STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

☐ 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

Dedra Koehler,

Petitioner,

vs.

NO: 14 WC 16584

17IWCC0471

Murray Center,

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 all of the issues, and being advised of the facts and law, affirms the Decision of the Arbitrator, which is attached hereto and made a part hereof, with the addition of the following supplemental analysis on the issue of whether Petitioner's injury arose out of and in the course of her employment:

> "To obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of the evidence, that [she] has suffered a disabling injury which arose out of and in the course of [her] employment." *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203 (2003). " 'In the course of employment' refers to the time, place and circumstances surrounding the injury." *Id.* There is no dispute that the accident in this case occurred in the course of Petitioner's employment; the issue here is whether the accident also arose out of her employment.
>
> "The 'arising out of' component is primarily concerned with causal connection" and is satisfied where the claimant shows "that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Id.* The Appellate Court has devised three categories of risks to which employees may be

exposed: "(1) risks that are distinctly associated with the employment; (2) risks that are personal to the employee; and (3) neutral risks that do not have any particular employment or personal characteristics." Noonan v. Illinois Workers' Compensation Comm'n, 2016 IL App (1st) 152300WC, ¶19 (internal quotations omitted). Employment risks are compensable, and personal risks are not compensable. Id. Injuries resulting from a neutral risk are compensable only where the employee was exposed to the risk to a greater degree than the general public. Id.

Petitioner first argues that her knee injury was incurred as the result of an employment-related risk. "Risks are distinctly associated with employment when, at the time of the injury, 'the employee was performing acts [she] was instructed to perform by [her] employer, acts which [she] had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to [her] assigned duties.' " Steak 'N Shake v. Illinois Industrial Comm'n, 2016 IL App (3d) 150500WC, ¶35 (quoting Caterpillar Tractor Co. v. Industrial Comm'n, 129 Ill. 2d 52, 58 (1989)). "A risk is incidental to the employment where it belongs to or is connected with what an employee has to do in fulfilling [her] duties." Caterpillar Tractor Co, 129 Ill. 2d at 58.

Applying this definition, Petitioner notes that, as a cook, she was expected, and even required by regulation (see 77 Ill. Adm. Code 750.512 (now repealed)) to wash her hands after engaging in any activity that could contaminate her hands. She further points out that she chose the location of neither the hand-washing sink nor the trash can, so that her injury was caused by her "doing a duty she was required to do, at a location she was required to do it at." In support of her position, Petitioner cites the Appellate Court's recent decision in Steak 'N Shake, 2016 IL App (3d) 150500WC. In Steak 'N Shake, a case in which the claimant suffered an injury as a result of wiping down restaurant tables, the Appellate Court rejected the Commission's application of a neutral-risk analysis and instead held the activity to constitute an employment-related risk. Steak 'N Shake, 2016 IL App (3d) 150500WC, ¶37. In so doing, the Appellate Court relied on the claimant's credible testimony that her normal job duties included the habitual cleaning and busing of tables and was therefore distinctly associated with her employment. Id. at ¶38.

The mode of injury in this case, however, differs qualitatively from that in Steak 'N Shake. The task the Steak 'N Shake claimant performed at the time of her injury was a distinctly job-related task: wiping down restaurant tables. Here, by contrast, Petitioner was injured while discarding a paper towel. In cases where the claimant's injury is triggered by an everyday task that cannot be said to be distinct to the claimant's job, the Appellate Court's most recent precedent dictates application of neutral-risk analysis.

For example, in Adcock v. Illinois Workers' Compensation Comm'n, 2015 IL App (2d) 130884WC, the claimant was injured while turning in a chair. The Appellate

Court reasoned that the risk associated with turning in a chair "was not 'distinctly associated' with the claimant's employment; rather, it was a neutral risk of everyday living faced by all members of the general public." Adcock, 2015 IL App. (2d) 130884, ¶33. In a similar case, Noonan, 2016 IL App (1st) 152300WC, the claimant was injured after he fell from his chair trying to reach for a pen he had dropped. The Appellate Court rejected the claimant's argument that his reaching for the pen was an act in furtherance of his duties and thus led to an employment-related risk, because the act of "reaching for a dropped item while sitting in a chair" was not "distinctly associated" with his employment (Noonan, 2016 IL App (1st) 152300WC, ¶21) but instead was a risk that he "would have been equally exposed to apart from his work for the employer" (Noonan, 2016 IL App (1st) 152300WC, ¶27). Thus, the Appellate Court applied a neutral-risk analysis. Id. at ¶27. In so doing, the court distinguished prior employment-risk cases that presented risks more closely associated with and distinct to the claimants' jobs:

> "Further, the facts in [Young v. Illinois Workers' Compensation Comm'n, 2014 IL App (4th) 130392WC, Autumn Accolade v. Illinois Workers' Compensation Comm'n, 2013 IL App (3rd) 120588WC, and O'Fallon School District No. 90 v. Industrial Comm'n, 313 Ill App. 3d 413 (2000)] each show that the claimant was performing acts his or her employer might reasonably have expected the claimant to perform when fulfilling his or her job duties—a parts inspector reaching into a box to retrieve a part for inspection (Young), a caregiver reaching to remove a safety hazard while holding onto an individual in the shower (Autumn Accolade), and a hall monitor turning and twisting to pursue a running student (O'Fallon)." Id. ¶26.

Based on this precedent, the risk that led to Petitioner's injury in this case—her turning to discard a paper towel—was an everyday occurrence that cannot be considered distinct to her employment even if it was undertaken in furtherance of her employment duties. Thus, the Commission must reject Petitioner's argument that her injury be considered the result of an employment-related risk.

Petitioner also argues that, if her injury is not the result of an employment-related risk, it nevertheless arose out of her employment with Respondent because it was a neutral risk to which she faced greater exposure than the general public. " 'Injuries resulting from a neutral risk generally do not arise of the employment and are compensable under the Act only where the employee was exposed to the risk to a greater degree than the general public.' " Noonan, 2016 IL App (1st)152300WC, ¶19 (quoting Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Comm'n, 407 Ill. App. 3d 1010, 1014 (2011)). " 'Such an increased risk may be either qualitative, such as some aspect of the employment which contributes to the risk, or quantitative, such as when the employee is exposed to a common risk more frequently than the general public.' " Id. (quoting Metropolitan, 407 Ill. App. 3d at 1014). For

17IWCC0471

example, in *Adcock*, the Appellate Court found an increased risk where the claimant undertook the everyday action of maneuvering in his chair on a "non-stop" basis. *Adcock*, 2015 IL App (2d) 130884WC, ¶34.

In this case, Petitioner offered no evidence that her job exposed her to any quantitatively or qualitatively unusual risk of injury due to turning to discard a paper towel. Although she points out in her brief that she was required to wash her hands (and incidentally required to discard her paper towel), she offers no evidence to quantify her exposure to this risk. In fact, her testimony establishes that she mopped the kitchen floor—the act she says triggers her duty to wash her hands—only once per shift, at the end of her workday. As a result, Petitioner has not carried her burden to establish that her job somehow gave her quantifiably greater exposure to the hand-washing or paper-towel-discarding risk. Neither did Petitioner offer any evidence to establish that her workplace somehow added a qualitative dimension to the risk. For these reasons, the Commission must find that Petitioner failed to carry her burden to show that her injury arose out of and in the course of her employment.

Petitioner also argues that the arbitrator erred in finding that she did not suffer a repetitive trauma injury, with a later onset date, as a result of her work. However, as the arbitrator observed, Petitioner offered no evidence that her injury was the result of repetitive trauma. For that reason, Petitioner's argument must be rejected.

All else is otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision dated 10/13/2016 is modified as stated herein.

DATED: JUL 25 2017
o:6/26/2017
TJT/knc
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

KOEHLER, DEDRA
Employee/Petitioner

Case# **14WC016584**
15WC014071

MURRAY CENTER
Employer/Respondent

17IWCC0471

On 10/13/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.49% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1239 KOLKER LAW OFFICES PC
BILLY A HENDRICKSON
9423 W MAIN ST
BELLEVILLE, IL 62223

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
PO BOX 19255
SPRINGFIELD, IL 62794-9255

0558 ASSISTANT ATTORNEY GENRAL
AARON L WRIGHT
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601-3227

1745 DEPT OF HUMAN SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

OCT 13 2016

Ronald A. Rascia

RONALD A. RASCIA, Acting Secretary
Illinois Workers' Compensation Commission

17IWCC0471

STATE OF ILLINOIS)
)SS.
COUNTY OF JEFFERSON)

- ☐ 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

DEDRA KOEHLER
Employee/Petitioner

v.

MURRAY CENTER
Employer/Respondent

Case # **14** WC **16584**

Consolidated cases: **15 WC 14071**

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 **Nowak**, Arbitrator of the Commission, in the city of **Mount Vernon**, on **11/5/2015**. 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. ☒ 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 _____

17IWCC0471

FINDINGS

On **3/29/14**, 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*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$45,120.21**; the average weekly wage was **$867.70**.

On the date of accident, Petitioner was **53** years of age, ***married*** with **0** dependent children.

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

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

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

Because Petitioner failed to establish that she sustained accidental injuries which arose out of and in the course of her employment on 3/29/14 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.

Michael K. Nowak, Arbitrator

9/2/16
Date

OCT 13 2016

FINDINGS OF FACT

Petitioner has two cases pending against Respondent. 14 WC 16584 alleges a single traumatic accident of March 29, 2014. (AX. 1) 15 WC 14701 alleges repetitive trauma injuries with a manifestation date on May 1, 2014. On the date of hearing the cases were consolidated without objection. The issues at trial were accident, causal connection, liability for medical costs, TTD, and Nature and extent of the Injury in both cases. In addition, notice was in dispute in 15 WC 14071.

Petitioner testified that she works at the Warren G. Murray Center where she has been employed since May 1st of 2008. At the time of her injury Ms. Koehler was working as a cook, and had been working in that position for about a year.

Petitioner testified that the kitchen was about half the size of football field. (T. 16) The kitchen included several different locations where materials were stored including a walk in cooler, freezer, ovens, and dry storage. (T. 16-17) As part of her job Petitioner was required to move from spot to spot gathering all the materials that were needed to prepare food for that day. (T. 16-17) Petitioner testified it was a fast paced job that required her to be on her feet and move around a lot. (T. 18) Her position also required a lot of lifting and carrying. (T. 17) After serving meals, Petitioner was required to clean up; moving all the pans to the dish room, cleaning all the tables, prep tables, stoves, and steam kettles. (T. 18-19) Petitioner would then sweep and mop the kitchen floor. (T. 19) Petitioner testified that her duties required her to be on her feet six hours out of her seven and a half hour day. (T. 20) Petitioner spent two to two and a half hours out of her day bending and squatting. (T. 20) Petitioner only spent one hour to one and a half hours of her workday sitting down or resting. (T. 20) Petitioner testified that when she got home from work after a typical day her feet and legs would be "tired, achy, and hurt." (T. 20)

Prior to March 29, 2014, Petitioner had been treating with chiropractor Dr. Michael Bowman for adjustments to her back. (T. 22) On March 25, 2014, Petitioner attended a regularly scheduled appointment with Dr. Bowman. (T. 22) On that date, Petitioner reported to Dr. Bowman that she had been having pain in her right knee for a couple weeks. (PX. 3) Petitioner testified that she was experiencing an "aching, dull pain behind her right knee" at that time and rated the pain a 2 out of 10. (T. 22-23) The medical record from this visit indicates that being on her feet for long periods of time made the pain worse, while resting with her leg up made the pain better. (PX. 3) The record further indicates that Dr. Bowman discussed the possibility of a Baker's cyst or degenerative joint disease of the knee with Petitioner. Petitioner testified that she had no injuries or treatment to her right knee prior to the March 25, 2014 visit with Dr. Bowman. (T. 25)

Four days after this visit to Dr. Bowman, on March 29th, 2014, Petitioner was working her regular duties as cook at Murray Center. (T. 25) Petitioner testified she had been at work for six and a half hours before the injury occurred. (T. 25) Petitioner had been on her feet for a majority of this time. (T. 25-26) Petitioner testified she had just mopped the floor, changed the mop head, and washed her hands. (T. 26) Petitioner went to throw a paper towel away after washing her hands, turning to her left toward the trash can, when she heard her right knee pop and felt a "very sharp pain" in the knee. (T. 26-28) Petitioner testified that she almost fell over having to catch herself on the sink because she could not put any weight on the knee. (T. 27) She testified that the pain was located behind and on the inside of her right knee, facing the interior. (T. 27) Petitioner rated the pain 10 out of 10, and stated it was a different pain than she had experienced prior to the accident. (T. 28)

A co-worker, Melodie Hall, witnessed the accident and reported it to their supervisor. The supervisor called a nurse on staff and Petitioner was directed to go to the emergency room at St. Mary's Hospital. Petitioner was rolled out of the facility in an office chair to a vehicle where co-worker Melodie Hall took her to the emergency room. (T. 30)

X-rays were performed at the emergency room at St. Mary's and Petitioner was diagnosed with a ruptured Baker's cyst. (PX. 2) Petitioner's leg was wrapped in ace bandages and she was given crutches. (PX 2) Petitioner was taken off work for three days. (PX. 6) Petitioner testified after leaving the hospital she could not put any weight on the knee and was directed to stay off it. (Tr. 30-31)

A Notice of Injury was filled out by Petitioner on March 29, 2014, and was received by Murray Center on April 3, 2014. (PX. 1)

On March 31, 2014, Petitioner returned to Dr. Bowman to have her knee evaluated. The record from this date indicates that Petitioner presented on crutches with swelling to both the anteromedial aspect and posteromedial aspect of the right knee. (PX. 3) She was diagnosed with internal derangement of right knee and a referred for an MRI. (PX. 3). She was taken off work until April 7, 2014. (PX. 6)

On April 4, 2014, Petitioner followed up with Dr. Bowman. (PX. 3) The record on this date indicates that Petitioner was off of crutches but notes swelling in the right knee and pain rated 6 out of 10. (PX. 3) This record indicates that Petitioner "still awaits the MRI – contingent on W/C." (PX. 3) Petitioner was taken off work until April 14, 2014. (PX. 6) Petitioner testified that she returned to Dr. Bowman for physical therapy for the right knee a few times before the MRI was taken. (T. 32-33) Petitioner was issued off work notes extending through this time. (PX. 6)

On April 4, 2014, Petitioner underwent an MRI of the right knee at InMed Diagnostic Services. (PX. 4) The MRI revealed fluid interspersed along the anterior aspect of the anterior cruciate ligament and "is noted suspicious for a partial tear..." (PX. 4) There was an increased signal in the posterior cruciate ligament and notes "It could represent a strain of that structure." (PX. 4) The MRI also indicates a slight elevation of the meniscus off of the anterior aspect of the tibia along the lateral aspect of the knee joint, and a possible contusion in the anterior aspect of the tibia. (PX. 4)

On April 21, 2014, Dr. Bowman referred Petitioner to Bonutti Clinic for evaluation and treatment. (PX. 3) Petitioner's first of two visits at Bonutti Clinic occurred on May 1, 2014. (PX. 5) Petitioner treated with physician's assistant Nickolas Williams. Upon reviewing the MRI, Mr. Williams noted edema in the intercondylar notch where the ACL attachment suggesting a grade I ACL sprain and questionable medial meniscus tear. (PX. 5) This record states "...this very likely is indeed a work related injury because of the new fluid collection around her ACL in ACL attachment site and intercondylar notch. In addition to this, there is a questionable medial meniscal tear." (PX. 5) Mr. Williams noted tenderness with Clarke compression. (PX. 5) The Arbitrator notes that this entry does not discuss repetitive stress to the knee, but instead indicates the condition is related to the incident on March 29, 2014. Further, even assuming Mr. Williams was referring to repetitive job duties as the source of Petitioner's condition, there is no description of Petitioner's job duties contained in the medical record. Mr. Williams simply states she worked as a cook. Petitioner was ordered to do physical therapy and was taken off work another 2-3 weeks, with a potential recommendation for injection or

arthroscopy if she failed to improve. (PX. 5) Petitioner continued physical therapy with Dr. Bowman through May 16, 2014. (PX. 3) Records through this period indicate that Petioner's condition was improving. (PX. 3).

On May 16, 2014, Petitioner phoned Bonutti Clinic and reported that she felt 80% better. (PX. 5) Physician's assistant, Nick Williams, extended her physical therapy and gave a return to work date for June 5, 2014. (PX. 5; PX 6) Petitioner testified she returned to work on this date. (T. 36) This is first date Petitioner had worked since the date of injury. (T. 36)

Petitioner continued her physical therapy with Dr. Bowman, and on June 12, 2014, Dr. Bowman ordered her to return as needed. (PX. 3) Petitioner returned to Dr. Bowman one final time on November 7, 2014. (PX. 3) The record on this date indicates that Petitioner was returning for a re-evaluation of her knee due to a mild exacerbation from work activities. (PX. 3) She was referred to Bonutti Clinic. (PX. 3)

Petitioner's second and final visit to Bonutti Clinic occurred on January 27, 2015. (PX. 5) These records note that Petitioner was still experiencing some slight instability in her right knee from time to time, "but it is very well tolerable." Petitioner was placed at maximum medical improvement. (PX. 5)

Petitioner testified that after returning to work she bid on and was transferred to a new position, property and supply clerk. Petitioner testified the main reason she wanted to transfer to this position was because of the injury to her knee and to avoid being on her feet so much. She stated, "It is a less paying job, but it is also less time on my feet." (T. 40) She testified that in her new position she is on her feet about half the time she was when she was a cook. (T. 40)

CONCLUSIONS

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

The claimant in a workers' compensation case has the burden of proving, by a preponderance of the evidence, all of the elements of his claim, including proof that he suffered an accident which arose out of and in the course of his employment. 820 ILCS 305/2 (West 2008); *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 1010, 1013, 944 N.E.2d 800, 348 Ill. Dec. 559 (2011). Both elements must be present at the time of the claimant's injury in order to justify compensation. *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 483, 546 N.E.2d 603, 137 Ill. Dec. 658 (1989).

Injuries sustained at a place where a claimant might reasonably have been while performing his work duties are deemed to have been received in the course of his employment. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 57, 541 N.E.2d 665, 133 Ill. Dec. 454 (1989). In this case, it is undisputed that the Petitioner's injuries were sustained in the course of her employment. At the time of her injury, Petitioner was working in the kitchen on Respondent's premises. The only legitimate issue for analysis in this case is whether the claimant's injuries arose out of his employment.

