2018 IL App (2d) 170630WC-U

FILED: July 3, 2018

NO. 2-17-0630WC

IN THE APPELLATE COURT

OF ILLINOIS

SECOND DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

JOHN B. SANFILIPPO & SONS, INC., Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (Alicia Garcia-Zavedra, Appellee).	)))))))	Appeal from the Circuit Court of Kane County No. 16MR1413 Honorable David R. Akemann, Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Holdridge and Justices Hoffman, Hudson, and Barberis concurred in the judgment.

ORDER

¶ 1 *Held*: The Commission's finding that claimant's repetitive-trauma injury manifested itself on October 9, 2013, was not against the manifest weight of the evidence.

¶ 2 On November 20, 2014, claimant, Alicia Garcia-Zavedra, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 to 30 (West 2014)), seeking benefits from the employer, John B. Sanfilippo & Sons, Inc. Following a hearing, the arbitrator determined (1) claimant's injuries arose out of and in the course of her employment and were causally connected to her job duties; (2) claimant was entitled to prospective medical expenses for arthroscopic surgery; (3) claimant was denied prospective

medical care for knee surgery; and (4) claimant was entitled to temporary total disability (TTD) benefits from February 8, 2014, through September 9, 2015.

¶ 3 On review, the Illinois Workers' Compensation Commission (Commission) affirmed and adopted the arbitrator's decision. On judicial review, the circuit court of Kane County confirmed the Commission's decision. The employer appeals.

¶ 4 I. BACKGROUND

¶ 5 The following recitation of facts is taken from the evidence presented at the arbitration hearing in September 2015. Claimant testified that she worked as a janitor at the employer's facility located in Elgin, Illinois. Each day, she worked from 6 a.m. until 4:30 p.m. cleaning the factory, store, and shipping area. Claimant testified that her job duties included mopping, reaching "above [her] head" to scrub mirrors, cleaning toilets, disposing of garbage bags that weighed approximately 40 pounds, scrubbing walls, cleaning office doors and windows by stretching her arms upward and standing on her "tippy toes," and cleaning vents by climbing onto a table and "stretch[ing] [her] arms all the way up ***." In addition, she cleaned the walls in the entryway of the factory with a broom and brush by reaching "above [her] head." She also cleaned two large rubber rugs that each weighed 30 pounds. In the afternoon, claimant used a spatula to clean grease off "very tall" machines located within the factory. She did not clean the machines on a daily basis; however, she estimated that she spent about two to four hours scrubbing the machines in a typical afternoon. She further testified that she cleaned a total of 8 offices and 15 bathrooms on a daily basis.

¶ 6 Claimant stated that, on October 9, 2013, she noticed her right arm "hurt a lot." That same day, she sought medical treatment from a primary care physician, Dr. Victor H. Colin. His medical records reflect the following history:

> "She [works] in housekeeping and states that reach[ing] above over her head and squatting down cause her to have pain especially at the end of the day. She reports pain in the back of her legs radiating down behind the knees and down her calfs. She states that [she has] upper and lower back pain as well as her shoulders and arms."

Claimant testified that she provided Jose Dellatore in Human Resources with a note from Dr. Colin regarding work restrictions.

¶ 7 Claimant testified that, in mid-October, her job duties changed to assembling boxes. She stated that she would stand on her "tippy toes" to "grab" boxes stacked on a table and she would assemble the boxes by hand. After performing this task, she noticed that her right arm would hurt.

¶ 8 At arbitration, the employer presented the testimony of Phillip Schiavone, claimant's supervisor. He stated that, before claimant began her new duties assembling boxes, claimant worked as a "level 1" janitor. He testified that the job duties of level 1 janitors included cleaning bathrooms, washing sinks, mopping, and cleaning windows and walls. He stated that, when the janitors clean the walls, "[m]ostly they're cleaning from four feet down" and "[a]nything above head level is generally cleaned once a month." He further testified that claimant brought in a note from her doctor on October 23, 2013, but he could not recall if she reported an injury to her right shoulder. He explained that claimant's job duties changed in mid-October "[b]ecause she was having a hip problem and knee problem."

¶ 9 On November 20, 2013, claimant saw Dr. Colin. His medical records note that claimant again complained of "right arm/leg pain." Dr. Colin further noted that claimant had been working in a light duty capacity.

¶ 10 On November 22, 2013, claimant was seen at Physicians Immediate Care for the first time. Medical records indicate that claimant complained of pain in her "right arm from shoulder to wrist" and that she had "throbbing pain." The medical records further reflect that "[claimant] has had pain previously, but [it] was aggravated after repetitive movements—building boxes at work yesterday." The medical records note the following history:

> "The patient presents with a chief complaint of constant (but worse at times) pain of the right upper extremity since Thu. Nov 21, 2013. *** The patient reports it was the result of an injury, which was work related, which had a gradual onset. The patient had no similar problems in the past. *** Patient denies that any non-work related event or illness possibly contributed to or is related to development of symptoms. The patient reports that the pain/pressure radiates to the right hand and right fingers. Patient notes pain in her right shoulder for years, she recently had her duties changed to lighter lifting and was packing boxes yesterday after which she noticed [a] significant increase in pain and weakness of her right shoulder. *** The patient also reports muscle pain, numbness, swelling, and weakness [of] abnormal symptoms related to the complaint."

X-rays were taken that same day, which showed no fractures or dislocations; however, there was "joint space abnormality" and "joint space narrowing noted" of "mild AC." The medical records from Physicians Immediate Care also note that the cause of injury was a "work related condition." The treating physician diagnosed claimant with a rotator cuff strain.

¶ 11 On December 11, 2013, claimant saw Dr. Colin because of continued pain in her right shoulder. Upon examination, Dr. Colin noted decreased range of motion in her right arm and edema over the mid-upper bicep and triceps. He diagnosed claimant with "osteoarthritis" and

"arthralgias."

¶ 12 On January 3, 2014, claimant underwent a magnetic resonance imaging (MRI) scan of her right shoulder. The MRI showed infraspinatus tendinopathy, supraspinatus tendinopathy, and a moderate partial undersurface tear.

¶ 13 On January 8, 2014, claimant was seen at Physicians Immediate Care where the treating physician noted complaints of increased shoulder pain. The physician gave claimant a steroid injection in her right shoulder to treat her pain. On January 15, 2014, claimant returned to Physicians Immediate Care. The medical records note that claimant reported a 50% improvement after the steroid injection but she continued to have burning in her elbow.

¶ 14 On February 7, 2014, claimant was seen by Dr. Roberto E. Levi, an orthopedic surgeon. His medical records reflect, in part, the following history:

> "The pain on [*sic*] the right shoulder and right elbow started in October of 2013. The patient did report this to her work. She works cleaning desks, cleaning tables, cleaning walls[,] and working at or above the shoulder level she had pain and had weakness and she developed severe pain on [*sic*] the right elbow."

Dr. Levi's impression was that claimant had at least a partial rotator cuff tear of the right shoulder, lateral epicondylitis in the right elbow, and osteoarthritis in her right knee. With respect to her right shoulder, Dr. Levi observed that claimant "work[ed] for four years doing the same work of cleaning with the right arm" and opined "[i]t is what produced the symptoms." Claimant testified that she did not work for the employer following her appointment with Dr. Levi on February 7, 2014.

¶ 15 Medical records from ATI Physical Therapy indicate that claimant began physical therapy on February 13, 2014, and continued it through June 2014. In addition, Dr. Levi

administered steroid injections on April 11, 2014, and July 7, 2014.

¶ 16 On March 17, 2014, Dr. Aaron Bare performed an independent medical examination (IME) at the employer's request. Dr. Bare's IME report reflects that he reviewed claimant's medical records and conducted an examination of claimant. In his IME report, Dr. Bare stated as follows:

> "[Claimant] reported pain after cleaning walls ***. She had no traumatic injuries. After she did this, she was assembling boxes and[,] because of continued pain in her shoulder[,] she sought out human resources and was seen by a physician *** the following day, 11/22/2013.
>
> * * *
>
> She *** reported pain while she was cleaning walls as well as assembling boxes. This did not cause or create a rotator cuff tear. Rotator cuff tears are usually an attritional phenomenon in this age group and therefore she aggravated a pre-existing problem. I agree with conservative care and agree with physical therapy."

Dr. Bare diagnosed claimant with a partial thickness rotator cuff tear. He believed claimant would not require surgery. He recommended steroid injections and light duty restrictions. Dr. Bare opined that, "[d]ue to the fact that she denies any previous problems, treatments, or injuries to h[er] shoulder, causation likely exists linking her current condition today to her work aggravation."

¶ 17 On April 16, 2014, Dr. Levi performed a right shoulder arthrogram and CT scan, which revealed a slight irregularity of the distal supraspinatus tendon. According to Dr. Levi's medical records, the AC joint "demonstrated some mild inferior hypertrophic spurring" and slight narrowing with some impingement. Due to her ongoing pain, Dr. Levi recommended right

shoulder arthroscopic surgery. Claimant continued to see Dr. Levi for pain management treatment to her right shoulder while she awaited approval for her surgery.

¶ 18 On March 16, 2015, the employer sent a letter to Dr. Bare summarizing the additional treatment that claimant underwent following Dr. Bare's IME, including the injections and the subsequent CT and MRI arthrogram. The employer's letter also contained new information regarding claimant's job duties:

> "On November 21, 2013[,] when the alleged shoulder pain began the claimant was *not* engaged in cleaning activities, but was actually assembling small cardboard boxes weighing about 6-7 oz. each on a line at waist level. She had been performing this task exclusively since October 23, 2013. Prior to her work assembling boxes the claimant was engaged in cleaning, however, the vast majority of the work was done at or below waist level and only on occasion would she need to have her arms near shoulder level. Once a week for approximately 2 ½ hours she would clean walls, windows and mirrors, but used a 51" broomstick with attachment to reach the top of the surfaces. Use of the broomstick allowed her to complete the cleaning without extending her arms over her shoulder, as the tops of the mirrors she was cleaning were approximately six feet from the floor." (Emphasis in original.)

¶ 19 On April 17, 2015, in response to the employer's letter, Dr. Bare provided an addendum to his IME report. Dr. Bare opined that he did not believe claimant suffered a work-related injury. He noted that "[t]his is due to, as *** mentioned in [the employer's] letter, the fact that the individual worked 2-1/2 hours a week primarily cleaning walls and mirrors. She had no heavy reaching or lifting duties." He diagnosed claimant with a partial thickness rotator cuff tear

that was "likely a degenerative phenomenon and not related to any type of work injury." He noted that "[s]urgical intervention may be required ***."

¶ 20 Dr. Bare's deposition, taken on May 13, 2015, was presented at arbitration. Dr. Bare testified that "[i]t [was his] opinion that [claimant's] partial-thickness rotator cuff was not related to her work duties, but [is] more of an attritional age-related phenomenon." He noted that, if claimant's report of "no previous problems *** was accurate, it's possible that her current condition could be related to what she did at work, although [he] th[ought] with a high degree of medical certainty that's extremely unlikely." Dr. Bare admitted that assembling boxes and washing windows could aggravate a preexisting condition. However, he stated that "any type of activity can cause an aggravation." He opined that "[claimant] could pick up a piece of paper and tweak her shoulder ***."

