arbitrator's award against the Injured Workers' Benefit Fund. I am not persuaded that Respondent MLV Construction was not covered by workers' compensation insurance at the time of the alleged accident. Petitioner failed to submit certification from the National Council on Compensation Insurance ("NCCI"). Instead, Petitioner submitted exhibit #24 as evidence of MLV's lack of insurance. However, this document is hearsay and of no probative value, and it reflects an incorrect date of accident. Furthermore, the medical records of several providers reference Liberty Mutual as the insurance carrier and include a workers' compensation claim number. There are also Liberty Mutual documents in the medical records indicating that charges are pending further investigation of the claim; these forms include a workers' compensation claim number and the date of accident. There is no credible evidence proving that a Liberty Mutual policy, or any other carrier's policy, was not in effect at the time of the alleged accident. I do not believe that sufficient evidence has been presented to hold the Injured Workers' Benefit Fund responsible for any monetary award in this case and therefore I dissent from the majority opinion affirming and adopting the Decision of the Arbitrator.

I would also modify the Arbitrator's award of permanent partial disability with respect to the left leg because I do not believe the evidence supports a finding that Petitioner sustained 30% loss of use. Petitioner complained of left knee pain that increased in the weeks after he underwent right knee surgery. Dr. Silver suspected "compensatory stress," and believed Petitioner had a torn medial meniscus. On arthroscopic examination, however, no tears were found and there was no bursitis in the left knee. Dr. Silver debrided loose bodies and cartilage fragments, and the records show no significant residual complaints. I would modify the Arbitrator's permanent partial disability award down to 15% of the left leg.

Deborah L. Simpson

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK

17IWCC0662

- [X] 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

JUAN ESPINO
Employee/Petitioner

v.

MLV CONSTRUCTION, L.L.C., and INJURED WORKERS' BENEFIT FUND
Employer/Respondent

Case # 09 WC 48261

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 **DOUGLAS S. STEFFENSON**, Arbitrator of the Commission, in the city of **CHICAGO**, on **DECEMBER 2, 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. [X] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [X] 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. [X] What was the date of the accident?
E. [X] 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. [X] What were Petitioner's earnings?
H. [X] What was Petitioner's age at the time of the accident?
I. [X] 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. [X] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [X] TTD
L. [X] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [X] Other **ATTORNEY'S FEES BY FORMER ATTORNEY**

FINDINGS

On **OCTOBER 26, 2009**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the ten (10) months preceding the injury, Petitioner earned **$12,500.00**; the average weekly wage was **$562.50**.

On the date of accident, Petitioner was **32** years of age, ***married*** with **3** 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.

ORDER

The Respondent shall pay the Petitioner temporary total disability benefits of **$375.00**/week for **67** weeks, for the period from **10/31/2009** through **2/11/2011**, as provided in Section 8(b) of the Act.

The Respondent shall pay the Petitioner reasonable and necessary medical services of **$162,398.35**, pursuant to the Medical Fee Schedule, as provided in Section 8(a) of the Act.

The Respondent shall pay the Petitioner PPD benefits of **$337.50** per week for **129** weeks as provided in Section 8(e) of the Act, because the injuries sustained caused a **30% loss of use of the right leg** and a **30% loss of use of the left leg.**

Goldstein, Bender & Romanoff, the fee petitioning law firm, is entitled to 15% of the total attorney's fees applicable for this award.

THE ILLINOIS STATE TREASURER, AS EX OFFICIO CUSTODIAN OF THE INJURED WORKERS' BENEFIT FUND, WAS NAMED AS A CO-RESPONDENT IN THIS MATTER. THE TREASURER WAS REPRESENTED BY THE ILLINOIS ATTORNEY GENERAL'S OFFICE. AWARD IS HEREBY ENTERED AGAINST THE FUND TO THE EXTENT PERMITTED AND ALLOWED UNDER SECTION 4(D) OF THE ACT. IN THE EVENT OF THE FAILURE OF THE RESPONDENT-EMPLOYER TO PAY THE BENEFITS DUE AND OWING THE PETITIONER, THE RESPONDENT-EMPLOYER SHALL REIMBURSE THE INJURED WORKERS' BENEFIT FUND FOR ANY COMPENSATION OBLIGATIONS OF THE RESPONDENT-EMPLOYER THAT ARE PAID TO THE PETITIONER FROM THE INJURED WORKERS' BENEFIT FUND.