For an injury to "arise out of" the employment, its origin must be in some risk connected with, or incidental to, the employment so as to create a causal connection. *Caterpillar Tractor Co.*, 129 Ill. 2d at 58. There are three general types of risks to which an employee may be exposed: (1) risks that are distinctly

associated with the employment: (2) risks that are personal to the employee; and (3) neutral risks that do not have any particular employment or personal characteristics. *Potenzo v. Illinois Workers' Compensation Comm'n*, 378 Ill. App. 3d 113, 116, 881 N.E.2d 523, 317 Ill. Dec. 355 (2007) (citing *Illinois Institute of Technology Research Institute*, 314 Ill. App. 3d 149, 162, 731 N.E.2d 795, 247 Ill. Dec. 22 (2000)).

In this case, the Petitioner had finished washing her hands and simply turned to discard the paper towels into a trash container. There is evidence in the record tending to show that the she suffered from a physical condition prior to the accident. On March 25, 2014, four days before the alleged accident of March 29, Dr. Bowman had discussed the possibility of a Baker's cyst. When she went to the emergency department on the day of the alleged accident she was diagnosed with a ruptured Baker's cyst. This would seem to be, at least arguably, a risk personal to the employee. The risk associated with turning to throw paper towels away is clearly not a risk distinctly associated with employment as a cook. More compelling is the conclusion that the risk associated with risk associated with discarding paper towels is neutral in nature. See *Metropolitan Water Reclamation District of Greater Chicago*, 407 Ill. App. 3d at 1014.

Injuries resulting from a neutral risk do not arise out of the employment and are not compensable under the Act unless the employee was exposed to the risk to a greater degree than the general public. *Illinois Institute of Technology Research Institute*, 314 Ill. App. 3d at 163. The increased risk may be either qualitative, that is when some aspect of the employment contributes to the risk; or quantitative, such as when the employee is exposed to the risk more frequently than the general public. *Metropolitan Water Reclamation District of Greater Chicago*, 407 Ill. App. 3d at 1014.

While Petitioner asserts that the amount of time she spent on her feet created a quantitatively greater risk than that faced by the general public, there is not medical evidence to suggest that Petitioner's right knee injury is any way related to the amount of time she spent on her feet. Although PA Williams wrote "...this very likely is indeed a work related injury because of the new fluid collection around her ACL in ACL attachment site and intercondylar notch. In addition to this, there is a questionable medial meniscal tear," this simply indicates his opinion that the condition he diagnosed was related to the incident which occurred on March 29. It is not dispositive in determining whether an "accident" occurred under the Act. There is no evidence in the record to indicate Petitioner was exposed to any risk greater than that faced by the public at large. Turning to discard paper towels after washing ones hands is a risk to which the general public is exposed daily.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds Petitioner has failed to sustain her burden of establishing that she sustained injuries which arouse out of and in the course of her employment with Respondent on March 29, 2014. Benefits in 14 WC 16584 are therefore denied.

Likewise the record is bereft of any evidence indicating that Petitioner's condition is a result of repetitive trauma in any form. The Arbitrator further finds Petitioner has failed to sustain her burden of establishing that she sustained injuries which arouse out of and in the course of her employment with Respondent on May 1, 2014. Benefits in 15 WC 14071 are therefore denied.

Because Petitioner failed to sustain her burden of establishing that she sustained injuries which arouse out of and in the course of her employment with Respondent all other issues are moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CHER SMITH,

Petitioner,

vs.

NO: 11 WC 19917

MANHATTAN PARK DISTRICT,

17IWCC0462

Respondent.

DECISION AND OPINION ON REVIEW

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

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission makes the following findings:

17IWCC0462

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17IWCC0462

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

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

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

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

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

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

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

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

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

DATED: JUL 21 2017

MJB/tdm
O: 6-6-17
052

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

SMITH, CHER
Employee/Petitioner

Case# **11WC019917**

17IWCC0462

MANHATTAN PARK DISTRICT
Employer/Respondent

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

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

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

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

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

STATE OF ILLINOIS)
)SS.
COUNTY OF WILL)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION CORRECTED DECISION

Cher Smith
Employee/Petitioner

v.

Manhattan Park District
Employer/Respondent

Case # 11 WC 19917

17IWCC0462

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Christine M. Ory**, Arbitrator of the Commission, in the city of **New Lenox**, on **February 8, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

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

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

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

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

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

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

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

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

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

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

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

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

ORDER

Medical Benefits

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

Permanent Disability

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

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

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

Christine Moy

06/10/2016

Signature of Arbitrator

Date

ICArbDec p. 2

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

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

ADDENDUM TO ARBITRATOR'S DECISION

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

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

At issue in this hearing is as follows:

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

FINDING OF FACTS

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

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

The Arbitrator found the petitioner to be credible.

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

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

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

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

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

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

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

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

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

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

Manhattan F.P.D $950.00

Silver Cross Hospital -$1,330.45

Associated Radiologists - $37.00

EM Strategies LTD $419.00

Hinsdale Orthopaedics $298.00

Orthospine Center $80.00

Prescriptions $37.48

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

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

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DAVID A. CLARKE,

Petitioner,

vs.

NO: 08 WC 12057

CITY OF PEORIA,

17IWCC0475

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, occupational disease, TTD, and PPD, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below, and reduces the PPD award to 20% loss of use of person-as-a-whole, and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

FACTS

Petitioner was employed by the Respondent as a firefighter for 30 years. During his tenure, he rose in the ranks from firefighter to engineer to fire captain. (T. pp. 11, 18) His work activities for the City of Peoria were primarily those of firefighter, and Petitioner testified in detail regarding his extensive history of exposure to fire, smoke, toxins, high-stress situations, and noise. (T. pp. 15, 24-27, 33-37) The last 10 years of his career, he worked as Captain or Acting Captain. Even in those capacities, he continued to answer calls for home and industrial fires and would enter locations while the fire was actively engaged, in addition to having supervisory duties. (T. pp. 18-21)

Petitioner had last worked on December 26, 2007.On December 29, 2007, he was off-duty, and had not worked for 2.5-3 days. (T. p. 62) On December 29, 2007, Petitioner went to the ER after suffering upper chest pain. He was admitted to the hospital and on December 30, 2007, was diagnosed with a heart attack. (T. pp. 38-39) On December 30, 2007, Petitioner underwent left heart cardiac catheterization and 2 overlapping stents were placed. (T. pp. 54-55) Petitioner

did not return to work for the City of Peoria after this time. (T. p. 56)

Petitioner did not have a family history of cardiovascular disease. (T.p. 42) At the time of the heart attack, Petitioner was on mild blood pressure medication and medication for acid reflux. (T. pp. 45,47)

As a result of his heart attack, Petitioner applied for a disability pension and that was granted. (T. p. 56) Since that time, a third stent was placed, and Petitioner continues to see Dr. Malik on an annual basis. (T. p. 57)

Petitioner testified as to the traumatic experiences he went through as a firefighter. (T. pp. 26-27, 32-35) He additionally testified to the lack of sleep. (T. pp. 23-24)

The evidence deposition of Dr. Francesca Litow was admitted into evidence on behalf of Petitioner. Dr. Litow testified she prepared a report, and that in preparation of that report, she conducted an hour long telephone interview with Petitioner, reviewed his medical records, and reviewed literature regarding risk factors for cardiovascular disease in firefighters. She concluded that Petitioner's 30 years of exposure would have contributed to his cardiovascular disease and Petitioner's myocardial infarction.

The evidence deposition of Dr. Dan Fintel was admitted into evidence on behalf of Respondent. Dr. Fintel also prepared a report. He based his report on his review of Petitioner's medical records, but did not meet nor speak with Petitioner. Dr. Fintel concluded that Petitioner's heart attack and coronary artery disease were a direct consequence of Petitioner's multiple risk factors for coronary artery disease, including high blood pressure, hyperlipidemia, Petitioner's age and gender and Petitioner's family history, rather than Petitioner's work as a firefighter.

On January 1, 2008, the following changes to the Illinois Workers' Compensation Act and Illinois Occupational Diseases Act as it pertains to firefighters became effective:

> ...any condition or impairment of health of an employee employed as a firefighter... which results directly or indirectly from any...heart or vascular disease or condition, hypertension... resulting in any disability (temporary, permanent, total, or partial) to the employee shall be rebuttably presumed to arise out of and in the course of the employee's firefighting... and shall be rebuttably presumed to be causally connected to the hazards or exposures of the employment. ... However, this presumption shall not apply to any employee who has been employed as a firefighter, EMT, or paramedic for less than 5 years at the time he or she files and Application for Adjustment of Claim concerning this condition or impairment with the Illinois Workers' Compensation Commission. *820 ILCS 305/6(f)* and *820 ILCS 310/1(d)*

On December 17, 2015, Arbitrator Dollison issued a decision awarding Petitioner PPD benefits of 25% person as a whole, pursuant to 820 ILCS 305/8(d)2, as well as 8 weeks of TTD, and medical benefits. Arbitrator Dollison additionally found that the changed statutory language to 820 ILCS 305/6(f) and 820 ILCS 310/1(d) could be retroactively applied. The City of Peoria sought the instant review.

CONCLUSIONS OF LAW

Retroactive application of 820 ILCS 305/6(f) and 820 ILCS 310/1(d)

The Arbitrator correctly found the application of the statute should be retroactive. 5 ILCS 70/4 authorizes the retroactive application of amendments or repeals only if such changes are

procedural. Conversely, it forbids retroactive application of substantive changes to statutes. Procedural law has been defined as the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right. Rules of procedure, including rebuttable presumptions, may be changed by the legislature and applied retroactively, unless there is a savings clause as to existing litigation, without offending any constitutional prohibition. *The First Nat'l Bank of Chicago v. Narcissa Swift King, et al.*, 165 Ill. 2d 533, 542-43 (1995) *citing Maiter v. Chicago Board of Education*, 82 Ill.2d 373, 390 (1980); *Illinois Public Aid Comm'n v. Brauer*, 11 Ill. 2d 416, 419 (1957).

Since the statutory changes to the Acts simply create a rebuttable presumption, and not a conclusive rule of law, the change is only procedural and therefore can be retroactively applied. 820 ILCS 305/6(f) and 820 ILCS 3110/1(d) do not raise a presumption that Petitioner suffered from hypertension and/or heart disease, but only that once it is shown that Petitioner suffers from these ailments, the statutes raise a rebuttable presumption that such condition is causally related to his employment. A rebuttable presumption is one that may be overcome by the introduction of contrary evidence.

Standard of Proof

The changes in the Act create a "rebuttable" presumption in the favor of the firefighter, EMT or paramedic. The presumption of compensability is not conclusive. It is only rebuttable. In all workers' compensation claims, the claimant has the burden of proof to prove the claim is compensable. The Arbitrator erred in stating that the Respondent would need to introduce clear and convincing evidence to establish the nonexistence of the presumed fact. The standard is only to introduce evidence that is sufficient to support a finding of the nonexistence of the presumed fact. *Simpson v. Ill. Workers' Comp. Comm'n*, 2017 IL App (3d) 160024WC, ¶30.

Petitioner met his burden of proof regarding whether his heart condition was work-related. Respondent introduced evidence to rebut the presumption created by the statute, but Petitioner was able to prove by a preponderance of the evidence that his condition was work-related.

Causal Connection

The evidence is undisputed that Petitioner suffered a heart attack. Based on the retroactive application of the statute, Petitioner's condition is rebuttably presumed to arise out of and in the course of his firefighting, and to be causally connected to the hazards or exposures of firefighting. 820 ILCS 305/6(f) and 820 ILCS 310/1(d).

The Illinois Supreme Court has weighed in on the effect of rebuttable presumptions in *Diederich v. Walters*, 65 Ill.2d 95, 100-01 (1976). The Court states, in pertinent part:

> With regard to the procedural effect of presumptions, most jurisdictions in this country follow the rule that a rebuttable presumption may create a *prima facie* case as to the particular issue in question and thus has the practical effect of requiring the party against whom it operates to come forward with evidence to meet the presumption. However, once evidence opposing the presumption comes into the case, the presumption ceases to operate, and the issue is determined on the basis of the evidence adduced at trial as if no presumption had ever existed.

The prevailing view that a presumption ceases to operate in the face of contrary evidence has generally been followed in Illinois. A presumption is not evidence and cannot be treated as

evidence. It cannot be weighed in the scale against evidence. Presumptions are never indulged in against established facts. They are indulged in only to supply the place of facts. As soon as evidence is produced contrary to the presumption which arose before the contrary proof was offered, the presumption vanishes entirely. *Johnston v. Illinois Workers' Compensation Comm'n*, 2017 IL App. (2d) 160010WC, ¶37, *Franciscan Sisters Health Care Corp. v. Dean*, 95 Ill. 2d 452, 461 (1983)

In order to establish causation under the Act, Petitioner need only prove that some act or phase of his employment was *a* causative factor in his ensuing injuries. *Sisbro, In. v. Industrial Comm'n*, 207 Ill. 2d 193, 205 (2003), *Land and Lakes Co. v. Industrial Comm'n*, 359 Ill.App. 3d 582, 592 (2005). Thus, the causation presumption in the revised portion of 820 ILCS 305/6(f) and/or 820 ILCS 310/1(d) only required that the Arbitrator presume that Petitioner's employment as a firefighter was a *contributing cause* of Petitioner's coronary artery disease. In order to rebut this presumption, Respondent had to burst the bubble of the presumption by introducing evidence sufficient to support a contrary finding. Respondent was able to do so through the expert testimony of Dr. Fintel. However, Dr. Fintel testified that he had no knowledge of Petitioner's specific duties as a firefighter, nor did Dr. Fintel speak or meet with Petitioner prior to the issuance of his report. Petitioner's expert, Dr. Litow, testified she prepared a report, and that in preparation of that report, she conducted an hour long telephone interview with Petitioner, reviewed his medical records, and reviewed literature regarding risk factors for cardiovascular disease in firefighters. She concluded that Petitioner's 30 years of exposure would have contributed to his cardiovascular disease and Petitioner's myocardial infarction. Petitioner's expert's opinion that Petitioner's disease was work-related, was more persuasive than that of Respondent's expert's opinion that it was not. The Commission affords greater weight to the opinion of Dr. Litow. Thus, Petitioner was able to prove causal connection.

Permanency

The Commission, having weighed the evidence, finds that the Award should be reduced to 20% person-as-a-whole.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner is covered under the Occupational Diseases Act, 820 ILCS 310/1 *et seq*, and that 820 ILCS 310/1(d) be retroactively applied.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,114.84 per week for a period of 8 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $636.15 per week for a period of 100 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the loss of 20% person as a whole.

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.

17IWCC0475

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

DATED: JUL 27 2017

Charles J. DeVriendt

Joshua D. Luskin

L. Elizabeth Coppoletti

CJD/dmm
O: 6/6/17
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

CLARKE, DAVID A
Employee/Petitioner

Case# **08WC012057**

CITY OF PEORIA
Employer/Respondent

17IWCC0475

On 12/17/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.58% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1004 BACH LAW OFFICE
ROBERT W BACH
110 S W JEFFERSON SUITE 410
PEORIA, IL 61602

0980 HASSELBERG GREBE ET AL
BOYD O ROBERTS III
410 MAIN ST SUITE 1400
PEORIA, IL 61602

17IWCC0475

STATE OF ILLINOIS)
)SS.
COUNTY OF PEORIA)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
CORRECTED

David A. Clarke
Employee/Petitioner

v.

City of Peoria
Employer/Respondent

Case # **08** WC **12057**

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 **Gregory Dollison**, Arbitrator of the Commission, in the city of **Peoria, IL**, on **September 23, 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. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [ ] 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. [ ] Other _____

FINDINGS

On **12/29/07**, 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 was last exposed to an occupational disease 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 $**86,957.52**; the average weekly wage was $**1,672.26**.

On the date of accident, Petitioner was **56** years of age, ***married*** with **0** dependent children.

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

ORDER

The Arbitrator finds that Petitioner was temporarily totally disabled due to his occupational disease from December 29, 2007 until February 22, 2008, when he began receiving a statutory duty disability pension, or a total of eight (8) weeks. Petitioner is awarded 8 weeks of TTD at the rate of $1,114.84 per week. In addition, the Arbitrator finds the Petitioner has suffered a permanent partial disability loss of 25% person as a whole at the maximum rate of $636.15/week.

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

12/15/15
Date

I. FINDINGS OF FACT:

A. Petitioner's Testimony

Petitioner, at the time was a 56 year old firefighter with 30 years on the job, testified that he suffered chest pains while off duty on December 29, 2007. He last worked on December 26, 2007. He suffered a heart attack while hospitalized at Proctor Hospital on December 30, 2007. Cardiac catheterization revealed two areas of significant stenosis of the right coronary artery which were treated with the insertion of two stents. Petitioner testified that he was later readmitted to the hospital on June 11, 2008 for the insertion of a third stent into his right coronary artery.

Petitioner testified that in the course of his career as a firefighter he had worked as both a firefighter and an EMT at some of the busiest fire stations in the City of Peoria, working a 24 hours on 48 hours off shift. His duties included responding to home, grass, and industrial fires at which he wore a self-contained breathing apparatus (SCBA). During the overhaul phase, when the fire had been knocked down, he frequently would not. He stated the department policy did not mandate SCBA use during overhaul and that on some occasions he ran out of air bottles.

While on duty, alarms would go off in the firehouse at all hours. Petitioner stated that if an alarm went off anywhere in the city it rang into all of the firehouses. He reported difficulty sleeping and sleep interruption due to the loud bell tones of the alarm. He admitted to being nervous in anticipation of the next call as well.

Petitioner stated that he had been exposed to many stressful situations and witnessed many gruesome injuries and deaths at accident scenes. He described being called to a scene where a knife wielding man attacked police officers and was shot to death less than 20 feet from him. On another occasion he and a fellow firefighter crawled through upstairs bedrooms at a house fire in an unsuccessful attempt to rescue two young children. Petitioner found one child burned to death and another dead from smoke inhalation. He recalled that he responded to the scene of a gruesome daytime accident where he futilely attempted to save the life of an injured motorcyclist. These experiences cause him to lose sleep, experience nightmares and suffer anxiety.

Petitioner testified that his prior medical history included treatment for high blood pressure (hypertension) and gastro-esophageal reflux disorder, both of which were controlled with oral medication. He stated he was diagnosed with hypertension in 2000 and had never treated for hyperlipidima prior to his heart attack. He testified that he had never smoked and had no family history of heart disease. He was 5'10" tall and had weighed between 180 and 190 lbs for twenty years prior to his heart attack. He had annual department physicals required by the Fire Department.

B. Medical Evidence

1. Heartcare Midwest Records of Treatment.

Petitioner was a patient at Heartcare Midwest during and after his hospitalization in December 2007. The records of his treatment substantiate that he suffered a heart attack due to right coronary artery blockage which was addressed initially by the placement of two stents with a third being implanted in June 2008. Petitioner's prior medical history is notable for never having been a smoker, and high blood pressure which was controlled by the oral medication, Norvasc.