¶ 21 Claimant submitted Dr. Anthony Cummins' deposition at arbitration. Dr. Cummins testified that he was an orthopedic surgeon. He stated that he performed an IME and reviewed claimant's medical records at the request of her attorney. According to Dr. Cummins, claimant provided a history of ongoing right shoulder pain that developed in November 2013 "after cleaning walls and assembling boxes." He stated that, in his medical opinion, "those activities at work caused the shoulder pain she's experiencing." He noted that claimant's right shoulder had tenderness around the sub-acromial space. He diagnosed claimant with a partial rotator cuff tear. Dr. Cummins stated that claimant's temporary relief following the right shoulder injections confirmed his diagnosis. He agreed with Dr. Levi that claimant had exhausted non-operative measures and she should undergo surgery.

¶ 22 Claimant testified that, at the time of the arbitration hearing, she intended to undergo the arthroscopic surgery because of her continued pain.

¶ 23 The arbitrator determined that claimant's injuries arose out of and in the course of her employment and were causally related to her job duties. Claimant was awarded prospective medical expenses for arthroscopic surgery and TTD benefits from February 8, 2014, through September 9, 2015.

¶ 24 On review, the Commission affirmed and adopted the arbitrator's decision. The circuit court subsequently confirmed the Commission's decision.

¶ 25 This appeal followed.

¶ 26 II. ANALYSIS

¶ 27 On appeal, the employer argues claimant "failed to prove that her alleged right shoulder condition manifested on October 9, 2013," and thus that the Commission's decision was against the manifest weight of the evidence.

¶ 28 "To obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of the evidence, that [s]he has suffered a disabling injury which arose out of and in the course of h[er] employment." *Sisbro Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203, 797 N.E.2d 665, 671 (2003). An injury "arises out of" employment when "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.*

¶ 29 Whether an employee has suffered a work-related accident is a question of fact for the Commission to determine, and its decision will not be overturned on appeal unless it is against the manifest weight of the evidence. *Kertis v. Illinois Workers' Compensation Comm'n*, 2013 IL App (2d) 120252WC, ¶ 13, 991 N.E.2d 868. "In order for a finding to be contrary to the manifest weight of the evidence, an opposite conclusion clearly must be apparent." *Teska v. Industrial Comm'n*, 266 Ill. App. 3d 740, 741–42, 640 N.E.2d 1, 3 (1994). It is solely within the

Commission's province to judge the credibility of witnesses and weigh conflicting medical testimony. *ABF Freight System v. Illinois Workers' Compensation Comm'n*, 2015 IL App (1st) 141306WC, ¶ 19, 45 N.E.3d 757.

¶ 30 Compensable injuries under the Act may arise from a single identifiable event or be caused gradually by repetitive trauma. *Edward Hines Precision Components v. Industrial Comm'n*, 356 Ill. App. 3d 186, 194, 825 N.E.2d 773, 780 (2005). An employee who suffers a repetitive-trauma injury may apply for benefits under the Act, but must meet the same standard of proof as a claimant who alleges a single, definable accident. *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 64, 862 N.E.2d 918, 924 (2006). "[T]he date of the injury in a repetitive-trauma compensation case is the date when the injury manifests itself—the date on which both the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person." (Internal quotation marks omitted.) *Id.* at 67. An employee alleging repetitive trauma "must still show that the injury is work related and not the result of a normal degenerative aging process." *Edward Hines Precision Components*, 356 Ill. App. 3d at 194.

¶ 31 Here, as stated, the employer argues that claimant failed to prove that her alleged right shoulder condition manifested on October 9, 2013. We disagree.

¶ 32 The Commission noted that claimant saw Dr. Colin on October 9, 2013. On that date, claimant complained of pain in her shoulders. According to the Commission, claimant attributed her pain to "lifting over her head doing her housekeeping duties at work." The Commission also noted claimant's testimony regarding the onset of her shoulder pain "during the performance of her housekeeping duties *** *before* she was transferred to the box assembly job." (Emphasis added.) In addition, the Commission acknowledged that the medical records

from Physicians Immediate Care provided conflicting information regarding the manifestation date; however, the Commission explained that those medical records also state that claimant's shoulder pain *began previously* and was "aggravated" when she started lifting boxes at work. The employer points to claimant's testimony at arbitration where she agreed, on cross-examination, that her "right shoulder injury occurred November 21, 2013." It further points out that claimant asserted in her application for adjustment of claim that the date of accident was November 21, 2013. However, we note claimant was otherwise consistent in stating her right shoulder injury occurred as a result of her cleaning duties, which ended in mid-October. We further note she later amended the date of accident in her application for adjustment of claim to October 9, 2013.

¶ 33 Additionally, as noted, the parties agree that claimant's job changed from janitorial duties to box assembly in October after claimant sought medical attention for her shoulder pain in October 2013. Indeed, as stated, the medical records of Dr. Colin note that claimant was in fact examined on October 9, 2013, she complained of shoulder pain, Dr. Colin provided claimant with a note regarding work restrictions in October 2013, and claimant submitted that note to Human Resources *before* her job duties changed. Dr. Colin's medical records support claimant's testimony that she started to have pain in her right shoulder before her job duties changed to assembling boxes. Even the IME report by the employer's examining physician, Dr. Bare, states that claimant first experienced right shoulder pain after she was "cleaning walls" for the employer, and she had "continued pain" that worsened after she began assembling boxes. Dr. Levi's medical records also support claimant's contention that her shoulder pain manifested itself in October 2013. Dr. Levi's medical records note that claimant reported that her shoulder pain began in October 2013 after "cleaning with her arms at or above

shoulder level." Dr. Levi's medical records further state that "[claimant] was working for four years doing the same work of cleaning with the right arm" and "[i]t is what produced the symptoms." Though there is some conflicting evidence regarding the manifestation date, based on the above, the Commission could have reasonably concluded that claimant suffered a work-related injury that manifested itself on October 9, 2013.

¶ 34 As stated, weighing conflicting medical testimony and judging the credibility of witnesses are within the province of the Commission. *ABF Freight System*, 2015 IL App (1st) 141306WC, ¶ 19. We cannot say the Commission's finding—that October 9, 2013, was the manifestation date of claimant's work injury—was against the manifest weight of the evidence.

¶ 35 III. CONCLUSION

¶ 36 For the reasons stated, we affirm the circuit court's judgment, which confirmed the Commission's decision, and remand the matter for further proceedings pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327, 399 N.E.2d 1322 (1980).

¶ 37 Affirmed and remanded.

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

Alicia Garcia Zavedra,

Petitioner,

vs. NO: 14WC002764

John B. Sanfilippo & Sons, Inc.,

Respondent,

16IWCC0728

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent, herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, temporary total 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. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

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

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

16IWCC0728

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 $30,700.00. 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: NOV 9 - 2016
MJB/bm
o-9/12/16
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

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

ZAVEDRA, ALICIA GARCIA
Employee/Petitioner

Case# **14WC002764**

JOHN B SANFILIPPO & SONS INC
Employer/Respondent

16IWCC0728

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.

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

2932 KUGIA AND FORTE PC
MARTIN V KUGIA
711 W MAIN ST
WEST DUNDEE, IL 60118

1505 SLAVIN AND SLAVIN LLC
DAVID VanOVERLOOP
100 N LASALLE ST 25TH FL
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF KANE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Alicia Garcia Zavedra
Employee/Petitioner

v.

John B. Sanfilippo & Sons, Inc
Employer/Respondent

Case # 14 WC 2764

Consolidated cases: N/A

16IWCC0728

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Jessica Hegarty, Arbitrator of the Commission, in the city of GENEVA, on 9/10/15. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

16IWCC0728

FINDINGS

On the date of accident, **10/9/13**, 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 $**28,759.12**; the average weekly wage was $**553.06**.

On the date of accident, Petitioner was **62** years of age, **married** with **0** dependent children.

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

Respondent shall be given a credit of $ **21,385.18** for TTD, $0 for TPD, $0 for maintenance, and $**1,244** for other benefits, for a total credit of $ **22,629.18**.

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

ORDER

1. THE RESPONDENT IS ORDERED TO AUTHORIZE, APPROVE AND PAY FOR THE PETITIONER'S RIGHT SHOULDER ARTHROSCOPY, AS PRESCRIBED BY DR. LEVI, PURSUANT TO SECTION 8(A) OF THE ACT.

2. RESPONDENT IS ORDERED TO PAY TTD AT THE RATE OF $368.71 FOR THE PERIOD OF 2/7/14 THROUGH 9/10/15, A PERIOD OF 82 AND 6/7 WEEKS.

IN NO INSTANCE SHALL THIS AWARD BE A BAR TO SUBSEQUENT HEARING AND DETERMINATION OF AN ADDITIONAL AMOUNT OF MEDICAL BENEFITS OR COMPENSATION FOR A TEMPORARY OR PERMANENT DISABILITY, IF ANY.

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

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

Jessica C. Myatt

Signature of Arbitrator

1/29/16
Date

ICArbDec19(b)

FEB 2 - 2016

STATE OF ILLINOIS)
)
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

ALICIA GARCIA ZAVEDRA,
Employee/Petitioner,

v.

JOHN B. SANFILIPPIO & SONS, INC.
Employer/Respondent.

Case No. 14 WC 2764

16IWCC0728

ADDENDUM TO THE DECISION OF THE ARBITRATOR

On September 10, 2015, this matter was heard by Arbitrator Jessica A. Hegarty in Geneva, Illinois.

The issues in dispute are:

- Accident
- Causal Connection
- TTD
- Prospective Medical Treatment. (Arb. 1).

The parties agreed to reserve ruling with respect to all issues related to medical bills for determination at a later date. (Id., TX. 5)

Petitioner was granted leave to amend the date of accident from November 21, 2013 to October 9, 2013 on the Application for Adjustment of Claim (Application for Benefits). Respondent had no objection. (Id. at 7)

Petitioner testified at the hearing through an interpreter. (Id. at 9)

FACTS OF THE CASE

Petitioner's Testimony

Petitioner, Alicia Garcia-Zavedra, was employed by Respondent, John B. Sanfilippo & Sons, Inc., on October 9, 2013 as a cleaning person. (Id. at12) Petitioner is 65 years old and 5'3" tall. (Id. at 10)

Petitioner worked from 6 am to 4:30 pm cleaning various areas in the Sanfilippo facility which was comprised of a store, a factory and a shipping area. (Id. at 13)

16IWCC0728

Petitioner testified she began each work day by her filling her cleaning cart with supplies. She then proceeded to the store area of the facility where she was required to clean the windows, sweep the floors, clean two bathrooms as well as the store offices. (Id.)

Cleaning the bathrooms consisted of cleaning the mirrors, the walls, the sinks and the toilets, as well as sweeping and mopping the floors. (Id. at 14) In order to clean the bathroom mirrors, she had to climb onto a sink and reach with her right hand, over her head, to spray windex on the mirror and wipe it. (Id. at 14-15) There were two toilets in each bathroom that she cleaned using her right arm to scrub. (Id.) She cleaned the bathroom floors by lifting a 20 pound bucket of water off the cart (that was knee-high to her body) and carrying it a short distance to the bathroom. (Id. at 16-17) She used a 5 or 6 pound mop to mop the floors. (Id. at 15) In addition to her bathroom tasks, she emptied the bathroom garbage cans and dumped them into a larger bag. (Id. at 18-19)

The store offices required cleaning the windows and taking out the garbage. (Id. at 23) There were four windows in each office, the top of each, was higher than Petitioner's head. (Id. at 24) Petitioner testified she stood on her tip toes, reached over her head with her right hand and wiped the windows with paper towels. (Id.)