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

FEBRUARY 14, 2017
Date

FEB 14 2017

17IWCC0662

JUAN ESPINO V. MLV CONSTRUCTION, L.L.C, and INJURED WORKERS' BENEFIT FUND

09 WC 48261

FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

This matter was tried before Arbitrator Steffenson in Chicago on December 2, 2016. All issues were in dispute. Additionally, the parties agreed to receipt of this Arbitration Decision and any subsequent Decision and Opinion on Review via e-mail. (*Arbitrator's Exhibit* 1).

FINDINGS OF FACT

The Petitioner, Juan Espino, was the only witness to deliver live testimony. The Respondent employer, MLV Construction (hereinafter, "MLV"), received proper notice of said hearing via certified mail on or after November 14, 2016. (*Petitioner's Exhibit* 25). No representative of MLV was present for the December 2, 2016 hearing. (*Transcript* at 41-42). Furthermore, MLV did not have workers' compensation insurance on the date of accident, October 25, 2009. (*Petitioner's Exhibit* (hereinafter, *PX*) 24). The Illinois Attorney General's office appeared on behalf of the Illinois State Treasurer, the ex officio custodian of the Injured Workers' Benefit Fund.

The Petitioner testified that on and before October 26, 2009, he was employed by MLV. (*Transcript* (hereinafter, *T.*) at 11). The Petitioner began working for MLV in mid-May of 2009 after contacting the owner of the company, Lucian Micu, in response to an online employment advertisement. (*T.* at 11-12). He interviewed with Mr. Micu directly and discussed the work he would be expected to perform, how much he would be paid, and what his expected work hours would be. (*T.* at 12).

The Petitioner testified that Mr. Micu would call the Petitioner every morning between 6:30 a.m. and 7:00 a.m. and direct the Petitioner to the location of the work to be performed that day. (*T.* at 13). Mr. Micu required the Petitioner to start work at 8:00 a.m. every day, provided the tools with which the Petitioner performed his work, and supplied the materials for the work to be performed. (*T.* at 14-15). MLV also supplied a uniform for the Petitioner to wear and required the Petitioner to wear the uniform while working. (*T.* at 15). The uniform consisted of a blue shirt with the name, "MLV Construction", as well as a badge. (*T.* at 15). The

Petitioner also was required to call Mr. Micu at the conclusion of every workday to report on his progress and any remaining work tasks at the job site. (*Id.*).

The Petitioner was compensated by MLV via a weekly check singed by Mr. Micu from the account of MLV Construction. (*T.* at 16 and *PX* 19). No taxes were withheld from these checks by MLV and the Petitioner testified he did not receive any tax documentation from MLV. (*T.* at 17). He further stated he declared his wages from MLV as Form 1099 income on the advice of his accountant and the Internal Revenue Service as he had not received a W-2 form from MLV. (*T.* at 19 and *PX* 20).

Initially, the Petitioner performed carpentry work for MLV that included wall construction and replacing plywood. (*T.* at 13). However, an MLV tile project was behind schedule and, after bringing his tile experience to the attention of MLV, his job duties changed to exclusively laying tile. (*T.* at 13). The Petitioner stated this type of work required him to work on his knees and placed all of his weight and a lot of pressure on his knees. (*T.* at 21). Prior to his accident date, the Petitioner was laying approximately 15 to 18 cases of tile every day. (*T.* at 22). In the weeks and months leading up to October 26, 2009, the Petitioner appreciated a worsening of pain and swelling in his knees, but he continued working his normal job and hours. (*T.* at 22).