2. Report and Testimony of Dr. Francesca Litow

Petitioner introduced the report and evidence deposition of Dr. Francesca Litow, a board certified physician in Occupational Environmental Medicine on the faculty of Johns Hopkins School of Medicine and Director of the residency program in Occupational Medicine at the University. She interviewed Petitioner, reviewed his medical records and drafted a report focusing on the causal connection between Petitioner's employment as a firefighter and his cardiovascular disease.

Dr. Litow's interview with Petitioner concerned his exposure to various job related situations during his 30 year career which included toxic fumes at fire scenes during overhaul, alarms at his firehouse during shifts which resulted in sleep disturbance/deprivation, stressful fire and accident scenes involving death and gruesome injury causing him anxiety.

Dr. Litow also described the impact of the "demand control" model of psychological stress in Petitioner's job experience. She stated that firefighters are an example of workers who are at increased risk for occupational stress because their jobs have very high demands yet very low control over how busy their shifts will be, resulting in stress to the individual firefighter such as Petitioner.

Dr. Litow expressed the opinion that these occupational exposures were a cause of Petitioner's hypertension and coronary artery disease as well as his subsequent myocardial infarction. Dr. Litow noted exposures at fire scenes, to a wide variety of toxicants, loud noise exposure, sleep deprivation, stress, anxiety, and shift work each increased the risk of cardiovascular disease in firefighters such as Petitioner.

Specifically, she testified to a positive correlation between sleep deprivation and occupational stress and the development of hypertension, which in turn contributed to the development of Petitioner's coronary artery disease.

On cross examination, Dr. Litow acknowledged that she has testified on three occasions in behalf of the International Association of Fire Fighters (IAFF) with respect to the causal relationship between firefighting and disease. She also stated that the IAFF contributed $90,000 per year to the Johns Hopkins School of Medicine for travel expenses for residents in the Occupational Medicine program and partial salary support. She has not lobbied for the IAFF.

Dr. Litow does not treat patients with cardiovascular disease but has training and education in heart disease. She acknowledged Petitioner's non-occupational risk factors for developing heart disease such as age, obesity, hyperlipidemia, hypertension and gender but maintained her opinion that his occupational exposures were a cause for coronary artery disease, hypertension and heart attack. This was the first case involving cardiovascular disease in which she had testified.

3. Report and Testimony of Dr. Dan J. Fintel

Dr. Fintel performed a record review at the request of the Respondent. He is a board certified internal medicine and cardiovascular disease doctor who is on the faculty of the Northwestern University School of Medicine. Dr. Fintel opined that the cause of Petitioner's heart attack was his multiple non-occupational risk factors for coronary artery disease including high blood pressure or hypertension, hyperlipidemia, age, male gender, and possibly family history. These risk factors dramatically increased his risk for having a coronary event and were the cause of his accelerated atherosclerosis.

On cross examination, Dr. Fintel admitted that his testimony regarding causation did not exclude other risk factors which might have been present. He also admitted that Petitioner's age of 56 was not a strong risk factor and that at 5'9", 200 lbs, he may not have been obese.

Dr. Fintel stated that Petitioner's hyperlipidemia and hypertension were both important risk factors for the development of coronary artery disease. He admitted that he did not know how long Petitioner had been suffering from hyperlipidemia and that that information would be necessary to know the importance of hyperlipidemia in the development of Petitioner's heart disease. He also admitted that he did not know the cause for Petitioners hypertension and stated it could be related to "emotional or physical stress". Dr. Fintel opined that hypertension was a cause of Petitioner's coronary artery disease, but did not express an opinion as the cause of Petitioner's hypertension.

Dr. Fintel admitted that the presence of one cardiovascular risk factor does not preclude other causes. Dr. Fintel had no information with respect to any potential occupational disease exposures to which Petitioner might have been subjected in his work as a firefighter. He admitted he had no experience or training in occupational medicine, and that he had no evidence concerning Petitioner's work activities.

4. Report of Dr. Keith Mankowitz to the Peoria Fireman's Pension Fund dated 3/12/08

Dr. Mankowitz, a member of the faculty at Washington University School of Medicine in St. Louis in the cardiovascular division. He performed an examination of Petitioner at the request of the Peoria Fireman's Pension Fund. Dr. Mankowitz noted Petitioner was suffering from hypertension but otherwise in good health until his myocardial infarction of December 30, 2007.

Dr. Mankowitz noted that Petitioner's hypertension was diagnosed at age 52 and that he had no family history of cardiovascular disease and had never been a smoker. He went on to state that Petitioner's coronary artery disease was due to his abnormal lipids and hypertension which predisposed him to that disease. The doctor mentioned age as a further cause. He did not address the causation of Petitioner's hypertension. He concluded that "disability is not caused by an on-the-job-incident" but rather related to coronary artery disease due to coronary risk factors.

5. Report of Dr. William S. Scott to the Peoria Fireman's Pension Fund dated 3/12/08

Dr. Scott of OSF Occupational Medicine performed an examination of Petitioner for the Fireman's Pension Board. He noted that Petitioner's hypertension and hyperlipidemia were fairly well controlled prior to his heart attack. He made no mention of any other history including any family history or smoking. His focus seemed primarily on whether Petitioner could return to work as a firefighter. He concluded his report by stating that based upon Petitioner's personal risk factors, non-work location and activities at the time of the cardiac event, he did not see this as an on-the-job incident.

With respect to (C.) Was Petitioner last exposed to an occupational disease on December 26, 2007 in the course his employment by Respondent and? (F) Is Petitioner's current condition of ill-being causally related to the said occupational disease, the Arbitrator finds as follows:

1. <u>Presumption under §1(d) – retroactivity</u>

The Illinois legislature passed an amendment to the Illinois Worker's Occupational Disease Act which which created the presumption contained in 820 ILCS 31-1(d) and became effective January 1, 2008. It states: "...Any condition or impairment of health of an employee employed as a firefighter, emergency medical technician (EMT), emergency medical technician-intermediate (EMT-I), advanced emergency medical technician (A-EMT), or paramedic which results directly or indirectly from any bloodborne pathogen, lung or respiratory disease or condition, heart or vascular disease or condition, hypertension,

tuberculosis, or cancer resulting in any disability (temporary, permanent, total, or partial) to the employee shall be rebuttably presumed to arise out of and in the course of the employee's firefighting, EMT, EMT-I, A-EMT, or paramedic employment and, further, shall be rebuttably presumed to be causally connected to the hazards or exposures of the employment. This presumption shall also apply to any hernia or hearing loss suffered by an employee employed as a firefighter, EMT, EMT-I, A-EMT, or paramedic. However, this presumption shall not apply to any employee who has been employed as a firefighter, EMT, EMT-I, A-EMT, or paramedic for less than 5 years at the time he or she files an Application for Adjustment of Claim concerning this condition or impairment with the Illinois Workers' Compensation Commission. The rebuttable presumption established under this subsection, however, does not apply to an emergency medical technician (EMT), emergency medical technician-intermediate (EMT-I), advanced emergency medical technician (A-EMT), or paramedic employed by a private employer if the employee spends the preponderance of his or her work time for that employer engaged in medical transfers between medical care facilities or non-emergency medical transfers to or from medical care facilities. The changes made to this subsection by this amendatory Act of the 98th General Assembly shall be narrowly construed. The Finding and Decision of the Illinois Workers' Compensation Commission under only the rebuttable presumption provision of this paragraph shall not be admissible or be deemed res judicata in any disability claim under the Illinois Pension Code arising out of the same medical condition; however, this sentence makes no change to the law set forth in Krohe v. City of Bloomington, 204 Ill.2d 392."

Petitioner last worked on December 26 and his coronary artery disease manifested itself on December 29, 2007 leading to a heart attack the next day. Respondent argues that §1(d)) should not be applied to Petitioner's claim for Occupational Disease benefits in this case because it was not in effect when he last worked or his coronary artery disease manifested itself, citing 5 ILCS 75/1 in support. That section addresses the effective dates of laws passed in the Illinois legislature.

However, when a change of law merely affects the law of procedure, all rights of action are enforceable under the new procedure, without regard to whether they accrued before or after such change of law. (*Maiter v. Chicago Board of Education*, 82 Ill.2d 373, 415 NE 2d, 1034, (1980), *Orlick v. McCarthy*, 4 Ill.2d 342, 122 NE 2d 513 (1954).

A presumption, such as the one in §1(d) is a procedural rule that dictates the effect of the absence of evidence (*Franciscan Sisters Health Care Corp .v Dean*, 95 Ill.2d 452 at 460, 448 NE 2d 872, (1983); *Diederich v. Walters*, 68 Ill.2d 95, 357 NE 2d 1128, (1976)). A presumption does not shift the burden of proof but rather shifts only the burden of production (*Franciscan Sisters, supra* at 460-62). Thus, a statutory presumption is a rule of evidence. No one has a right in any particular procedure (*Maiter, supra*). Therefore, the Arbitrator finds that the statutory amendment contained in §1(d) applies to Petitioner's claim because it constituted a change in a procedural rule.

2. <u>Presumption under §1(d) – effect</u>

Since Petitioner's coronary artery disease, hypertension and heart attack are presumed to be causally connected to and arising out of the hazards or exposures of his employment, it is necessary to analyze the effect of the presumption in light of the evidence introduced at arbitration.

Presumptions can be refuted by evidence which attacks or tends to disprove the "basic facts" which are those facts which must be proven in order for the presumption to arise. In this case, the basic facts required for the presumption are not in dispute. Petitioner, a firefighter, was employed in that capacity for more than 30 years. The presumption applies to any firefighter employed in excess of 5 years. Thus, it applies in this case.

A presumption can also be rebutted by proof that the presumed fact is not true. This would be proof relating to the nature or subject matter of the presumption. In this case it would be evidence that Petitioner's occupation as a firefighter was not a cause of his cardiovascular disease. Respondent did not attempt to "establish the nonexistence" of the presumed relationship between Petitioner's firefighting and cardiovascular disease. In fact, it did not introduce any medical testimony to the effect that firefighting did not cause cardiovascular disease. Instead it proffered evidence directed toward showing that other non-occupational causes existed, which might have caused Petitioner's heart disease, hypertension and heart attack.

Petitioner is not required to prove that his employment was the sole or even the primary cause of his condition, but only a cause (*Old Ben Coal Co. v. Industrial Commission*, 217 Ill.App. 3d 70, 576 NE 2d 890 at 899). Thus, in the absence of evidence that firefighting does not cause cardiovascular disease or that there cannot be more than one cause for the development of cardiovascular disease, the evidence proving the existence of other non-occupational factors does not exclude the presumed relationship between Petitioner's work and illnesses.

The Illinois Supreme Court has held that statutory presumptions require strong evidence to overcome, and has stated that under certain circumstances clear and convincing evidence must be introduced to counter such a presumption (*Franciscan Sisters, supra*). In this case the presumption requires the Arbitrator to accept the presumed fact that Petitioner's cardiovascular disease, hypertension and heart attack are work related unless the evidence introduced by Respondent constitutes clear and convincing evidence establishing the nonexistence of the presumed fact. (*Franciscan Sisters, supra (emphasis added)).*

Respondent introduced evidence that Petitioner had other personal lifestyle risks for the development of cardiovascular problems; that he was male, overweight, had high blood pressure and high cholesterol, and was over 45 years old. No testimony was offered to the effect that the presence of these factors excluded the occupational exposures of noise, shift work, toxic fume exposure, psychological stress and sleep disturbance/deprivation as additional causes for Petitioner's cardiovascular disease. In fact, Dr. Fintel admitted that the presence of these factors did not exclude other factors in Petitioner's illness. Respondent's experts did not discuss, much less exclude occupational factors in their reports or testimony. None of them opined that Petitioner did not experience these exposures or that they were not a cause, directly or indirectly, for his cardiovascular conditions. While the doctors stated that they did not find that Petitioner's cardiovascular disease to be related to his activities as a firefighter, these general opinions are insufficient to overcome the presumption.

The Arbitrator further finds that the evidence regarding Petitioner's hypertension supports a finding of a causal connection between Petitioner's employment and his cardiovascular disease. First, pursuant to §1(d), hypertension is presumed to be a result of Petitioner's employment as a firefighter. Respondent did not offer evidence regarding the cause of Petitioner's hypertension and in particular no doctor opined that his hypertension was not related to his employment. The only doctor to address the causation of this condition was Dr. Litow who expressed the opinion that Petitioner's hypertension was a result of exposure to various occupational risks including noise exposure, shift work and stressful on-the-job situations. Therefore, even if the presumption of §1(d) did not to apply in this case, Dr. Litow's opinion that Petitioner's hypertension is work-related stands unrefuted.

Secondly, all doctors expressed the opinion that hypertension was a cause for Petitioner's coronary artery disease. On this point, all of the medical evidence is consistent. Drs. Litow, Fintel, Scott and Mankowitz concur that Petitioner was suffering from hypertension and that this lead to the development of his coronary artery disease.

Thus, with or without the presumption, the evidence supports a finding that Petitioner's coronary artery disease and heart attack were related to his employment.

With respect to (K) What benefits are in dispute (TTD), the Arbitrator finds as follows:

Petitioner testified that he did not return to work following his heart attack. He was granted a duty disability pension effective February 22, 2008. The Arbitrator finds that Petitioner was temporarily totally disabled due to his occupational disease from December 29, 2007, and February 22, 2008, when he began receiving a statutory duty disability pension, or a total of eight (8) weeks.

With respect to (L) What is the nature and extent of the injury, the Arbitrator finds as follows:

The Arbitrator finds that Petitioner's occupation is a heavy duty job from which he was permanently disabled due to his coronary artery disease and which, given his age of 56, prevented him from continuing in his chosen profession for a number of years. This has substantially impaired his earning capacity. In addition, Petitioner's disability is corroborated by the medical evidence. He testified that he did not have the same energy or stamina following his heart attack and that he had voluntarily restricted his activities for this reason. His coronary artery disease has required two surgical procedures to place a total of three stents. In combination with the above factors, the Arbitrator awards 25% loss of the person as a whole.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Terrence Shanahan,

Petitioner,

vs.

NO. 11WC 26651

17IWCC0450

Dykstra Concrete,

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 1, 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.

17IWCC0450

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.

JUL 18 2017

DATED:
SJM/sj
o-6/29/17
44

Stephen J. Mathis

David L. Gore

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SHANAHAN, TERRENCE
Employee/Petitioner

Case# **11WC026651**

17IWCC0450

DYKSTRA CONCRETE
Employer/Respondent

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

If the Commission reviews this award, interest of 0.34% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0274 HORWITZ HORWITZ & ASSOC
MITCHELL HORWITZ
25 E WASHINGTON ST SUITE 900
CHICAGO, IL 60602

0210 GANAN & SHAPIRO PC
JAMES M BRYNES
210 W ILLINOIS ST
CHICAGO, IL 60654

17IWCC0450

STATE OF ILLINOIS)
)SS.
COUNTY OF Will)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Terrance Shanahan
Employee/Petitioner

v.

Dykstra Concrete
Employer/Respondent

Case # **11** WC **26651**

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 **Doherty**, Arbitrator of the Commission, in the city of **New Lenox**, on **6/7/2016**. 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. xx 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. xx Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **6/24/2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**1,312.00**; the average weekly wage was $**1,640.00**. SEE DECISION

On the date of accident, Petitioner was **53** years of age, ***married*** with **1** dependent children.

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

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

Respondent shall be given a credit of $**282,706.49** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**282,706.49**.

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

ORDER

Respondent shall pay Petitioner temporary total disability/maintenance benefits of $1093.33 /week for 258-4/7 weeks, commencing June 25, 2011 through June 7, 2016.

Respondent shall pay Petitioner permanent partial disability benefits, commencing 6/8/16, of $786.67/week for the duration of the disability, because the injuries sustained caused a loss of earnings, as provided in Section 8(d)1 of the Act.

Respondent shall pay reasonable and necessary medical services of $ 2,790.75 , as provided in Sections 8(a) and 8.2 of the Act. The respondent shall have a credit for bills paid by respondent prior to the award.

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.

Carolyn M. Doherty

Signature of Arbitrator Carolyn Doherty — Date: 6/30/16

ICArbDec p. 2

JUL 1 - 2016

FINDINGS OF FACT

On June 24, 2011, the 52 year old Petitioner, Terrance Shanahan, was employed by the Respondent, Dykstra Concrete, as a cement mason. At that time, the Petitioner had worked for the Respondent for 4 days. The Request for Hearing form reflects that the parties stipulated to the issues of accident, notice and causal connection at trial. ARB EX 1. Petitioner testified that he graduated from high school in 1975. After he graduated he began working as a cement mason. He worked as a cement mason from the time that he graduated from high school in 1975 until his injury on June 24, 2011. He does not have any other specialized skills or further education.

The Petitioner testified that, as a cement mason, his job duties included pouring and finishing concrete. The job also required lifting, climbing ladders and scaffolds. Petitioner was exposed to walking on uneven surfaces, such as mud, debris, dirt, and various surfaces on a construction site. For the 11 years before his accident, the Petitioner was a member of the Local 11 Cement Mason's Union. He testified that, as a member of the union, his base salary was $41.00 per hour. As a cement mason it was usual for him to work for more than one employer per week; during some weeks he could work for up to five different employers. He testified that he received jobs when he was contacted by the union's business agent, Anthony Frescura, Jr., and sent out to various worksites.

The Petitioner testified that his regular work week was working 5 days per week, 8-10 hours per day. This was full-time work. He would earn overtime pay if he worked on Saturdays or Sundays. As a cement mason, he was required to be available to work 5 days per week, and sometimes 6- to 7-days per week. He testified that if it was raining he was still required to show up to the job site.

The Petitioner suffered an injury to his right eye approximately 30 years ago. This injury caused a punctured globe and detached retina of his right eye. (PX 1). He testified that, as a result of this injury, he had diminished vision in his right eye and problems with depth perception. Before his injury, he relied on his left eye as his "dominant eye." Since his 2011 injury, his right eye has further deteriorated.

Petitioner testified that he began working for the Respondent the week of June 24, 2011. He testified that he worked for 4 days that week and was ultimately injured on June 24, 2011. He worked for the Respondent for 32 hours and earned $41.00 per hour before the undisputed accident on 6/24/11.

On June 24, 2011, the Petitioner was hammering a nail while at work for the Respondent. The nail flew up and struck him in his left eye. He was transported by ambulance to Silver Cross Hospital. (PX 1). He treated at the Silver Cross Emergency Room and was diagnosed with hypema (eye) post-trauma. *Id.* Mr. Shanahan followed up with Dr. Rassouli of the Spectrum Eye Institute on June 24 and again on June 25, 2011. On that date, he noted that his pain had decreased, but he was noticing a blurry spot in his central vision. He was diagnosed with possible macular edema, possible glaucoma, a conjunctive laceration, hyphema and a retinal tear of the left eye. (PX 2) Dr. Rassouli performed optical coherence tomography of the left eye and referred him for further treatment of the retinal tear. (Id.)