Petitioner testified she also cleaned the office doors which were made of glass. (Id. at 25) She used a stepstool and stretched her arms as far as she could to wipe the doors with windex. (Id.) According to her testimony, Respondent also had her clean the air vents in the offices which were located close to the ceiling. (Id.) To enable this task, she would reach up with her arms over her head and stretch her arms all the way up with a duster to clean them. (Id. at 25-26) Besides the windows, doors, and air vents, Petitioner also had to sweep and mop the floors in each office. (Id. at 26)

In addition to the store bathrooms and offices, the Petitioner also had to clean the store itself. (Id.) She testified that there were 7 or 8 windows in the entire store. (Id. at 27) First, she dusted the windows by reaching over her head with a cloth and then washed the windows by reaching over head in the same manner that she washed the office windows. (Id. at 27-28) The Petitioner testified that when she was finished cleaning the store, she would carry large trash bags, weighing 40 pounds, to the trash container outside. (Id. at 28) She would throw the garbage bags into the container with her hands by stretching her arms out above her head and tossing them in. (Id.) She testified that each day she would throw out as many as 4 garbage bags from the store. (Id. at 29)

When she finished cleaning the store she would start cleaning the factory area. (Id.) There were 13 or 14 bathrooms in the factory. (Id.) There were up to 2, large mirrors in each bathroom that she cleaned by getting on her tip toes and reaching over her head in the same manner that she washed the other mirrors.

Petitioner testified that she also cleaned the factory bathroom walls which required her to reach over her head with a "fiber" to scrub. (Id. at 31- 32). She would spend

about an hour scrubbing the walls. (Id. at 32). She testified that she would scrub the walls using her hand, not a broomstick. (Id. 32). She was also required to clean 3 toilets in each of the factory bathrooms. (Id. at 31)

Petitioner also cleaned the 5 factory offices. Each office had four windows which required the same type of over-head cleaning as Petitioner described earlier. (Id. 33, 34). She testified that her boss would also tell her to clean the doors in the office. (Id.33). The factory office doors were not made of glass so she would clean those with a different solution. This task also involved reaching over her head. (Id. 34). She testified that she also had to reach over her head to clean the air vents on the ceiling in the factory offices. (Id.) She also mopped the office floors. (Id. 34).

The Petitioner next cleaned 2 rubber rugs located at the entrance floor every day. (Id. at 35) She estimated the rugs weighed 30 pounds. (Id. 36). She testified that she had to bend over and stretch out her arms to fold the rugs. (Id. 36).

According to her testimony, she also had to clean 3 hand washing sinks in the factory located near the entryway. (Id. at 37) The sinks were waist high and she would have to reach with her arms extended to scrub the inside of the sinks. (Id. 37, 39).

Petitioner testified that she was also required to clean a wall [near the entryway]. She would use a broom stick to enable this task, stand on her tippy toes and reach with her hands above her head to scrub the wall. (R. 38). When she was done scrubbing, she would throw water onto the wall. She would spend about an hour scrubbing the wall. (Id. 38).

In addition to the factory and the store, the Petitioner testified that she had to clean the bathrooms and the offices in the shipping area. (Id. at 40.) There were 4 bathrooms and 4 offices in the shipping area which she cleaned in the same manner as the other bathrooms and offices. (Id.).

The Petitioner testified that in the afternoons "they would have me clean the machines or walls or throw away the garbage – the whole factory's garbage." (Id. at 41) She testified that the machines were "pretty big...very high up...[v]ery tall...[a]bove my head". (Id. 42). In order to clean the machines, she would fill a bucket with soapy water and use a "spatula" to scrub the machines. (Id. 42). She testified that the machines were very dirty and she had to apply a lot of pressure with the spatula to scrape off the grease. (Id. 42). She had to reach with the spatula above her head to scrub the machines. She estimated that she would typically spend between 2 to 4 hours working with the spatula over her head scrubbing the machines (Id. 43).

In mid-October, 2013 the Respondent switched her job duties after she brought in a note with restrictions from her doctor. (Id. at 55, 56). At that time she was given a job assembling boxes. She testified that she would retrieve boxes that were stacked on a pallet above her head, standing on her tip toes. (Id. at 56). She would

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then assemble the boxes on a waist high table. She testified that she would reach over her head for a box more than 60 times in a shift. (Id. at 60)

On cross exam, Petitioner agreed that she has the broom and brush that she uses to clean the [entrance] walls "available" to her in her cart, when she cleans the bathrooms. (Id. at 84) She agreed that she performed the same cleaning tasks every morning, throughout her work week. (Id. at 85) In the afternoon, she had different job tasks, day-to-day, depending on what was needed at the company. (Id.) She agreed she did not clean the walls and machines every afternoon, "some days they would ask us. Some days they wouldn't". (Id. at 85-86) When asked the total number of bathrooms at Respondent's facility, she estimated 15-16, all of which she was responsible for cleaning on a daily basis. (Id. at 86-87) She further testified that there were 8 offices in the facility that she cleaned every day of her workweek. (Id. at 86-87)

Petitioner testified on cross that Respondent's facility is the biggest in Elgin. She agreed that spent a significant part of her morning walking between the different bathrooms and offices she was cleaning. (Id. 87-88)

Petitioner next identified her signature contained in Respondent's Exhibit 1 (IWCC Application for Adjustment of claim) listing a date of accident as November 21, 2013. (Id. at 91) Petitioner testified that she understood that the document initiates a worker's compensation claim in Illinois and further agreed that it is her belief and understanding that her right shoulder injury occurred on November 21, 2013. (Id. at 93)

On re-direct, Petitioner testified that with respect to cleaning the bathrooms, "the walls and the doors and the mirrors" took the longest to clean. (Id. at 94) When asked by her attorney why she did not utilize the broom stick to clean the bathroom walls and mirrors, Petitioner replied that there was fecal matter on the walls "and sometimes even on the doors" which required her to [scrub] "really, really hard with the broom". (Id). When asked why she did not use the broom stick to clean the bathroom mirrors, Petitioner replied, "How am I supposed to scrub a mirror with a broom? You don't scrub mirrors. I was on my tippy toes with that." (Id. at 94-95)

Petitioner further testified on re-direct that every afternoon workday she either had to clean the walls or the machines, "one or the other". (Id. at 96) She also testified that prior to the onset of her shoulder pain in "October" she did not have any shoulder pain. (Id.)

After Petitioner's testimony, Petitioner rested his case subject to the admission of exhibits.

Phillip Shiavone

The Respondent called Phillip Schiavone who has been employed by the Respondent for 8-9 years as the Sanitation Supervisor. (Id. at 98-99) He is in

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charge of overseeing the sanitation personnel which included Petitioner in October and November of 2013. (Id. at 99-100) Mr. Shiavone testified that Respondent's facility is located in Elgin and is approximately 1.1 million square feet in size: "100,000 square feet are office and one million square feet are plant." (Id. at 98)

Mr. Schiavone testified that as a level 1 janitorial employee, Petitioner was required to clean bathrooms and the outlet store at the facility. Level 1 janitorial employees also clean the hand wash sinks and perform mopping jobs throughout the day, as well as cleaning windows and walls. (TX, 101) A level 1 janitorial employee would typically spend a total of 3 hours a day, cleaning all of the bathrooms at the facility. Mr. Schiavone described the tasks of cleaning the bathrooms as sweeping the floor, checking the toilet paper, checking the soap, cleaning mirrors, cleaning the sink and counter, cleaning the toilets and mopping. (TX, 102)

Mr. Schiavone testified that the walls in the bathrooms were standard eight foot walls, and that level 1 janitorial personnel are provided with a 51" stick with a brush on it to clean the walls. (TX, 104) Mr. Schiavone testified that the employees were not cleaning the tops of the walls, but only cleaned about 4 feet down where the walls were dirty from people putting hands or feet on the wall. (Id.). Anything located overhead level is cleaned maybe once a month on a "spot check" basis. (Id.) Mr. Schiavone testified that he was 5'5", and that only 2% of the tasks required to clean a bathroom would require working at or above shoulder level, and such tasks were essentially limited to "spot checking". (TX, 106)

Petitioner's duties in cleaning the store area required her to clean the bathrooms, as well as sweep and mop. (TX, 105) Regarding the store offices, Mr. Schiavone testified that the ceiling vents were not cleaned any more than once a month, and that specific task was rotated on a weekly basis between different scheduled level 1 janitorial employees. Mr. Schiavone testified that cleaning doors is not part of the cleaning tasks of a level 1 janitorial employee, and they at most may wipe down a door handle. Mr. Schiavone also testified that the windows in the store were not cleaned daily, but only on a weekly basis.

Mr. Schiavone described the task of cleaning the hand wash sink as removing the rugs in front of the sink, washing the sink, checking and refilling the soap, washing and sanitizing the hand driers, and performing a final sweep and mop. Mr. Schiavone testified that the sinks the level 1 janitorial personnel were required to wash were at his waist level. Mr. Schiavone further testified that in cleaning the hand wash sink area, none of the tasks required use of arms above his shoulder level. (Id. at 105)

According to Mr. Schiavone, the size of the facility required level 1 janitorial employees to spend a significant amount of time walking between different areas: "I would say 20 to 25 percent of the time is actually physically walking from area to area getting ready to do your job". (Id. at 107)

Mr. Schiavone testified that he would have been notified if a level 1 janitorial employee reported any injury. He further testified that Petitioner engaged in the job duties of level 1 janitorial employee up to October 23, 2013, and during that time she never made any reports of injury. (Id. at 108-109)

Mr. Schiavone testified that Petitioner was taken off of janitorial duties after October 23, 2013 due to a hip and knee problem, and moved to light duty work assembling boxes. (TX, 110)

He described the box assembly as occurring at a waist high table with stools available for individuals if they needed to sit. (Id. at 111) The unassembled boxes are delivered to the table on pallets set on the ground with stacks of unassembled boxes stacked up four feet high. (Id. at 112) The employees would take stacks of the unassembled boxes to the table, assemble the boxes, then move them to a separate table for the packers. (Id.). Mr. Schiavone testified that the job tasks of box assembly did not require any over the shoulder activity, and that box assemblers would make about 400 per shift. (Id. at 113)

On cross exam, Mr. Schiavone admitted that the bathroom mirrors are not to be cleaned with a stick. (Id. at 115) Regarding the ceiling air vents, Mr. Shiavone testified that the workers were "supposed" to clean them on a weekly basis but "If I can get them to do it more than once a month, it would be a miracle." (Id. at 115-116)

Mr. Schiavone testified that the doors in the store offices are made of metal, not glass, and the workers were not required to clean them. (Id. at 116). He agreed that Petitioner's duties "probably" included washing the store windows on a weekly basis. (Id. 118) He testified that if the walls in the bathroom, higher than 4 feet, were dirty, he would expect Petitioner to clean them. (Id. at 119) He did not inspect the bathrooms before they were cleaned. (Id.). He inspected the bathrooms every other day after they were cleaned as part of a "finish inspection". (Id.). Mr. Schiavone also agreed that after Petitioner's morning cleaning duties, she would work on the machines or walls in the afternoon, and he did not refute that she had to reach overhead to clean the machines. (R. 122).

Mr. Shiavone agreed that Petitioner was one of the better workers. (R 116).

With respect to the box assembly job, Mr. Schiavone agreed that the Petitioner had to retrieve boxes from a pallet and assemble them. He testified that the boxes were stacked four feet high. (R. 112).