On October 26, 2009, the Petitioner, while at a MLV jobsite, was working on a tile project when he heard "a big lock" in his knees. (T. at 22-23). He continued to work on the tile project but appreciated increasing pain and swelling in his knees. (T. at 23). He contacted Mr. Micu later that morning, advised him of his knee injury, and requested that he be allowed to go home. (T. at 23). However, the Petitioner testified Mr. Micu denied his request as the jobsite was behind schedule. (*Id.*). As such, the Petitioner continued with his work and finished his normal work hours for that date. (*Id.*).

The Petitioner sought medical care from Los Quiropracticos on October 27, 2009, and reported pain in his right knee as a result of working on his knees. (*PX* 2 at 8). At the end of that medical visit, he was diagnosed with a right knee ligament injury, issued a knee brace, and placed on modified work status that began with three days of being completely off of work. (*PX* 2 at 10, 20, and 39). The Petitioner testified he advised Mr. Micu on that day of his work restrictions and tendered a written copy of the same to Mr. Micu. (*T.* at 24). The Petitioner then returned to work on October 30, 2009 after his three days of off work status. (*T.* at 25). He testified that Mr. Micu informed him at the end of the work day that he was being terminated from MLV due to his work injury episode. (*T.* at 25).

After treating with Los Quiropracticos for approximately one month, the Petitioner then sought further medical care on November 25, 2009 from the Chicago Pain Center. (*T.* at 27 and *PX* 3 at 86). The Petitioner provided a history of increasing right knee pain as a result of laying tile at work. (*PX* 3 at 86). He was instructed to undergo a physical therapy regime for "4-6 consecutive weeks". (*PX* 3 at 88). After that therapy program did not reduce his knee pain, the Petitioner was referred to Dr. Leon Huddleston on December 4, 2009. (*PX* 3 at 95). The Petitioner advised Dr. Huddleston of his history of knee pain while laying tile at work. (*PX* 3 at 95). Dr. Huddleston examined the Petitioner, opined the Petitioner's right knee pain was "related to his work as a construction worker", and recommended he undergo a right knee MRI study "to evaluate for any internal derangement." (*Id.*). The December 7, 2009 MRI study indicted "pre-tibial bursitis with prominent prepatellar edema." (*PX* 7). After reviewing the MRI study on December 18, Dr. Huddleston recommended the Petitioner continue his therapy program and utilize a Medrol Dosepak for pain (*PX* 3 at 102). However, the Petitioner's knee pain symptoms continued and, after a series of injections failed to relieve his knee pain, Dr. Huddleston referred the Petitioner to Dr. John O'Keefe to explore an orthopedic surgery option. (*PX* 3 at 112).

During his January 26, 2010 appointment with the Petitioner, Dr. O'Keefe took the Petitioner's accident and medical history, conducted a physical examination, and reviewed the Petitioner's MRI study. (*PX* 8). Dr. O'Keefe opined the Petitioner's knee difficulties were causally related to his work for the Respondent, directed him to utilize a cane for ambulation, revised his medication program, and took him off of work. (*PX* 8). On February 22, 2010, the Petitioner returned to Dr. O'Keefe and received a diagnosis of right knee internal derangement and prepatellar bursitis. Dr. O'Keefe continued the Petitioner's off work status and further revised his prescribed medications. (*Id.*). During a subsequent visit on March 10, 2010, Dr. O'Keefe recommended a right knee buresctomny to address the Petitioner's ongoing knee complaints and continued his physical therapy and work restrictions. (*Id.*).

The Petitioner then met with Dr. Ronald Silver for a consultation regarding his right knee pain. (*T.* at 29). After taking the Petitioner's work and medical history, conducting a physical examination, and reviewing the Petitioner's diagnostic studies, Dr. Silver opined the Petitioner to be suffering from chronic prepatellar bursitis with possible cartilage damage. (*PX* 9). Dr. Silver recommended and, on May 4, 2010, performed a right knee prepatellar bursectomy, arthroscopic debridement, and removal of a loose body. (*PX* 9). During the surgery, Dr. Silver noted the Petitioner suffered an articular cartilage fracture and fragmentation and prepatellar bursitis. (*Id.*).