Dr. Joseph Civantos performed focal laser eye surgery on the Petitioner's left eye on June 25, 2011. (PX 4). He appreciated hyphema and traumatic iritis on the left eye. *Id.* An eye exam revealed visual acuity of 20/100 in the Petitioner's left eye. *Id.* Dr. Civantos ordered the Petitioner off work at this time. *Id.* The Petitioner continued to treat with Dr. Civantos. *Id.* On July 14, 2011, Dr. Civantos diagnosed decreased visual acuity of the left eye of

20/400 vision. *Id.* He noted that the Petitioner can only read stop signs approximately 10 feet away and that it took "awhile" for the Petitioner's eyes to focus. *Id.* The Petitioner reported that he was not driving. *Id.*

As of July 28, 2011, Dr. Civantos noted that the Petitioner's hyphema had resolved but that the Petitioner continued to have unexplained decreased 20/400 visual acuity in his left eye. *Id.* He recommended that the Petitioner undergo neuro-ophthalmic treatment to identify any optic nerve pathology causing the decreased vision. *Id.*

The Petitioner presented to Dr. Thomas Mizen, a board-certified ophthalmologist at Rush University. Dr. Mizen performed Optic Nerve OCT, testing on the Petitioner's eye in January 2012. PX 3. The test results were normal. *Id.* He also performed a multifocal ERG test on the Petitioner's retinas in February 2012. *Id.* These test results were also normal. *Id.* He referred the Petitioner back to Dr. Civantos. *Id.*

The Petitioner returned to see Dr. Civantos in April 2012. (PX 4). On April 30, 2012 Dr. Civantos opined that the Petitioner's clinical examination is stable and opined that he reached maximum medical improvement with no further intervention planned. *Id.* Petitioner's vision was 20/25 is the right eye and 20/400 in the left eye. PX 4. He issued the following permanent restrictions.

> [L]ight duty dues not accurately summarize his visual limitations. He can perform heavy lifting or strenuous effort. The problem is that with the decreased vision in his left eye, he has decreased depth perception and impaired balance. I reviewed some of the requirements of his job description. One of the concerns is the need to work at a high elevation. Because of the decreased depth perception and the issues with balance, I would be concerned about the risk of a fall. I do not think he should work in an environment, which would require him to be on scaffolding or otherwise in a situation where a fall could have severe consequences. In addition, he would not be able to perform any job that required a commercial driver's license. His vision does meet the requirements for a regular passenger license, so he can drive a passenger car. (PX 4 and 5).

The Petitioner continued to treat with Dr. Civantos and Dr. Mizen for his injury throughout 2012. (PX 3, 4). They did not change his work restrictions or document improvement with his vision. *Id.*

The Petitioner entered letters from Local 11 business agent, Anthony Frescura, Jr., regarding the Petitioner's permanent work restrictions. (PX 6). In this letter, Mr. Frescura notes:

> According to the member, Mr. Shanahan, has decreased depth perception and issues with balance, He is restricted from being on scaffolding or in a situation where a fall could occur. He also cannot perform any job that requires a commercial driver's license.
>
> The job duties of a cement mason require that he be able to climb ladders and scaffolds to reach elevated positions on buildings. It also requires climbing into holes and using ladders and other structures during concrete pours. The job also requires walking on uneven surfaces, such as mud, debris, dirt, and various surfaces on a construction site.

> There is no light duty on our trade. I cannot refer Mr. Shanahan to a job site. These restrictions cannot be accommodated. If we refer Mr. Shanahan for work he has to be able to perform all the duties of a cement mason. With these restrictions he is not able to perform the full duties of a cement mason. (PX 6).

An additional letter was provided by Art Sturms, business manager at Local 11. (PX 7). He indicates "As a cement mason it is virtually impossible to work with a visual impairment. Not only would it not be productive, but more importantly it is extremely unsafe." *Id.* He detailed job requirements making full visual abilities necessary such as working with extreme measurement tolerances and the need for excellent hand eye coordination. PX 7.

The Petitioner participated in vocational rehabilitation with David Patsavas, M.A., C.R.C. of Independent Rehab Services, Inc. (PX 8). He began vocational rehabilitation services on January 27, 2013. *Id.* Mr. Patsavas reported that the Petitioner had a work history of 37 years in the Concrete industry with membership in the Operators, Plasters and Cement Masons International Association Local 11. *Id.* Petitioner reported that while in the cement industry he worked as a cement mason, concrete supervisor, construction superintendent and estimator. Petitioner also reported being self employed in the concrete industry from 1982 to 1999 doing residential and light commercial cement work and that he employed between 8 – 10 people. He poured concrete in the morning and handled bidding in the afternoon. He handled his own pay roll. The Petitioner indicated that he had no computer skills but would be open to a return back to school for possible retraining and obtaining computer skills. *Id.* He was interested in a sales-type position. *Id.*

The transferable skills analysis dated January 27, 2013 which yielded 21 jobs as excellent and 128 jobs as good to moderate options for Petitioner.

Mr. Patsavas noted that if Petitioner was unsuccessful at returning to employment as a Supervisor in the concrete industry then he would require, at a minimum, entry-level computer skills training to apply for management and/or supervisory positions outside of the concrete industry. *Id.* At the conclusion of the initial vocational assessment, Mr. Patsavas recommended a labor market survey as well as coordination for computer classes. *Id.*

A Labor Market survey was completed on February 28, 2013. PX 8. Mr. Patsavas indicated that the survey revealed that a stable labor market exists for the Petitioner. *Id.* The labor market survey notes that Mr. Shanahan had experience not only as a concrete mason, but as a supervisor, superintendent, and estimator. He also had approximately 17 years of self-employment in the cement finishing business, which involved both concrete work and bidding on jobs for his company. It was felt that if he could not return to work as a supervisor or estimator in the concrete industry, a viable and stable labor market existed for him outside the industry, including such positions as Shipping and Receiving Clerk, Distribution Clerk, Coordinator positions and positions in Distribution, Maintenance, Warehouse, Estimating, Paving, Maintenance Coordinator and Dispatching. (Id.) Mr. Patsavas estimated that most of the entry level positions in such fields pay between $10.00 and $15.00 per hour. PX 8.

The Petitioner attended further vocational rehabilitation services in July and August 2013. *Id.* Mr. Patsavas indicated that the Petitioner attended all of the recommended classes in computer training, but had difficulties comprehending some of the materials. *Id.* The Petitioner continued vocational rehabilitation services with Mr. Patsavas. *Id.* On November 15, 2013, Petitioner had completed his keyboarding class and was set to begin receiving job lead via email and was "expected to follow up with those job leads." PX 8. On January 31, 2014, the Petitioner received a telephone call from Guardian Security for a security guard position. *Id.* However, the

job required reading tags underneath trailer in order to check in trucks. *Id.* Because of the Petitioner's sight, he was not considered for the job. *Id.* Mr. Patsavas recommended that research be conducted regarding a computer that the Petitioner could utilize for job search activities. *Id.*

In February 2014, Mr. Patsavas again documented his vocational rehabilitation efforts. *Id.* He noted that the Petitioner continues to be provided assistance in completing online applications but reported no positive responses during the past month. *Id.* He recommended that the Petitioner's vision be evaluated by the Chicago Lighthouse for the Blind to enable him to work independently on a computer, completing online applications, email correspondence, and prepare him for work in an environment that utilizes the computer. *Id.* On April 4, 2014, Mr. Shanahan returned to see Mr. Patsavas. *Id.* He noted that the Petitioner completed his course in Microsoft Excel and was provided with enhancements to his computer screen so that he could complete assignments. *Id.*

Mr. Patsavas reported that the Petitioner attended a job fair on April 11, 2014 at Joliet Junior College. *Id.* He made contact with several employers and provided copies of his resume. *Id.* He did not receive any job offers. *Id*

The Chicago Lighthouse for the Blind evaluated the Petitioner on April 25, 2014. *Id.* The Lighthouse recommended for the Petitioner to use a laptop computer, Zoom Text Screen Magnifier, Large Print Keyboard, Microsoft Office Home and Student, a printer with a USB cable, and a VisioBook S. *Id.* The Petitioner testified that these resources were provided by the workers' compensation carrier.

On October 16, 2014, the Petitioner presented to Dr. James Cutler for an eye-care consultation. The Petitioner reported that his vision had changed and was getting worse. The Petitioner reported the decreased vision to Mr. Patsavas. (PX 8). Mr. Patsavas recommended that the Petitioner apply for a transporter position at Marianjoy Hospital *Id.* He also advised the Petitioner to identify hiring opportunities online at Indeed, Monster, Career Builder, and Simply Hired. *Id.* He noted that the Petitioner's typing speed is still significantly slow. *Id.*

Petitioner continued to submit online applications through email leads provided by the counselor. The counselor also checked Petitioner's email account for responses but no responses were found or documented. It is not clear from the records whether Petitioner submitted his independent job search efforts or follow-ups to the counselor although requested to do so. PX 8. Petitioner continued to report no positive response to applications submitted. PX 8.

In February 2015, Mr. Patsavas recommended that direct contact be made to employers in Petitioner's local geographical area due to the lack of success from online applications. Mr. Patsavas updated his reporting on the Petitioner's vocational rehabilitation on March 27, 2015. *Id.* Mr. Patsavas noted that direct, yet unsuccessful, contact was made with employers in New Lenox, including Sam's Club, PetCo, and K-Mart. *Id.* He opined that the Petitioner made efforts to increase his skills on the computer by working on a daily basis. *Id.* However, the Petitioner continued to experience difficulty in becoming independent on the computer and felt that he would not be successful for a position requiring him to be on the computer for the majority of the day. *Id.* Although the computer improved his life, he was unable to retain and recall information and could only conduct basic computer-related activities. *Id.* Petitioner and the counselor decided to focus on jobs that do not require a significant amount of computer work so they agreed to focus on position in custodial work, stocking, loading and unloading and retail work that did not require a computer.

The Petitioner again met with Mr. Patsavas on June 27, 2015. *Id.* Mr. Patsavas noted that the Petitioner continued to apply with several employers but was unsuccessful at finding employment. *Id.* The Petitioner reported increased difficulties and bouts of mood swings and depression. *Id.* At this time, Mr. Patsavas opined

that, given the Petitioner's lack of transferrable skills, visual limitations, and lack of formal computer training, the Petitioner may continue to have difficulties in identifying full-time employment opportunities. *Id.* The Petitioner expressed his motivation to return back to some type of gainful employment, even at a minimum wage capacity. *Id.* He recommended that the Petitioner find a volunteer-type position in order to prove his ability for job tasks to potential employers and gain some practical work experience. *Id.*

In July 2015, the Petitioner began to volunteer at St. Mary Magdalene church in New Lenox, IL. *Id.* He reported that this opportunity provided him with a sense of purpose and improved his overall mood. *Id.* Despite the volunteer position, Mr. Patsavas opined that his lack of transferable skills, lack of formal computer training, and visual limitations may continue to present difficulties in full-time employment. *Id.*

The Petitioner met with Mr. Patsavas at the last time on September 4, 2015. *Id.* He reported that the Petitioner continued to volunteer at St. Mary Magdalene church. *Id.* The Petitioner expressed a decline in his overall mood with increased levels of anxiety and depression of the past few months. *Id.* He indicated that he felt his vision is declining and that this caused additional stress. *Id.* Mr. Patsavas noted that the Petitioner was participating in Job Placement Activities since June 2013 but was unable to fully grasp the computer training that was provided to him. *Id.* The Petitioner was not able to demonstrate the abilities to utilize the computer in a way that would transfer into a work environment. *Id.* Mr. Patsavas documented that the Petitioner made contact with local employers with a few interviews during the past few years. *Id.* These interviews were unsuccessful. *Id.* He opined that the Petitioner fully cooperated with Vocational Rehabilitation efforts. *Id.* Finally, he stated:

> Numerous job openings in [the Petitioner's] local area have been identified as potential employment opportunities for him, however, [the Petitioner] has not been offered any jobs to date. Job placement efforts with [the Petitioner] have been unsuccessful and training opportunities have not proven to be effective given his visual impairment, lack of transferable skills and inability to comprehend computer technology. *Id.*

Based on these opinions, Mr. Patsavas terminated vocational rehabilitation. *Id.*

With regard to his job search efforts, Mr. Shanahan testified that he "applied for a bunch of jobs," although he did not provide specific information concerning the nature of his contact with potential employers. He testified that he met with the vocational counselor at least once per month, sometimes twice, and at each meeting, the counselor would provide a list of job leads. He agreed that he was expected to contact the prospective employers set forth in the list of job leads on his own, apart and independent from any assistance from the counselor. He also agreed that he was to keep a written job log, setting forth the dates that he contacted potential employers, who he spoke with and the results of these contacts. The idea was that he would report back to the counselor the following month with the job log that outlined his independent job search activities. This expectation was noted in the records from Independent Rehabilitation Services. (PX 8) Despite being aware of the expectations of him, he testified that he did not keep any documentation of his job search activities, as he expected that his counselor would keep such records. The records from Independent Rehabilitation Services contain no job search logs prepared by Mr. Shanahan or any other documentation of the nature of his independent job search efforts, other than whatever took place during the meeting with the vocational counselor. (Id.)

The formal vocational rehabilitation program was suspended as of September 4, 2015. Mr. Shanahan testified that he has not made any effort to find work since that date.

At trial, the Petitioner testified regarding his vision in his left eye. He testified that he can see "hand signals." He explained that his vision cannot be rated as a "20/20"- or "20/40"-vision. When he closes his right eye and looks out of his left eye, he can see some motion out of his eye. His right eye has deteriorated since his injury.

The Petitioner currently volunteers at St. Mary Magdalene church. He helps to move desks and chairs. He testified that he volunteers. "whenever the priest needs me." He wants to be there every day. He said, "I feel good when I go there."

He testified about his activities of daily living. He attempts to read using his VisioBook. He uses the computer to follow drag-racing. He does the dishes and listens to music.

On cross-examination, the Petitioner testified that he met with vocational rehabilitation counselors every two weeks from January 2013 through September 2015. At these meetings he would report on leads and contact employers between meetings. He testified that he did not keep a job-search log because of his vision problems and that the vocational rehabilitation counselors maintained that information. He has not looked for work since September 2015.

The Arbitrator also heard testimony from Anthony Frescura, Jr. Mr. Frescura is a business agent for Local 11 Area 161 in Will and Grundy County. He testified that he was the business agent in 2011 and worked with the Respondent at that time. The Respondent was a signatory to the union's collective bargaining agreement. PX 14.

Mr. Frescura testified that he was familiar with the regular work-week of a cement mason. A cement mason was a full-time position. The members had to be available from Monday to Friday. A regular work-day was from 7:00am through 3:30pm or 8:00am through 4:30pm. If the cement mason worked on Saturdays of Sundays they would earn overtime. The masons were also entitled to overtime if they worked more than 8 hours in a single week-day.

He further testified that a member must be available 5 days per week, sometimes 6, or even 7 days per week when needed. In the event of rain or inclement weather, the worker was expected to appear at the job site and would earn two-hour's pay. If weather clears up, they will get paid once they put their tools on and they perform work. Cement mason work is sequenced with other trades in the construction industry. If there was any delay in the scheduling of construction work, the worker still must be available. The Respondent did not cross-examine Mr. Frescura.

The Respondent called one witness, Dave Stuursma. Mr. Stuursma testified that he was the owner of Dykstra Concrete and had owned the company for 22-years. As part of his daily job duties he would estimate the cost of jobs, order materials, and direct cement finishers/masons.

He testified regarding payroll records of other employees. Mr. Stuursma testified that he would hire cement masons at an as-needed basis, particularly if he was in a different county. He testified that a cement mason had no guarantee of hours; different sized projects would last for a different number of days. He further testified that the Petitioner worked for four, eight-hour days, 32 hours, before his accident.

On cross-examination, Mr. Stuursma testified that cement masons were expected to be available for work at least five-days per week, Monday through Friday. He testified that cement masons' regular work-week was a five-day, 40-hour work week. The cement masons were expected to work from 7:00am through 3:30pm or 8:00am through 4:30pm.

CONCLUSIONS OF LAW

The foregoing findings of fact are incorporated into the following conclusions of law.

A. In support of the Arbitrator's Decision relating to (G) the Petitioner's Earnings, (K) What temporary benefits are in dispute TTD and (N) Is Respondent due any credit the Arbitrator finds as follows:

The Arbitrator notes that based upon the entirety of the record at trial, Petitioner's regular work week as a cement mason was a 40-hour week and that the Petitioner earned $41.00 per hour. The Petitioner was required to be available five-days per week for an eight-hour day; sometimes weekends included. Therefore, the Petitioner's AWW was as follows: $41.00 x 40 hours per week = $1,640.00 per week. This finding is supported by Petitioner's testimony, and the testimony of Mr. Frescura the Local 11 business agent and by Mr. Stuursma, the owner of Respondent Dykstra who agreed that he expected the cement masons he hired to be available for work at least five-days per week, Monday through Friday. He testified that cement masons' regular work-week was a five-day, 40-hour work week. The cement masons were expected to work from 7:00am through 3:30pm or 8:00am through 4:30pm. Petitioner testified that he was always available to work 5 days per week. Accordingly, the Arbitrator finds that Petitioner's average weekly wage was $1,640 and his TTD rate was $1,093.33. Lastly, the Arbitrator notes Petitioner's arguments made on the record regarding the binding nature of Respondent's "stipulation" made years before this trial that the AWW was $1,640 and the TTD payments made by Respondent based on that rate. However, the Arbitrator's finding here was based on the evidence submitted at trial thereby making Petitioner's "stipulation" argument moot.

Noting that Respondent paid Petitioner TTD of $1,093.33 per week based on the AWW of $1,640, the Arbitrator further finds there was no overpayment of TTD benefits as claimed by Respondent at trial. The parties have stipulated that the period of the Petitioner's temporary total disability is not in dispute. They agree that Mr. Shanahan has not worked since the date of the accident on June 24, 2011 and has been temporarily totally disabled or entitled to maintenance since that date to the date of the hearing on June 7, 2016, a period of 258-4/7 weeks. Petitioner was owed TTD commencing 6/25/11 as stipulated by Respondent and was paid at the correct rate. ARB EX 1. The Arbitrator further finds that Respondent shall receive credit for TTD paid. ARB EX 1.

B. In support of the Arbitrator's decision relating to (L) the Nature and Extent of the Petitioner's Injury, the Arbitrator finds as follows:

The Petitioner testified that he participated in vocational rehabilitation with Independent Rehabilitation Services from January 27, 2013 through September 4, 2015. He testified that he took various computer classes at Joliet Junior College. He testified that he was also afforded the benefit of services through the Chicago Lighthouse for the Blind and was also provided with new computer equipment and other assistive devices to assist in his ability to read and access the internet and check his email. He met with the vocational counselors on a regular basis, who assisted in preparing a resume, providing hundreds of job leads, and assisting in filling out online job applications.