Injuries and Medical Treatment:

On October 9, 2013, Petitioner presented to Dr. Victor Colon of Elgin Family Physicians West with complaints of pain in the back of her legs radiating down behind the knees and down her calves. She further described upper and lower back pain as well as her shoulders and arms. Dr. Colin noted that she worked in housekeeping and that reaching above over her head and squatting down causes

her to have pain especially at the end of the day. He diagnosed Petitioner with hypothyroidism and arthalgias, noting he discussed with the patient possibilities including arthritis vs. muscular vs. overuse. (PX1)

The Petitioner testified that Dr. Colin gave her a note which she gave to Jose Dellatore in Human Resources. (TX. 54).

She continued working and was seen by Dr. Colin on October 23, 2013 for foot pain and pain in her right lower extremities. Mr. Schiavone testified that the Petitioner brought in a note from her doctor that day. He had no recollection as to what medical condition she was complaining of that day. (Id. at 109). Both the Petitioner and Mr. Schiavone agreed that at some point in mid-October the Respondent changed her duties from housekeeping to the box assembly job. (Id. at 55, 110).

The Petitioner was seen by Dr. Colin again on November 20, 2013. The records indicate she was being seen for right arm pain and leg pain which was better. She reported that she was working lite duty and not walking as much. Dr. Colin diagnosed osteoarthritis. (PX1)

The Petitioner testified that after working with the boxes her right arm pain worsened. (TX at 61). She reported her pain to her supervisor, Jose Dellatore, who sent her the same day in a cab to the Company Clinic, Physicians Immediate Care. (Id. at 62).

The records from Physicians Immediate Care indicate that she was seen there for the first time on November 22, 2013. (PX2). The records indicate that the Petitioner gave a history of pain in her right arm from her shoulder to her waist. She stated she was unable to raise her right arm and has throbbing pain. She stated that she had pain previously, but that it was aggravated after building boxes yesterday at work, at which time she noticed a significant increase in the pain and weakness of her right shoulder. (Id.) The record states that she has had no similar problems in the past, and that she denies any non-work related event or illness that could have contributed to the symptoms. (Id.) The physical exam noted weakness in the right shoulder, reduced right shoulder range of motion, right acromioclavicular joint tenderness, and tenderness in the rotator cuff. (Id.) The doctor diagnosed a right rotator cuff strain, ordered an MRI of the right shoulder, and prescribed pain medication. Regarding causation, the doctor stated that it was a work related condition. (Id.)

On December 11, 2013 the Petitioner returned to Dr. Colin who noted her complaints of knots in her arm and her inability to lift up her right shoulder. (PX1) His exam noted decreased range of motion in her right arm due to pain, and edema over the mid-upper bicep and triceps. He diagnosed arthralgias and osteoarthritis and continued her pain medications. (Id.)

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A right shoulder MRI was performed on January 3, 2013 which revealed infraspinatus tendinopathy, supraspinatus tendinopathy and moderate partial undersurface tear. (Id.)

On January 7, 2014, Petitioner presented to Dr. Colin who noted a history of ongoing right shoulder and upper back pain. (Id.) The doctor reviewed the MRI results and examined Petitioner noting reduced range of motion and tenderness in her right shoulder. Dr. Colin noted that the treatment options were surgery or physical therapy and he suggested she first proceed with physical therapy. Petitioner was seen the next day, January 8, 2014, at Physicians Immediate Care where the doctor noted complaints of increased shoulder pain with overhead lifting. The doctor noted that the pain started at work, that she has no non-work related events that have contributed to her pain, and that she had no similar problems in the past. The doctor gave her a right shoulder injection and agreed she should proceed with physical therapy. On January 15, 2014 she returned to Physicians Immediate Care. The doctor noted that she had 50% improvement after the injection. She noted that her shoulder pain had improved but that she continued to have burning in her elbow. (Id.)

The Petitioner was evaluated by Dr. Levi, an orthopedic surgeon, on February 7, 2014 who noted a history of right shoulder pain and right elbow pain beginning in October 2013. (PX3). Petitioner also reported right elbow and bilateral knee pain. Dr. Levi's exam demonstrated positive impingement maneuver on the right shoulder, positive across the chest maneuver and pain with abduction and both internal and external rotation. (Id.) Dr. Levi's impression was that she had at least a partial rotator cuff tear of the right shoulder, lateral epicondylitis of the right elbow and osteoarthritis of her right knee. He opined that with respect to the right shoulder and elbow: "It is evident of the fact that she was working for four years doing the same work of cleaning with the right arm. It is what produced the symptoms." Dr. Levi prescribed physical therapy, a TENS unit and off work restrictions. (Id.) The Petitioner testified that following that visit with Dr. Levi she went off work and has not worked for the Respondent since February 7, 2014. (TX. 64).

The records from ATI Physical Therapy indicate that Petitioner began physical therapy for her right shoulder on February 13, 2014. (PX4). The Petitioner testified that she did physical therapy at ATI through June of 2014 (TX. 65, 67).

Petitioner continued to see Dr. Levi who performed additional right shoulder injections on April 11, 2014 and July 7, 2014. (PX3) Dr. Levi also ordered a right shoulder arthrogram and CT which was completed on April 16, 2014. (Id.) The test showed a slightly irregular anterior glenoid labrum. (Id.) A tear could not be excluded. A slight irregularity of the distal supraspinatus tendon, and hypertrophic spurring in the AC joint with probable impingement was also noted. Due to her ongoing pain and the failure of conservative treatment to relieve her symptoms, Dr. Levi recommended right shoulder arthroscopic surgery. (Id.)

Dr. Levi has kept the Petitioner off work and has been waiting for approval for the right shoulder surgery since July 7, 2014. His most recent visit with the Petitioner prior to trial was July 29, 2015 at which time he reiterated that he is awaiting approval from workers' compensation for the right shoulder surgery and recorded her ongoing complaints of right shoulder pain.

On March 17, 2014, Petitioner presented to Dr. Aaron Bare for an IME at Respondent's request. Dr. Bare then issued two reports, and later testified via evidence deposition. (RX2) Dr. Bare is an orthopedic surgeon who specializes in shoulder and knee problems. (Id. at 5) In his report dated March 17, 2014, Dr. Bare noted a history of the onset of right shoulder pain after cleaning walls for the Respondent, worsening after she was assembling boxes. (RX2, attached as Respondent's deposition Ex. 2) The doctor reviewed the right shoulder MRI and examined Petitioner. He diagnosed her with a partial thickness rotator cuff tear, and agreed that she needed physical therapy. He stated that her job activity did not cause the rotator cuff tear, but that they "aggravated a pre-existing problem." (Id.). Dr. Bare further stated that "[d]ue to the fact that she denies any previous problems, treatments, or injuries to her shoulder, causation likely exists linking her current condition today to her work aggravation." Dr. Bare believed she would not require surgery but did believe light duty restrictions were appropriate. He suggested that if her symptoms continue, she might benefit from an injection or a repeat MRI to obtain a clear picture of the rotator cuff. (Id.)

The Respondent took the evidence deposition of Dr. Bare on May 13, 2015. (RX2). Approximately eight weeks prior to the deposition, The Respondent sent a letter to Dr. Bare for his review. The letter is attached as Petitioner's Exhibit 1 to Dr. Bare's deposition. The letter summarizes the additional treatment that the Petitioner had since Dr. Bare's first exam, including the injections and the subsequent CT and MRI arthrogram. The letter also contains new information about what the Respondent alleges the Petitioner's job duties were. The letter alleges that the Petitioner had pain in her shoulder for years that the Petitioner was not engaged in cleaning activities when her pain began, that she did not have to reach overhead on the box assembly job, and that the majority of her job duties while cleaning were not overhead.

At his evidence deposition, Dr. Bare testified that Petitioner may have suffered a temporary aggravation of a pre-existing condition, but that any ongoing right rotator cuff condition or need for surgery was unrelated to Petitioner's work for Respondent. (RX2 at 14) He believed that the MRI showed some degenerative fraying or partial-thickness tearing of the rotator cuff, and that there was no evidence of any traumatic event or incident causing the tear. (Id. at 10) He testified that partial-thickness degenerative tearing is an attritional phenomenon present in a high number of individuals over the age of 50 or 60, and Petitioner's history of events corroborated his opinion that the findings of the MRI were a pre-existing problem. (Id. at 11) According to his testimony, an individual with a pre-existing partial-thickness rotator cuff tear whose job does not require heavy-lifting duties above the head, shoulder or chest level, the work is unlikely to cause a permanent aggravation of the pre-existing tear. (Id. at 14)

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The doctor testified on cross that "an individual with a rotator cuff tear that I think is pre-existing, that any type of activity can cause an aggravation." (Id.) He testified that the letter sent by Respondent provided more information about Petitioner's job duties related to a lack of overhead work and that "due to the fact that she did no heavy lifting, she didn't hardly ever lift above her waist level, the boxes were small, I don't think there is any substantial inciting event that could have caused a long-standing aggravation to her problem." (Id. at 18-19) He further testified that Petitioner may have suffered a temporary aggravation by "tweaking" her shoulder, but that any activity of daily living, even as small as picking up a piece of paper, could cause such a temporary aggravation. (Id. at 19)

The doctor agreed that if Petitioner's symptoms began while washing walls at work, then he could consider Petitioner's work to be a causative factor. He also testified that based on the updated information that he was provided, surgery is a potential need for her right shoulder. (Id. at 23).

The Petitioner was sent by her attorney for an independent medical exam with Dr. Anthony Cummins, an orthopedic surgeon at Lake Cook Orthopedic who evaluated her on August 12, 2014. (PX5) He testified in his evidence deposition that she gave a history of ongoing right shoulder pain and difficulty reaching overhead which began after she was cleaning walls and assembling boxes at work. (Id. at 6). On exam he noted tenderness in the shoulder region around the sub-acromial space, a positive impingement sign, a positive O'Brien's test and decreased range of motion. (Id. at 9). Dr. Cummins also reviewed the MRI. His diagnosis was a partial rotator cuff tear. Dr. Cummins reviewed her medical records from Dr. Levi and the report from Dr. Bare. Dr. Cummins testified that her temporary relief following the injection in her shoulder confirmed the diagnoses, and that her treatment had been appropriate to date. Dr. Cummins testified that he agreed with the treating doctor, Dr. Levi, that she should undergo surgery to repair her shoulder. (Id. at 13.) Dr. Cummins testified that if Petitioner's job duties required her to reach overhead to wash mirrors, windows, and walls and if she used a brush on a broomstick to reach over head to wash walls, then it was his opinion that those job duties were a causative factor in her condition and need for surgery given the Petitioner's history and exam findings,. (Id. at 14-15).

The Petitioner testified that she continues to have pain in her right shoulder equivalent to a 9 out of 10 point scale. (R. 69). She wants to have the surgery to her right shoulder.

CONCLUSIONS OF LAW:

With respect to issues (C), did an accident occur that arose out of and in the course of employment, and (F), whether the Petitioner's current condition of ill being in her shoulder is causally related to the work accident, the Arbitrator finds the following:

Petitioner described seven different cleaning tasks that required her to lift her arm over her head: cleaning the mirrors, the windows, the doors, the walls, the

machines, the air vent on the ceiling, and throwing out the garbage bags. The Petitioner's specificity, including her explanation of how she climbed onto the sinks, used step stools, scraped the machines with a spatula, and her frequent reference that she had to get on her "tippy toes" to reach many of the areas, lends credibility to her testimony.