After this surgery, Dr. Silver restricted the Petitioner from returning to any work and implemented a post-surgical therapy program. (*PX* 9). During a July 14, 2010, follow up

appointment, Dr. Silver found the Petitioner had both "significant quadriceps atrophy" and increasing pain in his left knee "due to the compensatory stress he has placed on it." (PX 9). Subsequently, Dr. Silver noted improvement in the Petitioner's right knee while also finding further difficulties in his left knee. (*Id.*). An August 19, 2010 MRI study found a small tear in the medial meniscus and mild joint effusion that Dr. Silver then addressed via a second arthroscopic procedure on October 8, 2010, when he performed an arthroscopic debridement and removal of loose bodies in the joint. (*Id.*). Dr. Silver again recommended post-surgical therapy and continued to keep the Petitioner off of work. (*Id.*).

Due to ongoing difficulties with his right knee, the Petitioner sought a second opinion referral from Dr. Kreuger and, subsequently, was directed to Dr. Blair Rhode. (*PX* 3 at 220). He met with Dr. Rhode on January 5, 2011 and reported his work injury history of right knee pain due to repetitive tiling. (*PX* 15). Dr. Rhode opined the Petitioner to be suffering from right knee prepatellar bursitis due to repetitive kneeling at work. (*PX* 15). He kept the Petitioner off of work, performed a right knee injection, and asked the Petitioner to return for a follow-up visit in two weeks. (*Id.*). Due to improvements in his right knee after the injection, Dr. Rhode urged the Petitioner to attempt a return to work after a February 11 appointment. (*Id.*). Subsequently, the Petitioner returned to Dr. Rhode on May 9, 2011, with lingering right knee pain. (*Id.*). Dr. Rhode noted the Petitioner had tolerated full duty work but also provided a second right knee injection for the Petitioner's "aggravated" pain complaints. (*Id.*).

Thereafter, the Petitioner returned to Dr. Kreuger on May 12, 2011 and was directed to complete a functional capacity evaluation. (PX 3 at 231). On May 24, 2011, the FCE indicated the Petitioner capable of medium duty work with a 45 pound lifting restriction and a 25 pound carrying restriction. (*PX* 16).

The Petitioner testified he returned to carpentry work for a different construction company approximately one month after the FCE. (*T.* at 34). He indicated he is able to work within his restrictions by avoiding lifting tasks as well as kneeling work. (*T.* at 35). He also noted difficulty with certain daily living tasks and had not suffered any prior injuries to either his right or left knee. (*T.* at 35-26 and 22).

The Petitioner provided notice of the December 2, 2016 trial date to Respondent MLV Construction. (PX 25). Counsel for the Petitioner also unsuccessfully sought out a representative from MLV Construction outside the hearing room at the Commission. (T. at 41-42).

CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law set forth below.

Issue A: *Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?*

The Arbitrator finds that the Respondent-employer was operating under and subject to the Illinois Workers' Compensation Act. The Petitioner's un-rebutted and credible testimony establishes that MLV Construction was operating a construction and carpentry business in the State of Illinois. As such, the Respondent-employer was operating as an employer under the Act which applies automatic coverage to: "[a]ny business or enterprise in which goods, wares or merchandise are sold or in which services are rendered to the public at large..." 820 ILCS 305/3(17(a)).