The records from Independent Rehabilitation Services also make it clear that Mr. Shanahan had an obligation to conduct independent job search activities, specifically utilizing the new computer equipment and reading device that he was provided with by Chicago Lighthouse for the Blind. The reports repeatedly state that he was to provide job logs or otherwise to "document all of his employer contacts and provide those to the office of Independent Rehabilitation Services." (PX 8) Mr. Shanahan admitted on cross-examination that the purpose of

the job leads provided by the vocational counselor was to encourage him to contact prospective employers on his own and report his progress back to the counselor at the next meeting. Mr. Shanahan admitted that in fact, he did not keep track of his contacts by way of a written job log or other documentation. While the records from Independent Rehabilitation Services contain hundreds of job leads with potential employers, there is no written documentation to establish that Mr. Shanahan in fact took advantage of the job leads provided to him; no list of employers contacted by Mr. Shanahan, no list of when any contacts took place, no documentation of whom he may have spoken to and no documentation of any effort Mr. Shanahan took on his own volition to find work within his restrictions. Petitioner simply testified that he thought the logs and records were kept by Independent Rehabilitation Services because he could not use the computer to keep track.

Mr. Shanahan testified as to one interview he attended with a potential employer, which involved reading tags on semi-trucks. Mr. Shanahan determined that he would not be capable of performing such work and thus it does not appear that the interview ever resulted in a job offer. No evidence was offered as to whether Mr. Shanahan inquired as to possible accommodation for this position.

The Arbitrator specifically notes that David Patsavas of Independent Rehabilitation Services performed a labor market survey and set forth the results in his report of February 28, 2013. In that report, he stated the opinion that a viable and stable labor market exists for Mr. Shanahan, even given his education, experience and physical restriction. He set forth a variety of occupations which he believes Mr. Shanahan is capable of performing and noted that the average entry level position in such occupations pays on average from $10.00 to $15.00 per hour.

Based on the above, the Arbitrator finds that the Petitioner is not permanently and totally disabled. The labor market survey from 2013 establishes that a viable and stable labor market existed for him as of that time. The Arbitrator notes that he was given the tools from his vocational counselor to engage in a quantitative job search but the record is devoid of evidence that he properly availed himself of those resources to engage in a successful qualitative job search. There is no medical opinion that Petitioner is incapable of working in any capacity but only that he cannot return to his pre-injury employment as a cement mason.

The Arbitrator finds that the Petitioner is instead entitled to wage differential benefits pursuant to Section 8(d)1 of the Act. Based on the labor market survey, it is reasonable to find that he would be capable of earning $12.50 per hour in alternative employment, had he properly availed himself of the significant resources provided. Over the course of 40 hours, this would amount to a sum of $500.00. In comparison, the current wage for a Local 11 cement mason is $42.00 per hour. (PX 20) This calculates as $1,680.00 over the course of 40 hours. This results in a difference of $1,180.00 per week and a wage differential rate of $786.67.

J. Medical Services

At trial, Respondent stipulated to liability for unpaid medical bills. Petitioner submitted the following bills as unpaid bills. Respondent shall pay the following medical expenses pursuant to Sections 8 and 8.2 of the Act. To the extent any of the following bills have been paid prior to trial, Respondent shall receive credit for amounts paid.

ASSOCIATED RADIOLOGISTS OF JOLIET	6/24/2011	6/24/2011	$240.00	$240.00
EM STRATEGIES	6/24/2011	6/24/2011	$477.00	$477.00
RUSH UNIVERSITY MEDICAL CENTER	6/25/2011	2/21/2012	$2,073.75	$2,073.75
TOTALS			**$2,790.75**	**$2,790.75**

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Roy Sims,
Petitioner,

vs.

NO: 15 WC 26947

17IWCC0429

Aramark,
Respondent.

DECISION AND OPINION ON REVIEW

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

The underlying facts of this claim were well laid out in the Arbitrator's Decision, which is incorporated herein, and the Arbitrator's findings of fact are adopted. With regard to the nature and extent of the injury, however, the Commission reviews and weighs the facts somewhat differently than did the Arbitrator. Specifically, the Commission takes note of the fact that while the claimant did suffer a left ankle fracture, he returned to his regular employment and was able to continue in that work until he had a separate and unrelated injury.

The Commission notes the factors identified in Section 8.1b of the Act, as did the Arbitrator. The claimant had an AMA impairment rating of 12% to the left lower extremity. The Arbitrator further noted the petitioner's employment as a school custodian, his age (69 years at the time of the accident), and the petitioner's complaints as corroborated by the medical records, and assigned these issues appropriate weight. However, the Arbitrator gave no weight to the fact that there was no evidence that this injury had any effect on the petitioner's future earning capacity. The Commission finds that there was affirmative evidence presented on this point, specifically his ability to return to ongoing employment since the injury, which also weighed in on the petitioner's job history. The Commission assigns this some weight. In light of the above, the Commission

17IWCC0429

finds an award of permanent partial disability of 35% loss to the left foot to be more in line with the extent of the injuries sustained, and modifies the Arbitrator's award accordingly. All other findings of the Arbitrator are affirmed.

The parties stipulated that the claimant was owed 12 & 3/7 weeks of TTD benefits incurred from 7/23/2015 through 10/18/2015, and that the respondent would be credited $5,028.57 in TTD benefits previously paid (see Arbitrator's Exhibit I). The Arbitrator acknowledged such at the hearing, and included the credit for TTD benefits in the "Findings" section of the decision, but did not overtly specify the TTD award in the "Order" section, so the Commission adds the following language to the "Order" section of the Arbitrator's Decision:

Pursuant to the parties' stipulations, the respondent shall pay the petitioner temporary total disability benefits of $393.33/week for 12 & 3/7 weeks, as provided in Section 8(b) of the Act. Against this amount, the respondent shall be given a credit of $5,028.57 for disability benefits paid to date.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $354.00 per week for a period of 58.45 weeks, as provided in §8(e) of the Act, as the injuries sustained caused the 35% loss of use of the Petitioner's left foot.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay the petitioner temporary total disability benefits of $393.33/week for 12 & 3/7 weeks, as provided in Section 8(b) of the Act. Against this amount, the respondent shall be given a credit of $5,028.57 for disability benefits paid to date.

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 $20,800.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JUL 3 - 2017

Joshua D. Luskin

o-06/07/17
jdl/ac
68

Charles J. DeVriendt

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SIMS, ROY
Employee/Petitioner

Case# **15WC026947**

ARAMARK INC
Employer/Respondent

17IWCC0429

On 1/6/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.63% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0152 LINN CAMPE & RIZZO LTD
JACK M LINN
215 N MARTIN L KING JR AVE
WAUKEGAN, IL 60085

1739 STONE & JOHNSON CHTD
PATRICK DUFFY
111 W WASHINGTON ST SUITE 1800
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF LAKE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Roy Sims
Employee/Petitioner

v.

Aramark, Inc.
Employer/Respondent

Case # 15 WC 26947

17IWCC0429

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 **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **Waukegan**, on **November 23, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

17IWCC0429

FINDINGS

On **July 22, 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 $**30,680.00**; the average weekly wage was $**590.00**.

On the date of accident, Petitioner was **69** 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 $**5,028.52** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**5,028.52**.

ORDER

Respondent shall pay Petitioner the sum of $**354.00**/week for a further period of **70.975** weeks, as provided in Section **8(e)** of the Act, because the injuries sustained caused **the 42.5% loss of use of the Petitioner's left foot**.

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.

Arbitrator Anthony C. Erbacci

December 22, 2016
Date

JAN 6 - 2017

FACTS:

On July 22, 2015 the Petitioner sustained undisputed accidental injuries arising out of and in the course of his employment with the Respondent as a custodian. The Petitioner testified that, while he was performing the regular duties of his employment on that date, he slipped on a wet floor and fell injuring his left ankle. The Petitioner testified that he immediately noticed extreme pain in his ankle and, when he tried to stand up, his left foot was dangling.

The Petitioner reported his injury to his supervisor and drove himself to the emergency room at Condell Hospital where X-Rays demonstrated a comminuted intra-articular fracture of the medial malleolus, a slightly displaced and angulated fracture of the distal fibular metadiaphysis, and extensive soft tissue swelling and joint effusion. The Petitioner was referred to Dr. Roger Collins. who performed an open reduction internal fixation that same day. Dr. Collins' pre-operative and post-operative diagnoses were unstable bimalleolar fracture of the left ankle. The Petitioner was discharged from the hospital on July 23, 2015 and he continued to follow up with Dr. Collins. Dr. Collins applied a splint and then a short leg cast and on September 2, 2015 Dr. Collins ordered physical therapy and instructed Petitioner to begin weight bearing. The Petitioner attended a course of physical therapy and on October 19, 2015 the Petitioner returned to light duty work.

The Petitioner testified that upon his return to work he noticed pain and swelling in his ankle and he returned to Dr. Collins. Dr. Collins ordered an MRI which the Petitioner underwent on December 17, 2015. On December 22, 2015 the Petitioner asked Dr. Collins to release him back to full duty work and Dr. Collins agreed to release the Petitioner to full duty. The Petitioner last saw Dr. Collins for the left ankle on March 31, 2016. Dr. Collins noted that the Petitioner reported pain with activities, and discomfort in the left foot after a long day. Dr. Collins noted that the Petitioner was walking with an antalgic gait, had weakness on eversion, and had some dysfunction with the posterior tibial tendons. Dr. Collins stressed the importance of wearing shoes with good arch support, but placed the Petitioner at MMI.

The Petitioner testified that he had never previously injured his left ankle. He further testified that he has a scar on his left ankle where the permanent plate and screws were implanted and ongoing discomfort due to the raised nature of the implanted screws.

The Petitioner testified as to the continued complaints he has relative to his injured left ankle, including needing to take frequent breaks after being on his feet for extended periods of time at work, difficulty climbing stairs and walking on uneven surfaces, soreness and stiffness in the left ankle, and the inability to wear boots. He further testified that he has difficulty sleeping due to the ongoing discomfort in his left ankle, and had to purchase specialized shoes in order to walk with any degree of comfort, and that he walks with a limp which becomes more pronounced by the end of the day.

At the request of the Respondent, the Petitioner was examined by Dr. Holmes on September 2, 2015 and January 6, 2016, and Dr. Lee on October 17, 2016. On September 2, 2016, Dr. Holmes noted that "surgery was absolutely necessary," and that the "condition is casually related to the work injury." Dr. Holmes concluded that the Petitioner's treatment had been reasonable and necessary, appropriate restrictions were sedentary duty, and that a return to work three to four months following the accident could be expected. On January 6, 2016, Dr. Holmes noted that the Petitioner

complained of pain at the incision and Dr. Holmes recommended a desensitization program. Dr. Holmes did not recommend removal of the surgical hardware.

Dr. Simon Lee examined the Petitioner on October 17, 2016 and concluded that the Petitioner sustained a 12% impairment of the left lower extremity.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (F.), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

The Petitioner sustained an undisputed injury to his left ankle and immediately commenced a course of medical treatment, which included surgery, for that injury. Dr. Holmes, the Respondent's examining physician, opined that the surgery was absolutely necessary, and that the Petitioner's condition was casually related to the work injury.

Based upon the foregoing, and having considered the totality of the credible evidence adduced at hearing, the Arbitrator finds that the Petitioner's current condition of ill-being is causally related to the work injury of July 22, 2015.

In Support of the Arbitrator's Decision relating to (L.), What is the nature and extent of the injury, the Arbitrator finds and concludes as follows:

The Petitioner's work accident occurred after September 1, 2011. Therefore, Section 8.1(b) of the Act requires consideration of the following criteria in determining the level of permanent partial disability:

* The reported level of impairment based upon the most current edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment;
* the occupation of the injured employee;
* the age of the employee at the time of the injury;
* the employee's future earning capacity; and
* evidence of disability corroborated by the treating medical records.

In the instant case, the Petitioner suffered a bimalleolar fracture of the left ankle which was surgically repaired using a plate and screws. The Petitioner underwent a course of post-surgical physical therapy and was ultimately released to return to regular work.

With regard to the reported level of impairment pursuant to Section 8.1(b), the Arbitrator notes that the record contains an impairment rating of 12% of the lower extremity as determined by Dr. Simon Lee, pursuant to the most current edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment. The Arbitrator notes that this level of impairment does not necessarily equate to permanent partial disability under the Workers' Compensation Act, but instead

is a factor to be considered in making such a disability evaluation. The Arbitrator gives some weight to this factor.

With regard to the occupation of the injured employee, the Arbitrator notes that the record reveals that Petitioner was employed as a school custodian 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 the Petitioner testified to complaints of pain after a full day of working and that the Petitioner had been off work for some time from an unrelated injury. The Arbitrator therefore gives greater weight to this factor.

With regard to the age of the employee at the time of injury, the Arbitrator notes that Petitioner was 69 years old at the time of the accident. Because of Petitioner's limited work life, the Arbitrator therefore gives greater weight to this factor.

With regards to the employee's future earning capacity, the Arbitrator notes there is no evidence that Petitioner's injury will limit his future earning capacity. The Arbitrator therefore gives no weight to this factor.

With regard to the evidence of disability corroborated by the treating medical records, the Arbitrator notes that the Petitioner's treating physician, Dr. Collins, and the Respondent's examining physicians, Dr. Holmes and Dr. Lee, corroborate the Petitioner's testimony that he has been disabled. Because of the physicians documenting the Petitioner's limited motion and weakness of the left ankle, the Arbitrator gives significant weight to this factor.

The Arbitrator notes that determination of permanent partial disability is not simply a calculation but an evaluation of all 5 factors as stated in the Act. In making this evaluation of permanent partial disability, consideration is not given to any single enumerated factor as the sole determinant. Therefore, having considered the factors enumerated in Section 8.1(b) of the Act, 820 ILCS 305/8.1(b), the Arbitrator finds that as a result of his accidental injuries the Petitioner has sustained 42.5% disability to his left foot.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILLIAMSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

BRYAN FRIEMAN,

Petitioner,

vs.

NO: 11 WC 33020

17IWCC0446

STATE OF ILLINOIS/PINCKNEYVILLE CORRECTIONAL CENTER,

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 issue of permanent partial disability (PPD), and being advised of the facts and applicable law, modifies the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Arbitrator awarded Petitioner 5% loss of use of the left hand and 7.5% loss of use of the right hand under Section 8(e) of the Act. The Commission hereby modifies the Arbitrator's Decision to find the Petitioner to be permanently partially disabled to the extent of 10% loss of use of the left hand and 10% loss of use of the right hand.

The Arbitrator considered the factors in Section 8.1(b) of the Act to determine the nature and extent of Petitioner's condition, and the Commission relies upon same. The Commission, however, disagrees with the weight the Arbitrator placed on the evidence of Petitioner's disability, and believes that additional PPD is required.

17IWCC0446

The Arbitrator concluded that Petitioner's evidence of disability at arbitration, namely his continued complaints and limitations, were somewhat corroborated by the treating medical records and placed lesser weight on this factor in determining permanency. However, the record demonstrates that an updated EMG/NCV, dated March 7, 2016, indicated severe bilateral sensory motor median neuropathies across the carpal tunnels with axonal involvement. While the ulnar nerve studies were similar to a previous study, the median nerve studies had deteriorated. (PX4). Petitioner's treating physician, Dr. George Paletta, stated that given this study, he believed that even with surgical treatment, Petitioner would have some residual symptoms and incomplete recovery. (PX3).

Dr. Paletta's prognosis was consistent with Petitioner's complaints at arbitration following bilateral carpal tunnel releases in May 2016. While Petitioner did experience an improvement in his condition following surgery, including resolution of his pre-operative symptoms and complaints of numbness, he nonetheless continued to have tenderness at the surgical incision. (PX3). At the November 15, 2016 arbitration, Petitioner continued to experience shooting pain in his palms as well as weakness in his hands. He also experienced pain and stiffness in his fingers when he bent them. (T.15). Petitioner testified that he continues to hunt, but no longer works on cars because it hurts to turn wrenches, and "it's hard to pull on them to get enough strength to loosen them or tighten them." (T.17-18). Petitioner stated that he takes Ibuprofen a couple of times a week as needed for pain. (T.16).

As of November 15, 2016, Petitioner was at maximum medical improvement, had no further doctor's appointments or therapy for his hands, and was able to work with no restriction. (T.16; PX3).

Based on the totality of the evidence, the Commission modifies the Arbitrator's Decision to find Petitioner to be permanently partially disabled to the extent of 10% loss of use of the left hand and 10% loss of use of the right hand.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed January 11, 2017, is hereby modified as stated above.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $667.69 per week for a period of 38 weeks, as provided in Section 8(e) of the Act, for the reason that the injuries sustained caused 10% loss of use of the left hand and 10% loss of use of the right hand.

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

17IWCC0446

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: JUL 14 2017

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

MJB/pm
D: 7-11-17
052

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

FRIEMAN, BRYAN
Employee/Petitioner

Case# 11WC033020

SOI/PINCKNEYVILLE CORRECTIONAL CENTER
Employer/Respondent

17IWCC0446

On 1/11/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.59% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0969 RICH RICH & COOKSEY PC
THOMAS C RICH
6 EXECUTIVE DR SUITE 3
FAIRVIEW HTS, IL 62208

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
PO BOX 19255
SPRINGFIELD, IL 62794-9255

0558 ASSISTANT ATTORNEY GENERAL
KENTON OWENS
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601-3227

1350 CENTRAL MANAGEMENT SYSTEMS
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

JAN 11 2017

RONALD A. RIOSIA, Acting Secretary
Illinois Workers' Compensation Commission

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
NATURE AND EXTENT ONLY

Bryan Frieman
Employee/Petitioner

v.

State of Illinois/Pinckneyville Correctional Center
Employer/Respondent

Case # 11 WC 33020

Consolidated cases: N/A

17IWCC0446

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Melinda Rowe-Sullivan**, Arbitrator of the Commission, in the city of **Herrin**, on **November 15, 2016**. By stipulation, the parties agree:

On the date of accident, **September 12, 2011**, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned **$57,866.00**, and the average weekly wage was **$1,112.81**.

At the time of injury, Petitioner was **46** years of age, ***married,*** with **0** dependent children.

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

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

17IWCC0446

After reviewing all of the evidence presented, the Arbitrator hereby makes findings regarding the nature and extent of the injury, and attaches the findings to this document.