Mr. Schiavone's testimony was less specific. Notwithstanding the fact that he admitted that the Petitioner was one of the better workers (R. 116), most of his testimony was about the tasks required of Level 1 janitors in general, not the Petitioner specifically. When Mr. Schiavone described the job requirements on direct, he did not mention that they had to clean the vents on the ceiling; however, he admitted that the vents did need to be cleaned during cross examination. (R. 115). He admitted that the Petitioner had to clean the machines and did not dispute that the task required her to reach over her head with a spatula to scrape them. He did not dispute that she had to throw the garbage bags over her shoulder to dispose of them. He did not dispute that she had to reach over her head to clean the mirrors in all the bathrooms.

Other parts of Mr. Schiavone's testimony were vague with respect to the duties of a cleaning person working for Respondent. He testified that the job required cleaning the door handles on the bathrooms, but not the door handles on the offices. (R. 117). He claimed that the workers were not expected to clean the doors to the offices, contrary to the Petitioner's specific testimony, notwithstanding the fact that he stated they were expected to clean everything that was dirty (R. 104, 119). Mr. Schiavone suggested that the walls in the factory and bathrooms do not get dirty over four feet high, but later admitted that he only inspected the bathrooms every other day and he only did so after they had been cleaned (R. 119). As such, he would have no way of ascertaining how dirty the walls or other areas of the bathrooms became before they were cleaned. When he was asked if he ever inspected the bathrooms in their dirty state he replied: "I am not that kind of supervisor." (R. 119).

The Arbitrator finds that the Petitioner's description of her job duties is credible, and that she did have to reach over her head on a regular and frequent basis while cleaning the factory and when she assembled boxes.

The parties agree that the Petitioner did not transfer out of her cleaning job to the box assembly job until mid-October, after she brought in a note from her doctor. The records of Dr. Colin confirm that she was seen there on October 9, 2013 with complaints of pain in both her shoulders, among other things, and that she attributed her pain to lifting over her head doing her housekeeping duties at work. This is this consistent with her testimony about her job duties, and her testimony regarding the onset of shoulder pain during the performance of her housekeeping duties, before she was transferred to the box assembly job. This is also consistent with her first visit to Dr. Levi wherein she states that her shoulder pain began in October 2013 from cleaning with her arms at or above shoulder level. The records from Physicians Immediate Care dated November 22, 2013, where she was sent by the Respondent after she complained of increased pain assembling boxes, states

that her shoulder pain had actually began previously and was "aggravated" when she started lifting boxes at work. All of the foregoing indicates that her overhead housekeeping duties contributed to the onset of her shoulder pain, which was made worse when she began the box assembly job.

The onset of her shoulder pain prior to her October 9, 2013 visit, at a time when she was still performing her housekeeping duties, is contrary to the information provided to Dr. Bare prior to his deposition. In the letter that the Respondent sent to Dr. Bare, the Respondent claimed that she did not have pain in her right shoulder until after she started the box assembly job. Furthermore, the letter also erroneously states that she did not have to reach overhead while performing her job duties. The letter states that she only had to clean mirrors, walls or windows once per day, contrary to the Petitioner's testimony that she cleaned the bathrooms daily. Moreover, the letter fails to mention her need to clean the machines, take out the garbage and clean the ceiling vents. The letter states that "[u]se of a broomstick allowed her to complete the cleaning without extending her arms over her shoulder, as the tops of the mirrors she was cleaning were approximately six feet from the floor.

There is no dispute that the Petitioner did not use the broomstick to clean the mirrors. Mr. Schiavone agreed that she would use a window cleaner and a hand towel to complete that task. It is counterintuitive to imagine someone using a broom stick to reach areas over one's head with raising her arms to at least shoulder level. Notwithstanding the letter, Dr. Bare testified that if the Petitioner's history is correct, then her job duties are a causative factor in her condition. (RX2, at 18, 20, 21, 24, 32).

Causation is also supported by the testimony of Dr. Cummins, and the records of Dr. Levi. The hypothetical posed to Dr. Cummins is consistent with the Petitioner's credible testimony of her job duties. Dr. Cummins testified that it is his medical opinion, based upon a reasonable degree of medical and surgical certainty, that her work activities caused the shoulder pain she is experiencing. (PX5 , page 15). Dr. Levi states in his records that "It is evident of the fact that she was working for four years doing the same work of cleaning with the right arm. It is what produced the symptoms." He has requested that workers' compensation authorize the surgery from the beginning.

There is no evidence that the Petitioner had any non-work related causes of her pain. While the records from Physicians Immediate Care contain somewhat contradictory comments (they state she has "no similar problems in the past" and that "she has had pain in her right shoulder for years"), no records were discovered that would indicate prior pain complaints.

Based on the above mentioned facts and the records as a whole, the Arbitrator finds that the Petitioner suffered an accident that arose out of and in the course of her employment with the Respondent, and that her current condition of ill being in her shoulder is causally related to her job duties for the Respondent.

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With respect to issues (K), is the Petitioner entitled to any prospective medical care, the Arbitrator finds the following:

The Petitioner has attempted conservative measures to cure her condition, including physical therapy, medications, injections and activity modification. She continues to have severe right shoulder pain and desires the surgery. Dr. Levi and Dr. Cummins agree that she needs right shoulder surgery. Dr. Bare stated on direct exam that, after learning of her updated treatment subsequent to his initial report, he has no opinion as to whether she needs surgery or not as of the date of his deposition. However, he admitted in cross examination that he thinks surgery is a potential need (RX2, page 23).

For the foregoing reasons the Arbitrator finds that the arthroscopic surgery recommended by Dr. Levi is medically necessary and orders the Respondent to authorize and pay for same and its related treatment.

With respect to issues (L) what TTD benefits are owed, the Arbitrator finds the following:

The Petitioner testified that she has not worked since Dr. Levi took her off work on February 7, 2014. The records of Dr. Levi indicate that he has kept her off work since then as he awaits approval for her surgery. Consequently, the Arbitrator awards TTD from February 8, 2014 through September 9, 2015, the date of trial.

With respect to issues (O), Prospective medical:

Petitioner asserts that the Arbitrator should find that the "knee surgery" prescribed by Dr. Levy and Dr. is "medically necessary" and should therefore order the Respondent to authorize and pay for same.

Petitioner's testimony at the hearing was focused on overhead work activities with respect to her right shoulder condition. Petitioner has offered insufficient evidence with respect to how her job duties related to any alleged knee condition. Accordingly, The Arbitrator declines to make such a finding as there is insufficient evidence contained in the record that would support such an award.

2018 IL App (3d) 170725WC-U

Order filed July 9, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

GEORGE CAMPBELL,	)	Appeal from the Circuit Court
	)	of the Twelfth Judicial Circuit,
Appellant,	)	Will County, Illinois
	)	
v.	)	Appeal No. 3-17-0725WC
	)	Circuit No. 17-MR-235
	)	
ILLINOIS WORKERS' COMPENSATION	)	Honorable
COMMISSION, *et al.*, (Central Freight	)	John C. Anderson,
Lines, Appellees).	)	Judge, Presiding.

PRESIDING JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Hoffman, Hudson, Harris, and Barberis concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The Commission considered and rejected the claimant's claim that he sustained a repetitive trauma injury with a manifestation date of February 19, 2010 (as opposed to a traumatic injury sustained on that date); and (2) the Commission's finding that the claimant failed to prove that he sustained accidental injuries arising out of and in the course of his employment with the employer was not against the manifest weight of the evidence.

¶ 2 The claimant, George Campbell, filed an application for adjustment of claim under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2010)), seeking benefits for

repetitive trauma injuries to his back and person as a whole which he claimed were causally connected to his employment as a truck driver for the employer. The claimant alleged that he had sustained severe back pain due to "repeated lifting of freight" and "vibration" from a broken seat in his truck. He alleged a manifestation date of February 19, 2010. After conducting a hearing, an arbitrator found that the claimant had failed to prove that he sustained an accident arising out of and in the course of his employment with the employer and denied the claimant's claim for benefits.

¶ 3 The claimant appealed the arbitrator's decision to the Illinois Workers' Compensation Commission (Commission). The Commission unanimously affirmed and adopted the arbitrator's decision.

¶ 4 The claimant then sought judicial review of the Commission's decision in the circuit court of Will County, which confirmed the Commission's decision.

¶ 5 This appeal followed.

¶ 6 FACTS

¶ 7 The claimant worked for the employer as a pick-up and delivery truck driver. His duties included driving, loading and unloading freight, and inspecting his truck before and after trips.

¶ 8 In order to load and unload freight, the claimant had open and close the door on his trailer many times per day. To do that, the clamant had to manipulate a latch to open the door, raise the door upward using a handle, and then lower the door again and secure the latch. The claimant testified that, beginning in 2009, the trailer door in his truck became extremely difficult to open. The claimant stated that he reported this issue to the employer in several of his Driver Vehicle Reports (DVRs), which truck drivers were required to prepare each day they drove. During the arbitration proceeding, the claimant introduced copies of 16 DVRs that he had submitted to the

employer between June 24, 2009, and August 11, 2009. Five of these reports referenced problems with the trailer door getting stuck or not closing easily.

¶ 9 The claimant testified that he experienced other problems with his truck in 2009, including brakes that were difficult to push (which caused him to jolt back and forth) and a leak in his air-glide seat (which caused him to slam to the floor and to slam his head on the ceiling while driving). He claimed that he reported these problems to the employer both before and after August 11, 2009. Several of the DVRs the claimant introduced mention that the brakes on the claimant's truck were "bad," "very stiff," or "spongy." However, none of them reference any problems with the driver's seat. The claimant testified that the employer never fixed any of the truck maintenance problems he reported.

¶ 10 The claimant testified that, at some point during 2009, he began to experience pain in his back and neck that progressively worsened. The claimant stated that, by January 2010, he was unable to perform his daily activities without pain.

¶ 11 On January 23, 2010, the claimant saw Dr. Shahid Masood, his family physician,[1] at Internal Medicine and Family Practice in Joliet. The claimant complained of back and neck pain, and he told Dr. Masood that his back and neck hurt from performing his duties as a truck driver. Dr. Masood's medical record of that visit reflects that the claimant was complaining of difficulty driving his truck and of pain in his neck and back. Dr. Masood recommended x-rays of the claimant's cervical and lumbar spine, which were performed on February 5, 2009. The x-rays of the claimant's cervical spine revealed moderate degenerative disc changes at C4-C5 and C5-C6 but normal anatomical alignment. The x-rays of the claimant's lumbar spine revealed a

[1] Dr. Masood had been the claimant's family physician for approximately 15 years at that time.

very mild spondylosis[2] which had progressed when compared to a prior study that was performed in 2007.

¶ 12 The claimant testified that, on the morning of February 19, 2010, he felt a sharp pain in his back while attempting to lift the door on his trailer. The claimant stated that the trailer door would not lift up and he had to exert excessive force to pull it open. The claimant testified that, at approximately 9:00 that morning, he told Tom Kovalik, the general manager of the employer's Bolingbrook facility, that he had felt pain in his back after pulling his trailer door. According to the claimant, Kovalik asked him whether he needed medical attention, and the claimant responded that he was already seeing a doctor for his back pain. Although the claimant acknowledged that it was the employer's policy to complete an incident report whenever an employee reported a work injury, the claimant testified that Kovalik did not ask the claimant to complete an incident report and the claimant was unsure whether Kovalik ever completed such a report.