Issue B: *Was there an employee-employer relationship?*

The Arbitrator finds that there was an employee-employer relationship between Petitioner and MLV Construction. The Petitioner credibly testified the Respondent-employer hired him to perform carpentry and tile work as a part of MLV Construction's remodeling and carpentry business. The Petitioner also demonstrated MLV Construction exerted significant control over the Petitioner's work. This included the Respondent-employer mandating a specific start time, directing the Petitioner to particular job sites, issuing a uniform to be worn while working, and requiring and end-of-day debrief session to ascertain both accomplished tasks and remaining work to be done at the job site. Furthermore, the Petitioner's unrebutted testimony detailed how MLV Construction supplied both the construction materials and tools utilized by the Petitioner when performing his carpentry and tile jobs. Finally, the Arbitrator notes the Petitioner was paid by the Respondent-employer for his work and that MLV Construction further confirmed the employee-employer relationship by terminating the Petitioner shortly after his October 26 work accident. As such, the preponderance of the evidence in this case establishes the existence of a bona-fide employer-employee relationship between the Petitioner and MLV Construction.

Issues C & D: *Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent? What was the date of the accident?*

The Arbitrator finds that an accident did occur on October 26, 2009 that arose out and in the course of the Petitioner's employment by the Respondent employer. The Petitioner provided credible and detailed testimony as to the mechanism of injury and how it occurred

while he was laying tile. Further, the medical records support a work-related accident as described by Petitioner. (*PX* 2 and *PX* 3).

For a claim based upon repetitive trauma, defining a so-called manifestation date is a fact determination for the trier of fact. *Palos Electric Co. V. Industrial Commission*, 314 Ill.App.3d 920, 930 (1st Dist. 2000). That means, *inter alia*, an employee suffering from a repetitive-trauma injury must still point to a date within the limitations period on which both the injury and its causal link to the employee's work became plainly apparent to a reasonable person. *Williams v. Industrial Commission*, 244 Ill.App.3d 204, 209 (1st Dist. 1993).

In the instant claim, the Petitioner testified in detail regarding the repetitive nature of his work activities and the corresponding impact on his bilateral knees. This testimony was unrebutted, and it was corroborated by the medical records as the Petitioner reported to each and every treating medical provider that his knee pain began as a result of working for the Respondent, MLV Construction. The Petitioner's testimony that he reported to his employer that he hurt his knees at work and also that he provided an off-work slip from his medical provider to his employer also is unrebutted. As a result, the Arbitrator finds the Petitioner sustained an accident which arose out of and occurred in the course of his employment with the Respondent, MLV Construction, on October 26, 2009.

Issue E: *Was timely notice of the accident given to Respondent?*

The Arbitrator finds that timely notice was given to the Respondent employer MLV Construction. The Petitioner credibly testified he informed Mr. Micu of his knee difficulties on October 26, 2009 when he sought permission to leave work early due his pain complaints. (*T.* at 23). His testimony regarding this notice went unrebutted and, as such, the preponderance of the evidence in this case establishes that timely notice of the accident was given to MLV Construction.

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

To establish causation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injury. *Land & Lakes Co. v. Industrial Commission*, 359 Ill.App.3d 582, 592 (2d Dist. 2005). It is not necessary to prove that the employment was the sole causative factor or even that it was the principal causative factor, but only that it was a causative factor. *Republic Steel Corp. v. Industrial Commission*, 26 Ill. 2d 32, 45 (1962).

In the instant claim, the Petitioner provided a consistent history of injury to all of his medical providers that his work activities for the Respondent caused his pain and problems. The Petitioner also introduced the opinions contained in the medical records of orthopedic

surgeons Dr. John J. O'Keefe, Dr. Ronald Silver and Dr. Blair Rhode concerning his bilateral knee conditions. Dr. O'Keefe, Dr. Silver and Dr. Rhode all opined that the Petitioner's right knee condition of ill-bring is casually connected to the subject work accident, and Dr. Silver opined that the Petitioner's condition of ill-being in his left knee is casually connected to the subject work accident. As such, the Arbitrator finds that the Petitioner's present condition of ill-being is causally related to the October 26, 2009 injury.