ORDER

Respondent shall pay Petitioner the sum of **$667.69**/week for a further period of **23.75** weeks, as provided in Section **8(e)** of the Act, because the injuries sustained caused 5**% loss of use of the left hand and 7.5% loss of use of the right hand.**

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

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

Melissa M. Pope-Gillman
Signature of Arbitrator

1/3/17
Date

JAN 11 2017

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

Bryan Frieman
Employee/Petitioner

Case # 11 WC 33020

v.

Consolidated cases: N/A

State of Illinois/Pinckneyville Correctional Center
Employer/Respondent

17IWCC0446

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

The Arbitrator notes that at the time his repetitive injuries manifested, Petitioner was a 46-year-old Correctional Officer for Respondent. He testified that he began working for Respondent at Menard Correctional Center and later transferred to Pinckneyville Correctional Center, where he realized he sustained work-related bilateral carpal tunnel syndrome as a result of his work as a Correctional Officer for Respondent at its facilities. By way of procedural history, the claim was disputed and heard on Petitioner's § 19(b) Petition on November 13, 2014 after which findings were rendered in favor of Petitioner. The 19(b) Arbitration Decision was thereafter appealed by Respondent. In its Decision and Opinion on Review, the Commission affirmed the Arbitrator's findings that Petitioner's work as a Correctional Officer at Menard Correctional Center and Pinckneyville Correctional Center led to the development of his work-related bilateral carpal tunnel syndrome, and the award of prospective medical care, including but not limited to the recommended surgical intervention. (PX7).

Petitioner testified that despite the improvement from surgery and post-operative therapy, he continues to have symptoms from his injuries. He testified that he has shooting pains in the palms of his hands when he puts his palms down on a surface. He testified that if he puts pressure on his palms, "it hurts pretty good." He also testified to a loss of strength in his hands and stiffness and aching in his fingers.

Petitioner testified that he now spends most of his time driving a transfer bus, vans and vehicles for Respondent. He testified that the wheel of the transfer bus vibrates. When asked what part of his job hurts his hands the most, he responded that opening the bus doors and cargo compartments "sends a zing to [his] hands." He also testified that he had to get down on his "elbows and knees" rather than his hands and knees to inspect the bus. He testified that he no longer works on vehicles because it is too difficult and painful to turn wrenches to loosen or tighten bolts. He testified that he takes Ibuprofen for his symptoms.

The Medical Bills Exhibit was entered into evidence at the time of arbitration as Petitioner's Exhibit 1. The Medical Records List was entered into evidence at the time of arbitration as Petitioner's Exhibit 2.

The medical records of Dr. Paletta were entered into evidence at the time of arbitration as Petitioner's Exhibit 3. The records reflect that Petitioner was seen on December 21, 2015, at which time it was noted that he had been seen back in 2010 for complaints of bilateral wrist pain as well as numbness and tingling. It was noted that Petitioner returned with ongoing symptoms involving both hands, that he

still worked for the corrections department and that he currently drove a prison bus. It was noted that Petitioner stated that he still got numbness and tingling involving the first three fingers and part of the fourth finger, and that he also continued to have nocturnal symptoms. It was noted that things had gotten worse but at best stayed the same, that he had tried night splints with no improvement in nocturnal symptoms and that the previous EMG and nerve conduction studies demonstrated bilateral carpal tunnel syndrome. The impression was that of chronic symptomatic carpal tunnel syndrome. A new EMG and nerve conduction studies were recommended, and it was noted that if these demonstrated continued electrophysiologic abnormalities consistent with carpal tunnel syndrome then Dr. Paletta would recommend Petitioner undergo a carpal tunnel release. Petitioner was issued a work slip, allowing him to return to work full duty effective December 21, 2015. (PX3).

The records of Dr. Paletta reflect that an EMG/Nerve Conduction Study review was performed on March 7, 2016, at which time it was noted that the studies were completed by Dr. Phillips on March 7, 2016. It was noted that the impression was that of (1) severe bilateral carpal tunnel syndrome with interval deterioration since the last EMG and nerve conduction study; (2) underlying diabetes. It was noted that Dr. Paletta opined that given the severity of involvement at the carpal tunnels, the progression of his carpal tunnel involvement since the last EMG and his underlying diabetes, the potential was high that even with surgical treatment Petitioner would likely have some residual symptoms and incomplete recovery. (PX3).

The records of Dr. Paletta reflect that Petitioner was seen on May 23, 3016 for an initial post-operative visit status post carpal tunnel release left wrist. It was noted that overall Petitioner was doing well and that his pain had been under control. It was noted that Petitioner was not currently taking any pain medication. It was noted that Petitioner was to initiate physical therapy. It was noted that Petitioner wanted to go ahead and do the right side, and it was recommended that they go ahead with the right side next week after he had completed one week of therapy so they could make sure he had a good usable hand. A work slip was issued on that date, allowing Petitioner to return to work with restrictions. At the time of the June 20, 2016 visit, it was noted that Petitioner returned for follow-up of both hands and that he was status post bilateral carpal tunnel releases. It was noted that overall Petitioner was doing well and that he denied any numbness and tingling in the median nerve distribution of the right hand. It was noted that with respect to the left wrist, Petitioner could continue with self-directed exercises at that point. It was noted that Petitioner would start physical therapy on the right side. A work slip was issued on that date, allowing Petitioner to return to work with restrictions. (PX3).

The records of Dr. Paletta reflect that Petitioner was seen on August 15, 2016 for continued follow-up of both his left and right carpal tunnel releases. It was noted that overall Petitioner was doing quite well and that his pre-operative symptoms had resolved. It was noted that Petitioner still noted a little bit of tenderness at the surgical incisions if he pushed up on a hard surface such as a chair rail, but overall he was pleased with how it was doing. It was noted that Petitioner had had an excellent outcome, and that he could continue full duty without restriction or limitation. It was noted that Petitioner required no additional treatment, follow-up or therapy and that he was at maximum medical improvement. It was noted that Dr. Paletta reassured him that the tenderness at the surgical incision sites typically disappeared within 3-6 months after surgery. A work slip was issued on that date, allowing Petitioner to return to work full duty. (PX3).

The medical records of Dr. Phillips were entered into evidence at the time of arbitration as Petitioner's Exhibit 4. The records reflect that Petitioner was seen on March 7, 2016 for bilateral upper extremity EMG and nerve conduction studies. The impression was that of severe bilateral sensory motor median neuropathies across the carpal tunnels with axonal involvement; the median nerve studies have deteriorated since last obtained; the ulnar nerve studies are similar. It was noted that many diabetic patients with this pattern would benefit from carpal tunnel decompressions. (PX4).

The medical records of Orthopedic Ambulatory Surgery Center of Chesterfield were entered into evidence at the time of arbitration as Petitioner's Exhibit 5. The records reflect that Petitioner underwent (1) left wrist exam under anesthesia; (2) left wrist carpal tunnel release on May 3, 2016 for pre- and post-operative diagnoses of (1) left wrist pain; (2) left carpal tunnel syndrome. The records further reflect that Petitioner underwent (1) right wrist exam under anesthesia; (2) right wrist carpal tunnel release on May 31, 2016 for pre- and post-operative diagnoses of (1) right wrist pain; (2) right carpal tunnel syndrome. (PX5).

The medical records of Pinckneyville Community Hospital were entered into evidence at the time of arbitration as Petitioner's Exhibit 6. The records reflect that Petitioner underwent therapy for the right hand for the timeframe of July 26, 2016 through August 9, 2016. At the time of the August 8, 2016 visit, it was noted that Petitioner stated that he did not have any numbness or tingling but it felt like it was still very weak. The records further reflect that Petitioner underwent therapy for the left hand for the timeframe of June 1, 2016 through June 9, 2016. (PX6).

The IWCC Decision and Opinion on Review dated October 22, 2015 was entered into evidence at the time of arbitration as Petitioner's Exhibit 7. The Decision and Opinion on Review found various exhibits and testimony to be inadmissible hearsay, but despite having found specific testimony inadmissible and striking same from record, affirmed the Arbitrator's decision, which found that Petitioner met his burden of proof in establishing that he sustained accidental bilateral repetitive trauma compression neuropathies that arose out of and in the course of his employment with Respondent, which were causally related to his current condition of ill-being. (PX7).

The TriStar Bilateral EMG/NCS Authorization was entered into evidence at the time of arbitration as Petitioner's Exhibit 8. The TriStar Bilateral Carpal Tunnel Release Authorization was entered into evidence at the time of arbitration as Petitioner's Exhibit 9. The TriStar Hand Therapy Authorization was entered into evidence at the time of arbitration as Petitioner's Exhibit 10.

CONCLUSIONS OF LAW

With respect to disputed issue (L) pertaining to the nature and extent of Petitioner's injury, and consistent with 820 ILCS 305/8.1b, permanent partial disability shall be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of Section 8.1b of the Act; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b. No single enumerated factor shall be the sole determinant of disability. *Id.*

With respect to Subsection (i) of Section 8.1b(b), the Arbitrator notes that no AMA rating was offered by either party. The Arbitrator places no weight on this factor when making the permanency determination.

With respect to Subsection (ii) of Section 8.1b(b), the Arbitrator notes that Petitioner testified that she continues to be employed by Respondent as a Correctional Office and was placed under no permanent restrictions from Dr. Paletta. The Arbitrator places greater weight on this factor when making the permanency determination.

With respect to Subsection (iii) of Section 8.1b(b), Petitioner was 46 years old on his date of accident. Given the younger age of Petitioner and the fact that his treating physician, Dr. Paletta, has placed him under no restrictions, the Arbitrator places greater weight on this factor when making the permanency determination.

With respect to Subsection (iv) of Section 8.1b(b), the Arbitrator notes that, following his work injury, Petitioner returned to his pre-accident employment with Respondent. As there was no direct evidence of reduced earning capacity contained in the record, the Arbitrator places lesser weight on this factor when making the permanency determination.

With respect to Subsection (v) of Section 8.1b(b), the Arbitrator notes that Petitioner testified that despite the improvement from surgery and post-operative therapy, he continues to have symptoms from his injuries. Petitioner testified that he has shooting pains in the palms of his hands when he puts his palms down on a surface. Petitioner testified to a loss of strength in his hands and stiffness and aching in his fingers, and that he no longer works on vehicles because it is too difficult and painful to turn wrenches to loosen or tighten bolts. At the time of the August 15, 2016 visit with Dr. Paletta, it was noted that overall Petitioner was doing quite well and that his pre-operative symptoms had resolved. It was noted that Petitioner still noted a little bit of tenderness at the surgical incisions if he pushed up on a hard surface such as a chair rail, but overall he was pleased with how it was doing. It was noted that Petitioner had had an excellent outcome, and that he could continue full duty without restriction or limitation. It was noted that Petitioner required no additional treatment, follow-up or therapy and that he was at maximum medical improvement. It was further noted that Dr. Paletta reassured him that the tenderness at the surgical incision sites typically disappeared within 3-6 months after surgery. (PX3). The Arbitrator concludes that Petitioner's evidence of disability at the time of arbitration, namely his continued complaints and limitations, were somewhat corroborated by his treating records at the conclusion of his treatment with Dr. Paletta. The Arbitrator accordingly places lesser weight on this factor in determining permanency.

The Arbitrator notes that the determination of permanent partial disability benefits is not simply a calculation, but an evaluation of all of the factors as stated in the Act in which consideration is not given to any single factor as the sole determinant. Based on the above factors and the record in its entirety, the Arbitrator concludes that Petitioner sustained permanent partial disability to the extent of **5% loss of use of the left hand and 7.5% loss of use of the right hand** as provided in Section 8(e) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Harold McCoy,

Petitioner,

vs.

NO: 10 WC 23695

17IWCC0474

Prairie Farms Distribution (PFD Supply),

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by Petitioner and Respondent herein and notice provided to all parties, the Commission after considering the issues of causal connection, temporary total disability benefits, medical expenses, nature and extent of permanent disability, penalties under §19(k) and §19(l) and §16 attorneys' fees and additional evidence 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.

Credit

The Commission notes the Arbitrator neglected to provide a credit to Respondent of $4,500.00 for an advance of permanent partial disability benefits in the Decision's findings. The Arbitrator did grant the same in the body of the Decision. The Commission corrects the clerical error awarding the $4,500.00 for the advance of permanent partial disability benefits paid by Respondent along with the $15,269.08 paid for temporary total disability benefits for a total credit of $19,769.08.

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Medical Expenses

The Commission has reviewed PX11- claimed medical expenses- in detail and discovered multiple duplicative billings as well as unsupported interest charges. The following is noted by the Commission:

*Dr. Gornet: $120,671.82 claimed from MFG Spine LLC and The Orthopedic Center of St. Louis. However, the account financial history for MFG Spine LLC evidences charges of $77,936.51 less payments of $12,871.67 and adjustments of $1,535.99 rendering a balance due of $63,528.85. Contained within these charges are unsupported interest charges of $7,876.03. The Commission declines to award these interest charges. As such the Commission awards the remaining balance from MFG Spine LLC in the amount of $55,661.82. The account financial history for The Orthopedic Center of St. Louis evidences charges of $57,142.97 of which $6,573.97 is due for interest. The remaining charges totaling $50,569.00 relate to spine surgery performed on June 16, 2014 also billed by MFG Spine LLC in the same amount under the same medical code. The Commission denies as duplicative the bill from The Orthopedic Center of St. Louis in the amount of $57,142.97.

*MRI Partners of Chesterfield: $2,645.00 claimed. However, the account financial history evidences charges of $7,245.00 less payments of $4,600.00 rendering a balance due of $2,645.00. Included in the charges are unsupported interest charges of $345.00 which the Commission declines to award. Therefore, the Commission awards the bill in the amount of $2,300.00.

*CT Partners of Chesterfield: $7,024.32 claimed. However, the account financial history evidences charges of $14,330.52 less payments of $6,082.59 and adjustments of $1,223.61 rendering a balance due of $7,024.32. Included in the charges are unsupported interest charges of $520.32 which the Commission declines to award. Therefore, the Commission awards the bill in the amount of $6,504.00.

*The Work Center: $6,115.00 listed for physical therapy 8-15-13 through 10-3-13. Therefore, the Commission awards the bill in the amount of $6,115.00.

*Pain and Rehabilitation Specialists of St. Louis: $5,597.00 claimed. However, the account financial history evidences charges of $5,597.00 less payments of $4,999.92 and adjustments of $597.08 rendering no balance due. Therefore, the Commission denies the bill.

*The Spine & Orthopedic Surgery Center: $138,393.86 claimed. However, the account financial history evidences charges of $147,423.86 less payments of $5,447.69 and adjustments of $3,582.31 rendering a balance due of $138,393.86. Included in the charges are unsupported interest charges of $14,061.52 which the Commission declines to award. Therefore, the Commission awards the bill in the amount of $124,332.34.

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*West County Care Center: $3,120.15 claimed. However, the account financial history evidences charges of $3,120.15 with no payments made and no adjustments rendering a balance due of $3,120.15. Included in the charges are unsupported interest charges of $358.93 which the Commission declines to award. Therefore, the Commission awards the bill in the amount of $2,761.22.

*Dr. Oliver: $198.61 claimed. No itemized statement is contained within PX11 and the records submitted reference treatment to the right knee. Therefore, the Commission denies this bill.

The Commission modifies the medical expense award pursuant to §8(a) of the Act to $197,674.38, subject to the limits of the Medical Fee Schedule pursuant to §8.2 of the Act.

Penalties

The Commission finds Petitioner is entitled to penalties pursuant to §19(l) of the Act in the amount of $10,000.00. Penalties pursuant to §19(l) are in the nature of a late fee. *Mechanical Devices v. Industrial Commission*, 344 Ill. App. 3d 752, 763, 800 N.E.2d 819, 828 (2003). In addition, the assessment of a penalty pursuant to §19(l) is mandatory "[i]f the payment is late, for whatever reason, and the employer or its carrier cannot show an adequate justification for the delay." *McMahan v. Industrial Commission*, 183 Ill. 2d 499, 515, 702 N.E.2d 545, 552 (1998). "The standard for determining whether an employer has good and just cause for a delay in payment is defined in terms of reasonableness. [citation omitted]." *Jacobo v. Illinois Workers' Compensation Commission*, 2011 IL App (3d) 100807WC, ¶19. The employer bears the burden to justify the delay. *Id.*

In its September 2, 2011 decision, the Commission awarded prospective medical care as recommended by Dr. Gornet. The decision did not specify the exact treatment awarded. On April 18, 2013 the Appellate Court affirmed the Commission's decision. Petitioner re-commenced treatment with Dr. Gornet on June 3, 2013 following a two year hiatus. During Petitioner's August 8, 2013 visit, Dr. Gornet recommended Petitioner exhaust conservative treatment including injections and physical therapy prior to undertaking the surgery which was previously recommended in 2011. On October 7, 2013 Dr. Gornet re-evaluated Petitioner who continued to complain of low back pain but was functional. Dr. Gornet recommended a watch and see approach in order to determine if Petitioner could function with potential restrictions in an effort to avoid surgery. Dr. Gornet recommended follow-up in three to four months. On Dr. Gornet's recommendations, Petitioner was re-evaluated four months later on February 6, 2014. Dr. Gornet recommended proceeding with the previously discussed surgery as Petitioner's pain affected all aspects of his life. PX1.

Given the above sequence of events, Respondent's failure to pay for the treatment recommended by Dr. Gornet beginning in 2014, including but not limited to surgical intervention was objectively unreasonable. Dr. Petkovich's opinion of November 21, 2013 that the surgery was neither reasonable nor necessary was the same opinion and with the same basis as he

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articulated in December of 2010, an opinion rejected by the Commission with its decision of September 2, 2011. RX12, p. 37. Dr. Gornet attempted conservative management of Petitioner's back condition, and when such treatment modalities failed, Dr. Gornet recommended and performed surgery. Respondent's denial of such treatment was unreasonable.

The Commission in its discretion declines to award penalties pursuant to §19(k) and attorney's fees pursuant to §16 of the Act. The standard for awarding penalties and fees under §§19(k) and 16 are higher than §19(l) of the Act. The standard requires "more than an 'unreasonable delay' in payment of an award. [citation omitted]. It is not enough for the claimant to show that the employer simply failed, neglected, or refused to make payment or unreasonably delayed payment without good and just cause. Instead, section 19(k) penalties and section 16 fess are 'intended to address situations where there is not only a delay, but the delay is deliberate or the result of bad faith or improper purpose.' *McMahan*, 183 Ill. 2d at 515." *Jacobo v. Illinois Workers' Compensation Commission*, 2011 IL App (3d) 100807WC, ¶23.

The Commission finds Respondent's conduct was not deliberate nor the result of bad faith or improper purpose. Respondent paid for the treatment provided by Dr. Gornet through 2013. Petitioner appeared to be functioning without significant issue following his appointment with Dr. Gornet on October 7, 2013. Dr. Petkovich re-evaluated Petitioner on November 21, 2013 at which time Petitioner advised of some pain into his lower back and into his left extremity. RX12, p.8. Dr. Petkovich recommended no further treatment at that time. Although Respondent's subsequent denial of Petitioner's treatment following this evaluation was not reasonable as outline above, Respondent's conduct did not rise to the level of bad faith or improper purpose as such medical opinion did question the reasonableness and necessity of the surgery.