¶ 13 The claimant testified that, during the time leading up to his visit to Dr. Masood in late January of 2010, it did not occur to him that his back and neck symptoms could be work related. On cross-examination, the claimant stated that, although he had been experiencing back pain prior to February 19, 2010, it was on that date that he became aware that his back and neck pain were related to his work. The claimant testified that he filed a claim alleging a February 19, 2010, accident date because his pain had been getting worse and was so "horrible" on that day that he reported it to Kovalik. Although the claimant continued to work after February 19, 2010,[3] he testified that his pain became worse thereafter and he was finding it increasingly more

[2] "Spondylosis" is a degenerative process affecting the vertebral disc and facet joints that gradually develops with age.

[3] The claimant's time logs indicate that he worked a full 8.75-hour day on February 19, 2010, 44.42 hours

difficult to work.

¶ 14 On February 20, 2010, the claimant returned to Dr. Masood. Dr. Masood's medical record of that visit reflects that the claimant continued to complain of neck and back pain and reported that he was unable to drive his truck. However, Dr. Masood's February 20, 2010, medical record does not mention that the claimant reported sustaining a work accident or injury on February 19, 2010. Dr. Masood examined the claimant and reviewed the claimant's prior x-rays. Upon examination, the claimant complained of tenderness over the cervical and lumbar spine. Dr. Masood ordered MRIs of the claimant's cervical and lumbar spine.

¶ 15 The MRIs were performed on February 27, 2010. The cervical MRI revealed degenerative changes at C4-C5 and C5-C6 with mild stenosis but without any compression of the spinal cord, and a mild disc protrusion at C6-C7 with no spinal stenosis. The lumbar MRI showed: (1) a "tiny" central disc protrusion at L4-L5 without any spinal stenosis or nerve root displacement; and (2) a mild amount of osteophyte formation in the right paracentral and right lateral location of L5-S1 causing minimal encroachment on the right neural foramen fat.

¶ 16 On March 2, 2010, Dr. Masood drafted a letter to the claimant "strongly recommending" that the claimant apply for Social Security disability benefits.[4] In the letter, Dr. Masood stated that the February 27, 2010, MRIs "show[ed] stenosis and disc herniation in [the claimant's] lumbar and cervical spine." Dr. Masood further noted that the claimant had "issues of pain in the neck, back, and lower extremities along with numbness and radiculopathy" and "a history of COPD with a nodule in [his] right lung." Dr. Masood's letter did not reference any connection between any of the claimant's medical conditions and his employment.

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during the week of February 22, 2010, 45.08 hours during the week of March 1, 2010, and 34.65 hours during the week of March 8, 2010.

[4] The letter was dated "March 2, 2009," but Dr. Masood testified that this was a typographical error. Dr. Masood stated that the letter was actually written on March 2, 2010.

¶ 17 On March 12, 2010, the employer informed the claimant that its Bolingbrook terminal was being closed, effective immediately. On March 15, 2010, the claimant came to work to pick up his final check. At that time, he had a conversation with Kovalik. The claimant testified that he told Kovalik that he had sustained a work-related injury, that his neck and back injury was "not over," and that he might never be able to operate a commercial vehicle again because his doctor had recommended that he apply for disability.

¶ 18 Kovalik disputed the claimant's testimony. During his evidence deposition, Kovalik testified that: (1) Kovalik was the only manager of the Bolingbrook facility during the relevant time period; (2) Kovalik was the "focal point" for handling workplace injuries; (3) when work injuries were reported, Kovalik would enter the information into his computer and send it to his immediate manager and to the employer's safety department; (4) the claimant never reported that he injured his back or neck at work; (5) when Kovalik spoke with the claimant on March 15, 2010, the claimant told Kovalik that he "may not be working much longer," but Kovalik was not sure whether this was because of the claimant's health or because of his wife's health; (6) Kovalik first became aware that the claimant was claiming a work-related injury when he spoke with one of the employer's attorneys well after the Bolingbrook facility had been closed; (7) had the claimant reported a work-related injury, Kovalik would have sat down with him, assessed whether medical attention was needed, and completed an incident report; and (8) on a previous occasion, the claimant had failed to report a prior work-related injury, and the employer had initiated disciplinary action against the claimant as a result.

¶ 19 On March 20, 2010, the claimant returned to Dr. Masood. He complained of pain in his neck as well as back pain that radiated into his legs. He told Dr. Masood that he was no longer able to work. The claimant saw Dr. Masood again on April 27, 2010. At that time, the claimant

complained of neck and back pain that radiated sideways. Dr. Masood recommended a neurosurgical consultation and referred the claimant to Dr. Mark Lorenz, an orthopedic surgeon.

¶ 20 That same day, Dr. Masood drafted an opinion letter regarding the claimant's back condition and its potential cause. In the letter, Dr. Masood noted that he was currently treating the claimant for "back pain resulting from a herniated disc," and he opined that the claimant's herniated disc "may have been caused from his duties *** at [the employer]." Dr. Masood stated that the claimant's duties included, but were not limited to: (1) loading and unloading freight; (2) opening and closing roll-up trailer doors that were in poor operating order; (3) pulling dock plates; (4) restacking freight that had fallen over or had been improperly loaded; (5) hooking and unhooking trailers by dolly handles that were poorly maintained; (6) "hooking air lines to hook/drop hook trailer"; and (7) climbing in and out of his truck. Dr. Masood noted that, "[a]ccording to [the claimant], he had no issues of back pain or any past injuries prior to his employment with [the employer." Dr. Masood opined that the claimant was no longer able to drive a truck or lift more than 10 pounds.

¶ 21 On July 26, 2010, the claimant returned to Internal Medicine and Family Practice (Dr. Masood's practice group), complaining of a backache as well as shoulder and neck pain. The claimant did not attribute these problems to a work-related event. The treating doctor assessed spinal stenosis, backache and degenerative disc disease, bilateral upper extremity radiculopathy, and COPD.

¶ 22 On August 11, 2010, the claimant saw Dr. Lorenz for an initial evaluation. Dr. Lorenz's medical record of that visit reflects that the claimant told him that he was in good health until February 19, 2010, when he forced a door open in the back of his truck that did not work well and hurt his back. The claimant completed a patient questionnaire in which he stated that he

began experiencing pain in his spine on February 19, 2010, and that he had no previous problems with his low back. Dr. Lorenz's medical record notes that the claimant also reported "a number of incidences *** where he was bounced on a malfunctioning air-glide chair causing him to strike the top of the cab as he was driving." The claimant testified that he also advised Dr. Lorenz that his back had hurt from other repetitive tasks he performed as a truck driver, including lifting trailer doors. However, Dr. Lorenz's August 11, 2010, medical record does not include any reference to that statement. Upon examination, the claimant exhibited a "fairly significant pain response through essentially all movement and touching of the upper and lower back." However, Dr. Lorenz noted that: (1) the claimant's neurological examination was essentially normal; (2) the MRI of the claimant's lower back was "rather unremarkable"; and the x-rays of the claimant's lower back showed only "very minimal degenerative changes." Dr. Lorenz diagnosed the claimant with chronic pain syndrome that was "probably aggravated by the lifting incident at work." Dr. Lorenz opined that the claimant was unable to work and that he was "definitely not a surgical candidate." He ordered a repeat MRI of the claimant's cervical spine.

¶ 23 The cervical MRI ordered by Dr. Lorenz was performed on August 16, 2010. The MRI revealed degenerative changes at C4-C5 and C5-C6, moderate stenosis at C5-C6, and neural foraminal and mild canal stenosis at C4-C5 and C6-C7.

¶ 24 On December 1, 2011, the claimant underwent a functional capacity examination (FCE). The therapist opined that the claimant demonstrated consistent performance throughout the testing ad that the claimant was able to work at the sedentary level for eight hours per day with occasional lifting of up to 15 pounds.

¶ 25 On December 5, 2011, the claimant returned to Dr. Lorenz. The claimant reported that his back pain was his biggest problem and that he was not concerned about his neck pain. Dr.

Lorenz noted that the claimant had degenerative changes in his cervical and lumbar spine and that his neurological examination was normal. He again concluded that the claimant was not a surgical candidate. Dr. Lorenz concluded that the claimant could work in a sedentary position. He recommended that the claimant return to work within the parameters and restrictions set by the FCE.

¶ 26 During his evidence deposition, Dr. Masood testified that he did not recall whether the claimant reported an acute incident of trauma occurring on February 19, 2010, when he saw the claimant the following day. Nor could Dr. Masood remember whether the claimant had reported such an injury at any time during his treatment. He could not recall whether the claimant reported that he had difficulty opening trailer doors or that he sustained any specific injury from lifting trailer doors. Nor did Dr. Masood recall whether the claimant reported any injuries caused by his bouncing around on a malfunctioning air glide driver's seat. Dr. Masood acknowledged that, if the claimant had reported any such specific incident, he would normally notate the incident in his medical reports.

¶ 27 Dr. Masood testified that the work tasks the claimant was performing as a truck driver during the year leading up to the time he saw the claimant in January and February of 2010 (*i.e.*, the job tasks listed in Dr. Masood's April 27, 2010, opinion letter) aggravated the claimant's cervical and lumbar conditions, rendering them symptomatic. Dr. Masood opined that the claimant's current low back and cervical spine conditions were more related to his driving a truck than to any specific incident of trauma.

¶ 28 During cross-examination, Dr. Masood admitted that the job duties listed in his April 27, 2010, letter were reported to him by the claimant, and Dr. Masood was never able to independently confirm that the information that the claimant gave him about his job duties was

correct. Dr. Masood never reviewed a written description of the claimant's job duties from the employer or a videotape depicting the performance of the claimant's job duties. Dr. Masood did not know the type of truck the claimant drove, how much time each day the claimant spent driving, unloading freight, or performing his other work duties, how much force was required to lift a roll-up door on a trailer, or the average weight of the freight the claimant lifted on the job.

¶ 29 Dr. Masood acknowledged that he had treated the claimant for back pain symptoms on two occasions before January of 2010. In September 2002, the claimant saw Dr. Masood with complaints of low back pain. Dr. Masood prescribed Ibuprofen and a muscle relaxer and ordered x-rays of the claimant's thoracic and lumbar spine. He also recommended an MRI of the "thoracic lower lumbar" spine "to rule out disc herniation" if the claimant's condition did not improve. The x-rays were normal, and the claimant did not undergo an MRI at that time. Dr. Masood's medical records indicate that the claimant underwent another x-ray of his lumbar spine in March of 2007. Although Dr. Masood did not recall ordering that x-ray, he acknowledged that the claimant must have had symptoms of back pain at that time. Dr. Masood opined that the 2002 and 2007 treatments were for muscle strains or spasms, not for degenerative joint disease. Because the 2002 x-ray showed no arthritis, Dr. Masood opined that the 2002 incident was "probably *** just a one-time episode of back pain." Dr. Masood opined that the claimant's degenerative joint disease did not become symptomatic prior to January of 2010.[5]

¶ 30 Dr. Lorenz also testified via evidence deposition. In his deposition, Dr. Lorenz opined that the February 19, 2010, incident aggravated the degenerative condition in the claimant's neck

[5] The claimant admitted having one or two prior complaints of back pain over the 15 years that he treated with Dr. Masood, but nothing "major" and nothing to the extent of the pain he began experiencing in January 2010. During an October 22, 2009, medical examination for a commercial driver fitness determination, the claimant indicated that he had no history of spinal injury or disease and no chronic low back pain.

and lower back. When asked whether lifting trailer doors over the period of time the claimant worked as a truck driver also aggravated his preexisting condition, Dr. Lorenz responded in the affirmative. Although Dr. Lorenz concluded that the claimant did not have any back pain prior to the February 19, 2010, incident, he opined that the degenerative changes in the claimant's spine "could be" related to "chronic lifting and chronic vibrational exposure." Dr. Lorenz explained that "with truckers, it is very common to have a fairly high level of low back and neck pain, including degenerative changes, and that is thought by epidemiologists to be related to their chronic long sitting and vibrational exposure."