Issue G: *What were Petitioner's earnings?*

The Petitioner introduced his 2009 tax return into evidence, which shows $12,500.00 in gross wages earned from MLV Construction over the course of the year. (*PX* 20). Given the Petitioner's testimony that his employment with Respondent commenced in mid-May 2009 and he was terminated on October 30, 2009, the Arbitrator finds, based upon the greater weight of the evidence, the Petitioner's average weekly wage pursuant to Section 10 of the Act is $562.50.[1]

Issues H & I: *What was Petitioner's age at the time of the accident? Marital Status? Dependent children?*

The Arbitrator finds on the date of accident, the Petitioner was 32 years of age, married, and had three (3) dependent children.

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?*

Section 8(a) of the Illinois Workers' Compensation Act mandates that employers shall provide and pay for all the necessary surgical services which are reasonably required to cure or relieve the employee from the effects of the accidental injury. 820 ILCS 305/8(a). Medical care under Section 8(a) is continuous as long as such care is required to relieve the effects of the injury. *Freeman United Coal Mining Co. v. Industrial Commission*, 81 Ill.2d 335 (1980). The necessity of medical care is not dependent upon a finding of temporary total disability. *Zarlev v. Industrial Commission*, 84 Ill.2d 380 (1981). Instead, the question of whether medical care should be awarded is whether said care is reasonable and necessary to cure or relieve from the effects of the accidental injury. *Plantation Mfg. Co. v. Industrial Commission*, 294 Ill.App.3d 705 (2d Dist. 1997).

[1] The following calculation was used to arrive at the AWW: $12,500.00 in claimed income divided by 22.22 weeks worked = $562.50.

Based upon the greater weight of the medical evidence, including the opinions of the various treating providers and orthopedic surgeons, and based upon the Arbitrator's finding that Petitioner's current condition of ill-being is causally related to the October 26, 2009 work accident, the Petitioner has established that he is entitled to satisfaction of his past medical expenses. The Arbitrator hereby awards Petitioner past medical expenses in the amount of $162,398.35 to be satisfied by Respondent pursuant to the fee schedule of the Workers' Compensation Act. (*PX* 1).

Issue K: *What temporary benefits are in dispute?*

The medical records and evidence indicate that the last date the Petitioner worked for Respondent was October 30, 2011 and he was restricted from working from October 27, 2009 through the date he was allowed a return to a trial of full duty work by Dr. Rhode on February 11, 2011. (*PX* 15). The Arbitrator finds that the Petitioner is entitled to TTD benefits in the lump sum of $25,125.00, totaling 67 weeks of temporary disability from October 31, 2009 through the date he reached maximum medical improvement on February 11, 2011.

Issue L: *What is the nature and extent of the injury?*

The Petitioner was released with permanent medium level restrictions pertaining to his bilateral knees. (*PX* 16). Although the Petitioner was able to return to work as a carpenter for another employer, he testified that his employment is challenging given his permanent lifting restrictions, and he is forced to avoid lifting in favor of other lighter tasks, including supervising and deliveries. (*T.* at 35). The Petitioner also testified that working on his knees causes him considerable pain and problems and he is forced to limit work on his knees to approximately 30 minutes to an hour maximum. Additionally, the Petitioner continues to struggle with many activities of daily living, such as riding a bike, walking and playing with his children.

In light of the Petitioner's testimony and the medical evidence, the Arbitrator finds that the Petitioner sustained injuries to the extent of a 30% loss of use of the right leg and a 30% loss of use of the left leg under Section 8(e) of the Act.

Issue O: *Attorney's Fees by Former Attorney.*

The law firm of Goldstein, Bender & Romanoff filed a fee petition for work performed on this claim that was entered and continued to disposition by Arbitrator Robert Lammie on May 12, 2010. (*T.* at 44-45). At hearing, counsel of record for the Petitioner from Whiteside & Goldberg, admitted to having failed to notify Goldstein, Bender & Romanoff of the December 2,

2016 hearing date. (T. at 45). Accordingly, the Arbitrator finds Goldstein, Bender & Romanoff entitled to 15% of any earned attorney's fees arising out of this Arbitration Decision.

Signature of Arbitrator

February 14, 2017
Date