The Commission affirms all else.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $433.33 per week for a period of 37-6/7 weeks, that being the period of temporary total incapacity for work pursuant to §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $197,674.38 for reasonable, necessary and related medical expenses under §8(a) of the Act, subject to the Medical Fee Schedule pursuant to §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $390.00 per week for a period of 4.1 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the permanent disability of the right hand to the extent of 2%.

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IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $390.00 per week for a period of 18.975 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the permanent disability of the right arm to the extent of 7.5%.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $390.00 per week for a period of 12.65 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the permanent disability of the left arm to the extent of 5%.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $390.00 per week for a period of 37.5 weeks, as provided in §8(d)2 of the Act, for the reason that the cervical spine injuries sustained caused the permanent disability of the person as a whole to the extent of 7.5%.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $390.00 per week for a period of 75 weeks, as provided in §8(d)2 of the Act, for the reason that the lumbar spine injuries sustained caused the permanent disability of the person as a whole to the extent of 15%.

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 Commission notes that Respondent paid $15,269.08 in temporary total disability benefits and $4,500.00 for an advance towards permanent partial disability benefits for a total credit of $19,769.08.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall be given a credit for medical expenses that have been paid, if any, 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 §8(j) of the Act.

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

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

DATED: JUL 25 2017
LEC/maw
o06/06/17
43

L. Elizabeth Coppoletti

Joshua D. Luskin

Charles J. DeVriendt

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

McCOY, HAROLD
Employee/Petitioner

Case# **10WC023695**

17IWCC0474

PRAIRIE FARMS DISTRIBUTION (PFD SUPPLY)
Employer/Respondent

On 9/6/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.48% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0438 BROWN & CROUPPEN
KERRY I O'SULLIVAN
211 N BROADWAY 16TH FL
ST LOUIS, MO 63102

2396 KNAPP OHL & GREEN
L DAVID GREEN
6100 CENTER GROVE RD POB 446
EDWARDSVILLE, IL 62025

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

Harold McCoy
Employee/Petitioner

v.

Prairie Farms Distribution (PFD Supply)
Employer/Respondent

Case # **10** WC **23695**

Consolidated cases: **N/A**

17IWCC0474

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 **Collinsville**, on **August 26, 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. ☒ 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 **April 7, 2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$33,800.00**; the average weekly wage was **$650.00**.

On the date of accident, Petitioner was **41** 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.

Respondent shall be given a credit of $**$15,269.08** for TTD, $**0** for TPD, $**0** for maintenance, and $**4500.00** for other benefits, for a total credit of $**19,769.08**.

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

ORDER

Respondent shall pay reasonable and necessary medical services of $283,765.58, as set forth in P.X. 11 as provided in Sections 8(a) and 8.2 of the Act.

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

Respondent shall pay Petitioner temporary total disability benefits of $433.33/week for 37 6/7 weeks, commencing 1/6/11 through 6/10/11 (22 2/7 weeks), and 5/27/14 through 9/12/14 (15 4/7 weeks), as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $$15,269.08 for temporary total disability benefits that have been paid.

Respondent shall pay Petitioner permanent partial disability benefits of $390.00/week for 35.725 weeks, because the injuries sustained caused the 2% loss of the right hand (4.1 weeks relative to the right wrist), 7.5% loss of the right arm (18.975 weeks relative to the right arm), and 5% loss of the left arm (12.65 weeks relative to the left arm), as provided in Section 8(e) of the Act.

Respondent shall also pay Petitioner permanent partial disability benefits of $390/week for 112.5 weeks, because the injuries sustained caused the 7.5% loss of the person as a whole (37.5 weeks relative to the cervical spine), and 15% loss of the person as a whole (75 weeks relative to the lumbar spine), as provided in Section 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

8/1016
Date

SEP - 6 2016

BACKGROUND

This matter was tried previously pursuant to Section 19(b) of the Workers Compensation Act and a decision was issued by Arbitrator Andrew Nalefski on January 25, 2011. (P.X. 12). Arbitrator Nalefski found that an accident occurred which arose out of and in the course of Petitioner's employment on April 7, 2010, and that Petitioner's condition of ill-being was causally related to the work injury. Arbitrator Nalefski ordered that Respondent shall pay medical bills in the amount of $9,473.00 and temporary total disability benefits for a period of 37 and 2/7ths weeks from April 7, 2010 through July 5, 2010 and from July 19, 2010 through January 5, 2011. Arbitrator Nalefski further ordered that Respondent shall authorize and pay for the prospective medical treatment recommended by Dr. Gornet, subject to the Fee Schedule. The decision issued by Arbitrator Nalefski on January 25, 2011 references Dr. Gornet's deposition testimony which stated that he would like to exhaust conservative measures, such as physical therapy and if that fails, then he would order injections and if injections fail, then surgery is an option. (P.X. 12). Arbitrator Nalefski's decision was appealed through the Illinois Workers Compensation Commission, Circuit Court and Appellate Court and affirmed at all levels of appeal. (P.X. 12).

The Arbitrator notes that among the exhibits submitted at Arbitration are two depositions of Dr. Petkovich. One deposition occurred prior to the hearing held before Arbitrator Nalefski. Since it is presumed Arbitrator Nalefski has previously ruled on any objections in the first deposition this Arbitrator will only consider objections raised in the second Dr. Petkovich deposition of April 14, 2014.

FINDINGS OF FACT

On April 7, 2010 Harold McCoy fell four to five feet off of the top of the ramp on his trailer. (P.X. 12). He landed on his right arm, head, and left elbow. He sustained a right minimally displaced fracture of the radial head of his right elbow, a right wrist sprain, left elbow traumatic bursitis, cervical disc herniations at C5-6 and C6-7 and an L4-5 annular disc bulge with left paracentral disc extrusion with caudal migration behind L5 and an annular disc bulge at L5-S1 with a paracentral disc protrusion and an annular tear. (P.X. 12). On September 10, 2010 Mr. McCoy's was sent a letter stating that his only route with PFD Supply, Church's Chicken, had been cancelled, thereby ending his employment. (T. 65).

On September 20, 2010, Dr. Gornet had recommended attempting conservative medical treatment for Petitioner's low back, and further indicated that if conservative measures were unsuccessful surgery was an option. (P.X. 1). The 19(b) hearing before Arbitrator Andrew Nalefski took place on January 5, 2011. (P.X. 12). After the 19(b) decision was issued on January 25, 2011, Petitioner continued to follow up with Dr. Gornet through April 25, 2011.

On March 21, 2011, Dr. Kaylea Boutwell administered an L4-5 epidural steroid injection on the referral of Dr. Gornet. (P.X. 5). On April 11, 2011, Dr. Boutwell administered an L5-S1 epidural steroid injection. Id.

On April 25, 2011, Dr. Gornet reexamined Petitioner's low back. At that time, Dr. Gornet recommended an anterior L5-S1 fusion and disc replacement at L4-5 and opined that Petitioner was temporarily and totally disabled. (P.X. 1). Petitioner testified that Dr. Gornet would not see him back after the April 25, 2011 appointment because workers compensation was not approving treatment. (T. 16). From April 25, 2011

through May 9, 2013, when his Appellate Court case was finalized, Respondent did not authorize treatment or pay TTD benefits. (R.X. 1, 2).

Approximately six weeks later, on June 8, 2011, Petitioner completed a physical exam for a commercial driver's license (CDL) so that he could attempt to obtain employment with AC Trucking. (R.X.4). Petitioner testified that on June 8, 2011 he checked off on the CDL physical exam form that he had a prior injury of a right elbow fracture, but he did not tell them he had chronic low back pain, neck pain, left elbow or wrist pain. He testified he did not disclose the true extent of his condition because he knew he would not be hired. He was not receiving benefits and he has a family to support. He further indicated that the job at AC Trucking he was applying for was low impact with nothing to move or carry. He would just be driving a truck. (T. 20, 21, 23). Petitioner did obtain the truck driving job at AC Trucking and he worked there from June 10, 2011 through June 27, 2011. (T. 22). He quit when he got a truck stuck in the mud and got into an argument with the boss. (T. 23).

Respondent offered Petitioner's tax records into evidence. His tax returns show that in 2010, he had net drywall earnings of $2,356.00. (R.X. 17 2010). Petitioner believed that the drywall side work he performed in 2010 was during the winter prior to his work injury on April 7, 2010, because he remembered that he left his PFD Supply coat at the job site and he was worried about having to buy a new coat. Petitioner's 2011 tax return shows gross income of $18,186.00, including net drywall earnings of $1,738.00. (R.X. 17). His 2012 tax returns gross income of $27, 965.00 indicate earnings from his work at Wehmeier Drywall, his current employer, and side jobs. (T. 50, R.X. 17).

On June 22, 2012 Petitioner began working at Wehmeier Drywall as a drywall taper. He continues to work at Wehmeier Drywall at the time of trial.

On April 4, 2013 was involved in a motor vehicle incident while leaving a bar when his brake pedal had a drink bottle stuck under it and he tried kicking it out, accidentally hit the gas causing his truck to go over the curb and crush a trash can against a wall. He testified was not injured and sought no treatment as a result of the incident. He was, however cited for driving while intoxicated and leaving the scene of an accident.

On April 18, 2013 the Appellate Court filed its decision. The time to appeal ran and the decision became final on May 9, 2013. On May 10, 2013, Petitioner's attorney provided Respondent a signed Satisfaction of Award/Judgement for the 19(b) decision. (R.X. 21). Petitioner's attorney noted that this was a "partial" satisfaction of award/judgment since Petitioner was awaiting authorization of medical treatment and confirmation of payment of the medical bills submitted at the 19(b) hearing. Id.

On June 3, 2013, Dr. Gornet reexamined Petitioner. (P.X. 1). Dr. Gornet noted that Petitioner had no new slips, falls or other issues. Id. Dr. Gornet prescribed a new MRI and allowed Petitioner to continue to work full duty. Id. Dr. Gornet recommended conservative measures to treat Petitioner's low back condition at that time, and Respondent approved this conservative medical treatment. (P.Ex.1; R.Ex.1:1; R.Ex.18:12).

Petitioner underwent physical therapy for his low back at the Work Center from August 15, 2013 to October 3, 2013. (P.X. 4). Respondent approved this physical therapy. (R.Ex.1:1; R.Ex.18:12). Dr. Boutwell administered a left L4-5 transforaminal epidural injection on August 19, 2013, a left L5-S1 transforaminal epidural injection on September 4, 2013, and a left L4-5 epidural steroid injection on September 23, 2013. (P.Ex.5).

On October 7, 2013, Dr. Gornet noted that conservative measures had failed. Dr. Gornet's note of that date addresses his concerns about proceeding to surgery which would require placing permanent restrictions on Petitioner. He indicated that as Petitioner "continues to work, albeit with significant symptoms," his recommendation for the time being was to continue to observe Petitioner. Petitioner was to return in three to four months. (P.X. 1).

Respondent obtained another Section 12 examination from Dr. Petkovich on November 23, 2013. Dr. Petkovich had previously examined Petitioner prior to the hearing before Arbitrator Nalefski. Dr. Petkovich reviewed Petitioner's DOT medical records and employment records from June of 2010 along with Petitioner's imaging studies (MRI and CT scans) from March of 2011 and August of 2013. Dr. Petkovich stated Petitioner's imaging studies showed the normal progression of the degenerative process in Petitioner's lumbar spine. Dr. Petkovich diagnosed Petitioner with degenerative lumbar disc disease at the L3-4, L4-5 and L5-S1 levels. Dr. Petkovich testified that these findings would have not been related to Petitioner's fall from April 7, 2010 since they occurred over a number of years and were longstanding. Dr. Petkovich testified that Petitioner required no additional medical treatment for his low back. Dr. Petkovich believed that Petitioner reached maximum medical improvement ("MMI") from the April 7, 2010 accident a long time ago. Dr. Petkovich further testified that Petitioner's proposed surgeries of disc replacement at L4-5 and a fusion at L5-S1 would not be reasonable and necessary for Petitioner's current condition based on his examination.

The Arbitrator notes that the opinions of Dr. Petkovich in November 2013 essentially the same as those he espoused in his July 26, 2010 report, which were found to be less credible than that of Dr. Gornet by Arbitrator Nalefski at the time of the Section 19(b) hearing in January 2011. Dr. Petkovich again opined that Petitioner's diagnosis is degenerative lumbar disc disease at L4-5 and L5-S1 and that the April 7, 2010 may have caused only a temporary exacerbation of his preexisting degenerative condition. Dr. Petkovich again opined that no further treatment was necessary. (R.X. 12).

After Dr. Petkovich's section 12 examination, Respondent denied additional medical treatment for Petitioner's low back. (R.Ex.18:14-16).

On February 6, 2014, Petitioner returned to Dr. Gornet as planned. Dr. Gornet and Petitioner again discussed surgical options. At this visit Dr. Gornet noted "I have tried to manage him conservatively for a long period of time, but at this point his pain affects all aspects of his life and his quality of life.

Dr. Gornet proceeded with surgery on May 27, 2014. The surgery included anterior decompression L4-5 and L5-S1, anterior lumbar fusion L5-S1 with 14x23 mm LT cages, large kit BMP and crushed cancellous allograft, and disc replacement at L4-5 with ProDisc L with two AmnioClear sheets. Dr. Gornet saw Petitioner in follow up on June 16, 2014 and July 10, 2014 and kept him off of work. (P.X. 1). On September 8, 2014, Dr. Gornet continued Petitioner off of work and ordered physical therapy. Petitioner did not obtain that physical therapy as it had not been authorized by Respondent. (P.X. 1). It was at this point that Petitioner returned to work full duty and part time at Wehmeier Drywall on September 12, 2014. Petitioner testified that he returned to work in the hopes that it would strengthen his back and the physical therapy was because financially he "was losing everything." On May 21, 2015, Dr. Gornet released the Petitioner at maximum medical improvement. Dr. Gornet noted that the CT scan confirmed solid fusion at L5-S1. (P.X. 1).

Petitioner testified that with regard to his neck, he has stiffness and it hurts to move his head to the right or left. (T. 34). He looks up a lot while drywall taping on ceilings and it is painful. (T. 34). He takes Aleve every day. With regard to his right wrist, he testified that he has stiffness and it pops and goes numb about once a week. (T. 34). With regard to his right arm, he wears a sock/sleeve/tube on it like baseball players wear, because it pops and locks up. He has to change hands when using a cell phone. (T. 35). With regard to his left arm, he testified that it pops and has some numbness but it is workable and not as bad as the complaints with regard to his right arm. (T. 35). Petitioner testified that following surgery his numbness went away for the most part, but his left leg is still numb. (T. 35). He has not slept through the night yet and has to get up multiple times per night to change positions. He cannot turn around to back up in his truck and has to use the mirrors. He cannot go on rides at Six Flags anymore, golf or help buddies with construction projects like roofing. (T. 35). He cannot bend over to tie his shoes, he has to sit down. He cannot lift over 50 pounds. He testified that after carrying groceries for a group of nuns at a jobsite, he was forced to remain in bed for a week due to back pain. He has pain in his rear end and left leg numbness which he does not think will ever go away. (T. 36).

CONCLUSIONS

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

Arbitrator Nalefski found on January 5, 2011 that Petitioner's medical condition was causally related to the April 7, 2010 work injury and that prospective medical treatment as recommended by Dr. Gornet was awarded to Petitioner. This issue has already been determined by the Commission and affirmed up through the Appellate Court and is therefore determined again in Petitioner's favor in accordance with the law of the case doctrine.

Under the law of the case doctrine, a court's unreversed decision on an issue that has been litigated and decided settles the question for all subsequent stages of the action. *Miller vs. Lockport Realty Group*, 377 Ill.App.3d 369, 374, 878 N.E.2d 171 (2007). The law of the case doctrine applies to matters resolved in proceedings before the Commission. *Ming Autobody vs. Industrial Commission*, 387 Ill.App.3d 244, 899 N.E.2d 365 (Ill.App.Ct. 1st Dist 2008). In *Irizarry v. Industrial Commission*, 337 Ill. App.3d 598, 786 N.E.2d 218 (2003), the Court noted that where an award of benefits, based on a finding of a causal connection between the claimant's work accident and the claimed injuries becomes final, same cannot be challenged in a permanency hearing. Once the first causation finding became a final judgment, it became the law of the case and is not subject to further review. *Ming,* 387 Ill.App.3d 244 (citing *Irizarry* at 606-607).

This Arbitrator also finds the opinions of Dr. Gornet more persuasive than those of Dr. Petkovich. Dr. Gornet's opinion that Petitioner's low back pain was caused by the April 7, 2010 fall that was significant enough to also fracture Petitioner's right elbow and herniate cervical discs is more persuasive than Dr. Petkovich's opinion that this is a long standing condition, despite no prior treatment.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds Petitioner has met his burden of establishing that his current condition of ill-being is causally related the accident of April 7, 2010.

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?

Arbitrator Nalefski's January 25, 2011 decision held Respondent liable for the prospective medical care recommended by Dr. Gornet. The course of treatment followed subsequent to the 2011 hearing was consistent with the recommendations of Dr. Gornet at the time of and before Arbitrator Nalefski's decision.

Respondent has submitted an opinion from Dr. Petkovich dated August 12, 2015 stating that Petitioner's medical bills from St. Louis Spine and Orthopedic Center and the Orthopedic Center of St. Louis are excessive and not customary for this geographical area. (R.X. 13). No basis or explanation was given for this assertion. Certified medical bills are presumed reasonable pursuant to Section 16 of the Act. Furthermore, the payment of the medical bills is subject to the Medical Fee Schedule, which dictates what reasonable payment shall be made for the specific geographic area.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds that the care and treatment provided to Petitioner was reasonable and necessary.

Respondent shall pay reasonable and necessary medical services of $283,765.58, as set forth in P.X. 11 as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit of 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.

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

Respondent has paid temporary total disability benefits pursuant to the January 25, 2011 Order from April 7, 2010 through July 5, 2010 and from July 19, 2010 through January 5, 2011 at the rate of $433.33. Respondent has also paid TTD benefits from January 6, 2011 through June 25, 2011.

Despite Dr. Gornet ordering Petitioner off of work on April 25, 2011, returned to his former occupation as a truck driver with AC Trucking on June 10, 2011. He was able to perform these duties until he left that employer due to a dispute with a supervisor which followed his getting a truck stuck in mud.