¶ 31 Dr. Lorenz confirmed his diagnoses of chronic neck and back pain and chronic pain syndrome. He stated that, when he examined the claimant, the claimant exhibited a "significant pain response essentially with everything that we did, all movements and even touching the upper as well as lower part of his back." Dr. Lorenz noted that the claimant's neurological examination was normal, and he described the claimant's pain complaints as "extraordinary and unexpected." He explained that chronic pain syndrome "suggests a greater pain response that one would expect for the pathology at hand." He further opined that the claimant was permanently restricted to working at a sedentary level and that this work restriction was causally related to both the degenerative changes in the claimant's spine and the February 19, 2010, work incident.

¶ 32 On May 8, 2012, the claimant was evaluated by Dr. Kevin Walsh, an orthopedic surgeon who served as the employer's section 12 independent medical examiner. According to Dr. Walsh's May 16, 2012, medical report, the claimant reporting suffering from low back pain and neck pain and "he believe[d] his neck pain [was] due to repetitive trauma from operating a truck with a bad air seat causing him to strike his head on the roof of the cab and bounce around inside

his cab." The claimant also reported "a history of low back pain which arose after opening the trailer door on February 19, 2010." According to Dr. Walsh's report, the claimant denied having any history of back pain prior to the February 19, 2010, incident.

¶ 33 After examining the claimant and reviewing the claimant's medical records, Dr. Walsh opined that "[i]t is not at all likely the patient's work activity caused any substantial damage to the cervical and lumbar spine." Dr. Walsh opined that "[a]ll of the imaging studies show changes which are consistent with the patient's age," and "[n]one of the imaging studies show anything that specifically can be related to the specific work injury to the [claimant's] cervical spine or chronic injury to the lumbar spine." Dr. Walsh diagnosed the claimant with degenerative changes in the cervical and lumbar spine and subjective complaints of substantial pain and discomfort. He opined that both his examination of the claimant and the claimant's prior imagining studies revealed "a paucity of objective abnormalities." Dr. Walsh further opined that the claimant's subjective complaints were "out of proportion to objective abnormalities," and, more likely than not, were unrelated to a work injury. He noted that the claimant "clearly had positive Waddell signs."

¶ 34 Dr. Walsh further opined that there was "no evidence in the[] medical records that the [claimant] suffered an aggravation or acceleration of a preexisting osteoarthritic spine." Dr. Walsh concluded that, more likely than not, all of the MRI findings were degenerative rather than traumatic in origin. Moreover, Dr. Walsh opined that there was "no evidence that the [claimant's] current subjective complaints were causally related" to the work injuries reported by the claimant.

¶ 35 Dr. Walsh concluded that the claimant "most certainly [was] not a candidate for any surgical intervention." He opined that the claimant required no further medical intervention,

pain management, or work restrictions as a result of his claimed work injuries. Dr. Walsh concluded that the claimant could be released to return to work without restriction based on his objective physical examination and his imaging studies.

¶ 36 During his subsequent evidence deposition, Dr. Walsh testified consistently with his May 16, 2012, medical report. He confirmed that the claimant had reported neck pain which the claimant attributed to repetitive, work-related trauma, and back pain which arose after the February 19, 2010, work incident. Dr. Walsh acknowledged that the February 27, 2010, MRI of the claimant's cervical spine showed abnormalities and that the February 27, 2010, MRI of the claimant's lumbar spine showed a "very tiny" central disc protrusion (*i.e.*, herniation). However, he opined that: (1) it was not likely that the claimant injured his back or neck as a result of his work activities; (2) the claimant's subjective reports of pain were out of proportion to any objective medical findings; (3) the changes seen on the claimant's spinal MRIs were degenerative in nature and were consistent with the claimant's age (and also with the fact that the claimant's symptoms worsened after he stopped working); (4) there was no evidence that the claimant had suffered an aggravation of preexisting degenerative spinal condition; and (5) the degenerative changes to the claimant's lumbar spine shown on the claimant's MRI studies were caused by aging and were not caused by the claimant's work activities.

¶ 37 The arbitrator found that the claimant failed to prove an accident arising out of and in the course of his employment. The arbitrator found that the claimant's testimony lacked credibility in light of the medical evidence. The arbitrator noted that, when the claimant saw Drs. Walsh and Lorenz, he was "quite emphatic" that he sustained an acute injury to his low back while lifting a defective trailer door on February 19, 2010, and that he was asymptomatic beforehand. However, when he saw Dr. Masood on February 20, 2010, the day after the claimed lifting event

of February 19, 2010, the claimant did not report any incident occurring the day before. In fact, Dr. Masood testified that the claimant never reported injuring himself on February 19, 2010, and Dr. Masood's treatment records are "devoid of any mention of [the claimant] injuring his low back or neck at work either on February 19, 2010 or in the performance of his regular duties." When [the claimant] was seen on February 20, 2010." The arbitrator found it "blatantly incredible that [the claimant] would not mention an acute incident of trauma to his primary doctor one day after it had occurred but later report its occurrence to several medical experts."

¶ 38 Moreover, the arbitrator found the claimant's report that he was asymptomatic until February 19, 2010, to be contrary to the evidence. The arbitrator noted that Dr. Masood's medical records reflect that the claimant complained of low back or neck conditions in 2002, more than eight years prior to the alleged incident of February 19, 2010.

¶ 39 Further, the arbitrator found that there was "no indication in either the testimony or the medical records that [the claimant] had any complaints contemporaneous with any particular work activity." The arbitrator noted that Kovalik, the claimant's manager, denied that the claimant had ever reported complaints or an injury related to his low back or neck. The Commission found it "unbelievable that *** Kovalik would initiate disciplinary action against [the claimant] for his failure to report a previous work related injury, but then neglect to document injuries when [the claimant] allegedly reported them on February 19, 2010 and March 15, 2010."

¶ 40 Based on all these facts, the arbitrator concluded that the claimant "did not sustain an accident on February 19, 2010," and found all remaining issues moot.

¶ 41 The claimant appealed the arbitrator's decision to the Illinois Workers' Compensation Commission (Commission). The Commission unanimously affirmed and adopted the arbitrator's

decision. The claimant then sought judicial review of the Commission's decision in the circuit court of Will County, which confirmed the Commission's decision.

¶ 42 This appeal followed.

¶ 43 ANALYSIS

¶ 44 On appeal, the claimant argues that the Commission erred as a matter of law by failing to consider the merits of his repetitive trauma claim. In the alternative, the claimant contends that the Commission's finding that he failed to prove a repetitive trauma injury was against the manifest weight of the evidence. We address these claims in turn.

¶ 45 The claimant argues that the Commission erred by failing to address the merits of his repetitive trauma claim and by analyzing his claim under the wrong legal theory. According to the claimant, the Commission found only that the claimant failed to prove a *traumatic accidental injury* on February 19, 2010, and did not address the repetitive trauma claim actually pled by the claimant (which alleged February 19, 2010, as a *manifestation date*, not the date of a traumatic injury). The claimant notes that the Commission's decision contains no references to "repetitive trauma" or to "manifestation date," and he maintains that all of the Commission's stated legal findings relate entirely to its conclusion that the claimant failed to prove a traumatic injury on February 19, 2010 (a claim that the claimant never raised or argued). The claimant maintains that the Commission erred as a matter of law by failing to consider and decide his repetitive trauma claim on its merits according to the proper legal theory. More specifically, the claimant contends that the Commission erred by failing to consider whether the date of injury he alleged in his Application for Adjustment of claim (February 19, 2010) was an appropriate manifestation date for his alleged repetitive trauma. Citing our decisions in *Edward Hines Precision Components v. Industrial Comm'n*, 356 Ill. App. 3d 186 (2005), and *Luttrell v. Industrial*

Comm'n, 154 Ill. App. 3d 943 (1987), the claimant argues that we should remand this matter to the Commission so that his repetitive trauma claim may be properly analyzed and decided.

¶ 46 The claimant in a worker's compensation proceeding has the burden of proving by a preponderance of the credible evidence that he suffered an accidental injury which arose out of and in the course of his employment. *Paganelis v. Industrial Comm'n*, 132 Ill. 2d 468, 480 (1989). An injury is considered "accidental" under the Act if it is caused by the performance of a claimant's job, even though it develops gradually over a period of time as a result of repetitive trauma. *Peoria County Belwood Nursing Home v. Industrial Comm'n*, 115 Ill. 2d 524, 529–30 (1987); *Fierke v. Industrial Comm'n*, 309 Ill. App.3d 1037, 1040 (2000). A claimant alleging a repetitive trauma need not prove a specific traumatic injury or a "final, identifiable episode of collapse" during which the claimant's bodily structure suddenly gave way. *Luttrell*, 154 Ill. App.3d at 957. However, an employee who alleges injury based on repetitive trauma must meet the same standard of proof as other workers' compensation claimants alleging "accidental injury"; there must be a showing that the injury is work-related and not a result of the normal degenerative aging process. *Peoria County Belwood Nursing Home*, 115 Ill. 2d at 530; *Edward Hines Precision Components*, 356 Ill. App. 3d at 194. The date of injury in repetitive trauma cases is the date on which the injury manifests itself, meaning the date on which the fact of the injury and the causal relation to work would have become plainly apparent to a reasonable person. *Edward Hines Precision Components*, 356 Ill. App. 3d at 194.

¶ 47 Although the Commission's decision in this case primarily discusses the claimant's failure to prove a traumatic injury on February 19, 2010, it acknowledges that the claimant brought a claim for repetitive trauma and it appears to reject that claim as well. At the beginning of its "Findings of Fact" section, the Commission's decision states that "[t]his case involves a

petitioner claiming injuries to his low back and neck due to an alleged accident on February 19, 2010," but then immediately notes that the accident alleged by the claimant "*is both traumatic and repetitive in nature*." (Emphasis added.) Moreover, in its "Conclusions of Law" section, the Commission notes that, in finding that the claimant had failed to prove a work-related accident, the Commission "look[ed] to the complete medical records of Dr. Masood which are devoid of any mention of [the claimant] injuring his low back or neck at work either on February 19, 2010 *or in the performance of his regular duties*." (Emphasis added.) These statements indicate that the Commission was aware of the claimant's repetitive trauma claim, that it considered and weighed evidence that undermined any such claim, and that it implicitly found that the claimant had failed to prove a work-related accident under a repetitive trauma theory. Although the Commission erred by focusing its analysis primarily on a traumatic injury claim that was not raised by the claimant, its decision reflects that it also considered and rejected the claimant's repetitive trauma claim.[6]

¶ 48 Contrary to the claimant's argument, the fact that the Commission's decision does not reference the manifestation date alleged by the claimant or include the phrase "repetitive trauma" does not establish that the Commission failed to consider the claimant's claim. The phrase "repetitive trauma" and the concept of a manifestation date were developed "in order to establish a date of accidental injury for purposes of determining when limitations statutes, and notice requirements, begin to run." *Peoria County Belwood Nursing Home*, 115 Ill. 2d at 530-31; see

[6] Apparently, the Commission erroneously assumed that the claimant had alleged both a repetitive trauma injury and a traumatic injury sustained on February 19, 2010. It likely made this assumption because Drs. Lorenz and Walsh each opined as to the causal connection between the claimant's current neck and lower back conditions and the February 19, 2010, work incident. It is not surprising that Drs. Lorenz and Walsh rendered opinions on that issue given that the claimant had told each of them that he felt back pain (*i.e.*, that his preexisting back condition became symptomatic) for the first time during the February 19, 2010, work incident.

also *Edward Hines Precision Components*, 356 Ill. App. 3d at 194. Thus, where the dates of manifestation or notice are not at issue, the use, or nonuse, of such terms is irrelevant. *Edward Hines Precision Components*, 356 Ill. App. 3d at 194. Here, the Commission found that the claimant failed to prove a work-related accident. It could have reached that conclusion by determining that the testimony and medical evidence did not support a claim for a work-related repetitive trauma. The Commission did not need to address the propriety of the manifestation date asserted by the claimant to find that the claimant failed to prove a work-related repetitive trauma injury.