Petitioner claims he is entitled to further TTD benefits from June 27, 2011 through June 22, 2012 and May 27, 2014 through September 12, 2014. Not only did Petitioner return to his former occupation as a truck driver for a time with AC Trucking, he applied for a number of other truck driving jobs during the June 27, 2011 through June 22, 2012. He was also doing drywall work on the side.

Respondent offered Petitioner's tax records into evidence. His tax returns show that in 2010, he had net drywall earnings of $2,356.00. (R.X. 17 2010). Petitioner believed that the drywall side work he performed in 2010 was during the winter prior to his work injury on April 7, 2010. Petitioner's 2011 tax return shows gross income of $18,186.00, including net drywall earnings of $1,738.00. (R.X. 17). His 2012 tax returns gross income of $27, 965.00 indicate earnings from his work at Wehmeier Drywall, his current employer, and side jobs. (T. 50, R.X. 17). On June 22, 2012 Petitioner began working at Wehmeier Drywall as a drywall taper. He continues to work at Wehmeier Drywall at the time of trial.

The Arbitrator did not find Petitioner's testimony regarding entitlement to TTD during the period from June 27, 2011 through June 22, 2012 to be credible. Further, Petitioner was able to return to his former occupation with AC Trucking in June of 2011. His reason for leaving that employment had nothing to do with

his injury. There was no change in his condition between his leaving AC Trucking and June 22, 2012 when he went to work for Wehmeier Drywall.

While Dr. Gornet opined that Petitioner could not return to work, Petitioner himself proved him wrong. The Arbitrator finds Petitioner was capable of returning to his former occupation during the June 27, 2011 through June 22, 2012 time frame when he returned to construction work for a drywall company. Benefits for that period are denied.

Petitioner also claims he is entitled to TTD from May 27, 2014 through September 12, 2014. This corresponds to the date of Petitioner's surgery and the day he actually returned to work. Based upon the foregoing and the record taken as a whole, including the Arbitrator's findings with regard to Issues F and J, the Arbitrator finds Petitioner is entitled to TTD benefits from May 27, 2014 through September 12, 2014 (15 and 4/7ths weeks). The Arbitrator further finds Petitioner is entitled to TTD benefits from January 6, 2011 through June 10, 2011 (22 and 2/7ths weeks)

Respondent shall pay Petitioner temporary total disability benefits of $433.33/week for 37 6/7 weeks, commencing January 6, 2011 through June 10, 2011 (22 and 2/7ths weeks), and May 27, 2014 through September 12, 2014 (15 and 4/7ths weeks), as provided in Section 8(b) of the Act.

The Arbitrator notes that the parties stipulated that Respondent is entitled to $26,786.07, however this amount includes the benefits paid pursuant to Arbitrator Nalefski's decision as well as those paid from January 6, 2011 through June 25, 2011.

The parties agree Respondent paid TTD benefits from April 8, 2010 through July 5, 2010 twice, once at the time the benefits were due in 2010 and again on May 9, 2013 at the time Respondent paid the January 25, 2011 Arbitration award. This creates a TTD credit owed to Respondent in the amount of $5,612.01. The total amount of benefits paid during the period of January 6, 2011 through June 25, 2011 is $9,657.07. The total credit against TTD awarded in this decision therefore is:

$ 5,612.01
9,657.07
$15,269.08

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

Petitioner's current occupation as a drywall finisher includes taping and finishing drywall to get it ready for paint. Petitioner was 41 years old at the time of the injury. Petitioner has many years remaining in the work force. Petitioner no longer works with Respondent as a truck driver. Petitioner testified that he was a "terrible truck driver". Petitioner was a drywall finisher for 15 years prior to working for Respondent. However, when the economy crashed, he was out of a job in drywall so he took the job as a truck driver with Respondent. Petitioner has now returned to drywall work. Petitioner testified that prior to the April 7, 2010 injury, he used to run tools like a bazooka, boxes and angle tools, but he can no longer use tools due to his back, so now he is forced to hand tape and consequently is less productive. He avoids lifting due to his low back. He has trouble looking up to drywall ceilings due to his cervical condition.

Petitioner testified that with regard to his neck, he has stiffness and it hurts to move his head to the right or left. He looks up a lot while drywall taping and it hurts. Petitioner testified that he has stiffness in his right

wrist, and it pops and goes numb about once a week. Petitioner wears a brace/sleeve on his right arm like baseball players wear, because it pops and locks up. He has to change hands when using a cell phone. With regard to his left arm, he testified that it pops and has some numbness but is workable and not as bad as his complaints with regard to his right arm. Petitioner testified that after his spine surgery, his back pain and numbness went away for the most part, but his left leg is still numb. Petitioner testified that he does not sleep through the night and he has to get up multiple times per night to change positions. He cannot turn at the waist to drive his truck in reverse and has to use the mirrors. Petitioner does not go on rides at Six Flags anymore, golf or help buddies with construction projects like roofing. He cannot bend over to tie his shoes, he has to sit down. He does not lift over 50 pounds. Petitioner complaints of pain in his buttock and left leg numbness which he does not think will ever go away. Petitioner takes Aleve every day.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds that as a result of the injuries sustained in the accident Petitioner sustained:

With regard to the right wrist	2% loss of use of the right hand (4.1 weeks)
With regard to the right arm	7.5% loss of use of the right arm (18.975 weeks)
With regard to the left arm	5% loss of use of the left arm (12.65 weeks)
With regard to the cervical spine	7.5% loss of use of the whole person (37.5 weeks)
With regard to the lumbar spine	15% loss of use of the whole person (75 weeks)

This is a total of 148.225 weeks.

Respondent shall pay Petitioner permanent partial disability benefits of $390.00/week for 35.725 weeks, because the injuries sustained caused the 2% loss of the right hand (4.1 weeks relative to the right wrist), 7.5% loss of the right arm (18.975 weeks relative to the right arm), and 5% loss of the left arm (12.65 weeks relative to the left arm), as provided in Section 8(e) of the Act.

Issue (M) Should penalties or fees be imposed upon Respondent?

Respondent had a good faith basis and valid defense to payment of a significant portion of the TTD benefits as demanded by Petitioner. With regard to the payment of medical expenses, while the prior decision of Arbitrator Nalefski did address the provision of prospective medical in general terms, Respondent was not specifically ordered to provide the surgical procedure Petitioner ultimately received. Between the time of Arbitrator Nalefski's decision and the date of the surgery Dr. Gornet's records reveal that he was somewhat equivocal with regard to performing the surgery. On October 7, 2013, Dr. Gornet addressed his concerns about proceeding to surgery which would require placing permanent restrictions on Petitioner. He indicated that as Petitioner "continues to work, albeit with significant symptoms," his recommendation for the time being was to continue to observe Petitioner. Respondent then obtained another Section 12 examination from Dr. Petkovich on November 23, 2013. It was not until February 6, 2014, when Petitioner returned to Dr. Gornet that surgery was actually recommended with Dr. Gornet noting "I have tried to manage him conservatively for a long period of time, but at this point his pain affects all aspects of his life and his quality of life." The surgery then took place on May 27, 2014.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds Petitioner has failed to establish that he is entitled to penalties or attorney's fees under the Act. Petitioner's request for those benefits is denied.

Issue (N): Is Respondent due any credit?

As indicated above, Respondent is entitled to a credit of $15,269.08 against TTD benefits awarded in this decision. Further, the parties stipulated Respondent is entitled to a credit of $4,500.00 for PPD previously paid. Respondent is therefore entitled to a total credit of $19,769.08.

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10:17:35 CASE DOCKET---ICDW

Conr

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

Case

Cour

CASE # 10 WC 023695 HEARING LOCATION

EMPLOYEE	MCCOY, HAROLD	IWCC OFFICE
EMPLOYER	PRAIRIE FARMS DISTRIBUTION	1803 RAMADA BLVD, SUITE B201
SETTING	COLLINSVILLE	COLLINSVILLE IL 62234
ARBITRATOR	HEMENWAY, CHRISTINA	ACCIDENT DATE 04/07/10
COMMISSIONER	COPPOLETTI, ELIZABET	CASE FILED 06/22/10
BODY PART	MULTIPLE PARTS N/A	

EMPLOYEE ATTORNEY	EMPLOYER ATTORNEY
BROWN & CROUPPEN	KNAPP, OHL & GREEN
KERRY O'SULLIVAN	6100 CENTER GROVE RD
211 N BROADWAY, STE 1600	P O BOX 446
ST LOUIS MO 63102	EDWARDSVILLE IL 62025

STATUS SETTLEMENT CONTRACT APPROVED

SETTLEMENT DATE 01/31/18

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

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

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Edward Scanlon,
Petitioner,

vs. NO: 12 WC 20817

Adrian Rivera, individually and d/b/a EGA Landscaping & Design, and the Illinois State Treasurer as Ex Officio Custodian of the Illinois Injured Workers' Benefit Fund,
Respondent.

17IWCC0430

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, casual connection, temporary total disability, permanent partial disability, employment relationship, jurisdiction, notice, penalties and attorney's fees and being advised of the facts and law, affirms the Decision of the Arbitrator, which is attached hereto and made a part hereof.

In so affirming the outcome of the case, however, the Commission notes that based on the evidence presented, the Arbitrator found that the claimant was an independent contractor, not an employee, and that benefits under the Workers' Compensation Act were therefore inapposite. While the Commission concurs that benefits under the Act should not apply, the Commission concludes that rather than acting as an independent contractor, the claimant was more akin to a working partner and co-venturer.

Specifically, the Commission notes that claimant testified that "I helped him [Adrian Rivera] start his landscaping company, actually." (Tr. 34) The claimant further testified:

Q: Did you ask him to work there?
A: No. We were basically – we were trying to get some little side jobs to make some extra money in the summer, and then he happened upon somehow getting into doing the Chicago Public Schools.

17IWCC0430

See Tr.34. The evidence presented clearly suggests that the claimant was neither hired by the respondent as an employee, nor retained or commissioned by the respondent as an independent agent. Rather, the claimant assisted the respondent as a co-founder of the venture. The claimant's lack of W-2 forms, securing his benefits in cash, and flexibility regarding his schedule were entirely consistent with this partnership arrangement.

The Commission notes the holding in *Metro Construction, Inc. v. Industrial Commission*, 39 Ill. 2d 424, 235 N.E.2d 817 (1968), where the Illinois Supreme Court observed "'In the workmens' compensation field it appears that with the exception of one jurisdiction (Oklahoma) every court where this issue has arisen has held that working partners are not employees within the meaning of the statutes.' ... We think the majority view to be sound and it is adopted." *Id.* at 426-7. Furthermore, pursuant to Section 1(b)3 of the Act, partners of a business may elect to be covered by the Act, but must declare themselves to be so covered. There was no such showing, especially given the lack of insurance coverage heretofore demonstrated.

Benefits under the Act are inapposite and therefore denied in their entirety.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 2, 2016 is hereby affirmed. Benefits are denied.

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: JUL 3 - 2017

Joshua D. Luskin

L. Elizabeth Coppoletti

Charles J. DeVriendt

o-06/21/17
jdl/ac
68

SCANLON, EDWARD
Employee/Petitioner

Case# **12WC020817**

RIVERA, ADRIAN INDIVIDUALLY AND D/B/A EGA LANDSCAPING & DESIGN AND THE ILLINOIS STATE TREASURER AS EX OFFICIO CUSTODIAN OF THE ILLINOIS WORKERS' BENEFIT FUND
Employer/Respondent

17IWCC0430

On 2/2/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.46% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

2221 VRDOLYAK LAW GROUP LLC
MICHAEL P CASEY
741 N DEARBORN ST 3RD FL
CHICAGO, IL 60654

0000 ADRIAN RIVERA, INDV AND DBA
EGA LANDSCAPING & DESIGN
2718 W 59TH ST
CHICAGO, IL 60615

5462 ASSISTANT ATTORNEY GENERAL
MAGGIE TIMLIN
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

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

Edward Scanlon 17IWCC0430 Case # **12** WC **20817**
Employee/Petitioner

v.

Adrian Rivera, individually and d/b/a EGA Landscaping & Design, and the Illinois State Treasurer, as Ex Officio Custodian of the Illinois Injured Workers' Benefit Fund
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 **Milton Black**, Arbitrator of the Commission, in the city of **Chicago**, on **December 3, 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. ☒ 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 **Insurance**

FINDINGS

On **June 8, 2012**, Respondent **Adrian Rivera, individually and d/b/a EGA Landscaping & Design** *was* operating under and subject to the provisions of the Act.

On this date, an employer-employee relationship ***did not*** exist between Petitioner, **Edward Scanlon**, and Respondent, **Adrian Rivera, individually and d/b/a EGA Landscaping & Design**.

ORDER

Because an employer-employee relationship did not exist, 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

February 2, 2016
Date

FEB 2 - 2016

FINDINGS OF FACT

Petitioner testified that on June 8, 2012, he was working as a general manager foreman for EGA Landscape & Design (EGA). Petitioner testified that Adrian Rivera was the owner. Petitioner testified that his job duties included maintenance and landscaping at fourteen Chicago Public Schools. Petitioner testified that each week, he would set the schedule and the route for the landscaping crew.

Petitioner testified that his position was seasonal from March through October. Petitioner testified that he worked approximately twelve hours per week for thirty two weeks for Adrian Rivera at a rate of $14.00 per hour. Petitioner testified that his normal work day would begin at 6 a.m. and that the end time would vary depending on that day's job. Petitioner testified that he was paid in cash and that taxes were not withheld. Petitioner testified that he did not receive any W-2's from EGA.

Petitioner testified that he was a childhood friend of Adrian Rivera and that he helped Mr. Rivera start EGA. Petitioner testified that he did not apply for his job and that he just asked Mr. Rivera to be a part of the business. Petitioner testified that Mr. Rivera owed and maintained all the landscaping equipment, which included lawnmowers, weed whackers, hedgers, and power machinery.

Petitioner testified that he and Adrian Rivera held a second job at Mobile Rail Solutions (Mobile) on the date of the accident. Petitioner stated that he worked at Mobile approximately twenty seven hours per week for twelve weeks prior to his date of accident at a rate of $9.00 per hour. Petitioner testified that he stopped working at EGA and Mobile on the date of his accident. Petitioner testified that Adrian Rivera was aware of his concurrent employment at Mobile.

Petitioner testified that on June 8, 2012, he was scheduled to work at Owen Scholastic Academy and that when he arrived, the principal asked him to remove weeds. Petitioner testified that he was walking and weed whacking in tall grass when he fell into a hole that was eight feet deep (PX3).

Petitioner testified that he felt immediate and immense shooting pain in his right leg. Petitioner testified that after his coworker, Jose Juarez, pulled him out of the hole by his wrists, he telephoned Adrian Rivera to inform him of the accident. Petitioner then arranged to be driven back to the office of EGA so that his wife could pick up his vehicle from the office and drive him to the hospital. Petitioner testified that when he returned to the office, he spoke with Adrian Rivera, in person, regarding the accident and informed Mr. Rivera that he was headed to the hospital.

Petitioner presented to Mercy Hospital on June 8, 2012, complaining of right lateral knee pain. Petitioner was diagnosed with a right knee sprain, was fitted with a knee immobilizer, was prescribed Norco and Ibuprofen for pain, and was instructed to follow up with his primary physician in two to four days (PX4).

Petitioner presented to Integrated Pain Management on June 18, 2012. A right knee MRI was taken, and he was recommended to have a consultation with an orthopedic surgeon (PX7). The MRI revealed bone contusions and a meniscus tear (PX9). Petitioner consulted at Orthopedic and Rehabilitation Centers, S.C.

Petitioner was prescribed pain medications and physical therapy (PX5). Petitioner underwent physical therapy on various dates from June 26, 2012 through September 24, 2012 (PX8). Petitioner was kept off work by his treating physicians (PX5; PX7).

On October 1, 2012, Petitioner underwent a right knee arthroscopy with partial lateral meniscectomy and chondroplasty of the lateral tibial plateau. The postoperative diagnosis was a right knee lateral meniscus tear and chondromalacia of the lateral tibial plateau (PX6). Thereafter, Petitioner underwent physical therapy and was kept off work (PX5).

Petitioner testified that he never returned to work at EGA after Adrian Rivera refused to accept this claim. Petitioner testified that he stopped working at EGA and at Mobile on the date of his accident. Petitioner testified that he eventually began working for Chicago's Mr. Handyman. Petitioner testified that his job duties for Mr. Handyman included general contracting and snow removal.

Petitioner testified that he continues to experience right knee pain. Petitioner testified that he is able to perform the demands of his current position.

CONCLUSIONS OF LAW

Was Respondent operating under and subject to the Act?

Petitioner testified that the work of EGA required him to perform various landscaping and maintenance tasks, including weed removal and mowing lawns. Petitioner testified that EGA used power machinery, hedgers, lawnmowers and weed whackers. These are sharp edged tools. The Arbitrator finds that the landscaping, the use of power machinery, and the use of sharp edged tools are sufficient for EGA Landscaping & Design to be subject to the automatic coverage provision of the Illinois Workers' Compensation Act.

Was there an employee-employer relationship?

The existence of an employment relationship is a prerequisite for any award of benefits under the Act. There is no specific litmus test for determining whether an employer-employee relationship exists. A case by case analysis is required. There are multiple factors to consider when assessing the nature of the relationship

between the parties. *Ware v. Indus. Comm'n.*, 318 Ill. App. 3d 1117, 1122 (1st Dist. 2000). Among these 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 pays the person hourly; (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; (6) whether the employer supplies the person with materials and equipment; and (7) whether the employer's general business encompasses the person's work. *See Robertson v. Indus. Comm'n.*, 866 NE.2d 191, 200 (Ill. 2007). Other relevant factors include the label the parties place on their relationship, and whether the parties' relationship was "long, continuous, and exclusive." *Ware*, 318 Ill.App. at 1122, 1126. No single factor is determinative and such determination of the employee-employer relationship rests on the totality of the circumstances. *Roberson*, 866 NE.2d at 200.

In the present matter, Petitioner failed to meet his burden of proving the existence of an employee-employer relationship. Petitioner testified that he was personally in charge of setting the schedule and planning the weekly route. Petitioner worked varying hours depending on the day's schedule, which he was in charge of setting. Petitioner was paid hourly in cash with no taxes were withheld. Petitioner was able to hold a second concurrent job at Mobile Rail Solutions with Adrian Rivera, and worked Petitioner there for approximately twenty seven hours per week. Petitioner was a childhood friend of Adrian Rivera, never formally applied for a job, helped Mr. Rivera start EGA, and then became part of the venture. Petitioner never testified that he was fired. It is a reasonable inference that he was free to come and go on his own without any outside control.

The totality the evidence indicates that Petitioner was an independent contractor, not an employee. Therefore, the Arbitrator finds that Petitioner failed to meet his burden of proving an employer-employee relationship existed between Petitioner and Adrian Rivera, individually and doing business as EGA Landscaping & Design.

The remaining issues are moot.