¶ 49 In addition, contrary to the claimant's assertion, *Luttrell* does not support the claimant's argument that we should remand this matter to the Commission for further (or more explicit) consideration of his repetitive trauma claim. In *Luttrell*, the claimant, who suffered from carpal tunnel syndrome, originally filed a claim for repetitive trauma under the Act, but requested during the arbitration hearing that his claim be considered under the Occupational Diseases Act (ODA) (820 ILCS 310/1 *et seq.* (West 2010)). The arbitrator denied benefits and the Commission affirmed. The circuit court affirmed the Commission's decision. After the Commission issued its decision, our supreme court decided *Peoria County Belwood Nursing Home*, which recognized claims for repetitive trauma under the Act. On appeal, we held that carpal tunnel syndrome is not a "disease" under the ODA and remanded the matter to the Commission for consideration of the claimant's repetitive trauma claim under the Act pursuant to *Peoria County Belwood Nursing Home*. *Luttrell*, 154 Ill. App. 3d at 957. We ordered the remand pursuant to section 19(a)(2) of the Act, which provides for the amendment of claims and the taking of further evidence by the Commission whenever a claimant "misconceives his remedy" by filing a claim under the ODA that should have been filed under the Act. 820 ILCS

305/19(a)(2) (West 2010). In this case, the claimant has not "misconceived" his remedy by filing his claim under the ODA. To the contrary, he has already raised a claim for repetitive trauma under the Act which the Commission has considered and rejected. Thus, unlike in *Luttrell*, section 19(a)(2) of the Act does not apply here, and there is no need for a remand.

¶ 50 In any event, even assuming *arguendo* that the Commission did not properly analyze the claimant's repetitive trauma claim, we could still affirm the Commission's decision. "We may affirm the Commission's decision on any basis supported by the record regardless of the Commission's findings or its reasoning." *Dukich v. Illinois Workers' Compensation Comm'n*, 2017 IL App (2d) 160351WC, ¶ 43 n.6; see also *General Motors Corp. v. Industrial Comm'n*, 179 Ill. App. 3d 683, 695 (1989). In other words, we review the result reached by the Commission, not the Commission's reasoning. The Commission's judgment in this case was that the claimant filed to prove a compensable work-related accident. The dispositive question is whether that judgment is against the manifest weight of the evidence, regardless of the rationale stated by the Commission.

¶ 51 This brings us to the alternative argument raised by the claimant in this appeal. The claimant argues that the Commission's finding that he failed to prove a work-related accident was against the manifest weight of the evidence. As noted above, to prove a work-related accident under a repetitive trauma theory, the claimant must prove that the injury is work-related and not a result of the normal degenerative aging process. *Peoria County Belwood Nursing Home*, 115 Ill. 2d at 530; *Edward Hines Precision Components*, 356 Ill. App. 3d at 194. In cases alleging repetitive trauma, the claimant generally relies on medical testimony establishing a causal connection between the work performed and the claimant's disability. *Nunn v. Illinois Industrial Comm'n*, 157 Ill. App. 3d 470, 477 (1987). A claimant may recover for the

aggravation or acceleration of a preexisting condition by a work-related repetitive trauma. *Cassens Transport Co., Inc. v. Industrial Comm'n*, 262 Ill. App. 3d 324, 331 (1994). To be recoverable, the claimant's work-related injury need not be the sole factor that aggravates a preexisting condition, as long as it is a factor that contributes to the disability. *Azzarelli Construction Co. v. Industrial Comm'n*, 84 Ill.2d 262, 267 (1981); *Cassens Transport*, 262 Ill. App. 3d at 331. Cases involving aggravation of a preexisting condition primarily concern medical questions, not legal questions. *Nunn*, 157 Ill. App. 3d at 478. This is particularly true in a repetitive trauma case, where the claimant must show that the injury is work related and not the result of a normal degenerative aging process. *Id.*

¶ 52 The existence of an accidental injury arising out of and in the course of employment is a question of fact for the Commission. *Cassens Transport*, 262 Ill. App. 3d at 331. Thus, where the claimant alleges accidental injuries caused by a repetitive trauma, it is for the Commission to determine whether a claimant's disability is attributable solely to a degenerative condition or to an aggravation of a preexisting condition due to a repetitive trauma. *Id.* It is also the Commission's province to judge the credibility of witnesses, to determine the weight to be given to their testimony, to draw reasonable inferences from the evidence, to resolve conflicts in the evidence (including conflicting medical testimony), to draw reasonable inferences from the evidence, and to choose among conflicting reasonable inferences. *Williams v. Industrial Comm'n*, 244 Ill. App. 3d 204, 209 (1993); *Fierke*, 309 Ill. App. 3d at 1039; *Fickas v. Industrial Comm'n*, 308 Ill. App. 3d 1037, 1041 (1999). We may overturn the Commission's factual determinations only when they are against the manifest weight of the evidence (*Williams*, 244 Ill.App.3d at 210), *i.e.*, only when the opposite conclusion is clearly apparent (*Westin Hotel v. Industrial Comm'n,* 372 Ill. App. 3d 527, 539 (2007)).

¶ 53 Applying these standards, we cannot say that the Commission's finding that the claimant failed to prove a work-related repetitive trauma injury was against the manifest weight of the evidence. Dr. Walsh opined that: (1) it was "not at all likely" that the patient's work activity caused any substantial damage to his cervical and lumbar spine; (2) the claimant's subjective reports of pain were out of proportion to any objective medical findings; (3) the changes seen on the claimant's spinal MRIs were degenerative in nature and were consistent with the claimant's age; (4) there was no evidence that the claimant had suffered an aggravation of preexisting degenerative spinal condition; and (5) the degenerative changes to the claimant's lumbar spine shown on the MRI studies were caused by aging and were not caused by the claimant's work activities or by any "chronic," work-related injury to the claimant's lumbar spine. Although Dr. Masood's and Dr. Lorenz's opinions conflicted with Dr. Walsh's opinions and provided some support for the claimant's repetitive trauma claim, it was the Commission's province to resolve conflicts in the medical opinion evidence. *Williams*, 244 Ill. App. 3d at 209; *Fickas*, 308 Ill. App. 3d at 1041. The Commission's decision to credit Dr. Walsh's opinions over those of Drs. Masood and Lorenz was not against the manifest weight of the evidence.[7]

¶ 54 Moreover, the claimant's testimony regarding his alleged repetitive trauma injuries was somewhat questionable given his inconsistent accounts of the date when he began experiencing back pain, his failure to produce evidence supporting his claim of repetitive trauma due to a malfunctioning driver's seat in his truck, his failure to report the alleged February 19, 2010, incident to Dr. Masood when he saw him the following day, the absence of an incident report for

[7] The Commission's decision to reject Dr. Masood's opinion that the claimant's job duties aggravated his preexisting cervical and lumbar spine conditions was reasonable because the foundation of Dr. Masood's opinion was shown to be dubious. During cross-examination, Dr. Masood acknowledged that, in rendering his causation opinion, he relied on the claimant's description of his job duties, he did not independently confirm the claimant's account of his duties, and he knew little about the nature of those duties.

that incident, and Kovalik's testimony that the claimant never reported experiencing a work-related injury to his back or neck.

¶ 55 Accordingly, there was ample evidence supporting the Commission's finding that the claimant failed to prove a work-related repetitive trauma. An opposite conclusion is not clearly apparent. We therefore affirm the Commission's decision. Because we affirm the Commission's finding of no work-related accident, we do not need to address the claimant's arguments regarding TTD and wage differential benefits.

¶ 56 CONCLUSION

¶ 57 For the foregoing reasons, we affirm the judgment of the circuit court of Will County, which confirmed the Commission's decision.

¶ 58 Affirmed.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

George L. Campbell,

Petitioner,

vs.

NO: 10 WC 18550

Central Freight Lines, Inc.,

17IWCC0004

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 19, 2015, is hereby affirmed and adopted.

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

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

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

DATED: JAN 11 2017
TJT:yl
o 1/10/17
51

Thomas J. Tyrrell

Kevin W. Lamborn

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CAMPBELL, GEORGE L
Employee/Petitioner

Case# **10WC018550**

CENTRAL FREIGHT LINES INC
Employer/Respondent

17IWCC0004

On 5/19/2015, 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 0.08% 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:

2998 QUINN MEADOWCROFT & MARKER
JASON A MARKER
400 W BOUGHTON RD SUITE 200
BOLINGBROOK, IL 60440

2965 KEEFE CAMPBELL BIERY & ASSOC
SEAN C BROGAN
118 N CLINTON ST SUITE 300
CHICAGO, IL 60661

STATE OF ILLINOIS)
)SS.
COUNTY OF WILL)

17IWCC0004

☐ 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

George L. Campbell
Employee/Petitioner

v.

Central Freight Lines, Inc.
Employer/Respondent

Case # **10** WC **18550**

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 **Gerald Granada**, Arbitrator of the Commission, in the city of **New Lenox**, on **April 9, 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 _____

FINDINGS

On **February 19, 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 not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was not*** given to Respondent.

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

In the year preceding the injury, Petitioner earned **$36,566.40**; the average weekly wage was **$703.20**.

On the date of accident, Petitioner was **56** years of age, ***married*** with **1** dependent children.

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

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

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

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

ORDER

Petitioner failed to meet his burden of proof on the issues of accident. Accordingly, Petitioner's claim for benefits is denied.

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

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

Signature of Arbitrator

5/15/15
Date

MAY 19 2015

17IWCC0004

FINDINGS OF FACT

This case involves a petitioner claiming injuries to his low back and neck due to an alleged accident on February 19, 2010. Petitioner's claimed accident is both traumatic and repetitive in nature. Respondent disputes this case based on the following issues: 1) accident, 2) notice, 3) causation, 4) TTD, 5) medical expenses and 6) nature and extent.

On February 19, 2010, George Campbell ("Petitioner") worked for Respondent as a pickup and delivery truck driver at the Respondent's Bolingbrook facility. He began working for Respondent in October 2008. Prior to working for Respondent, he worked as a truck driver for UPS for 30 years. He testified his job duties while working for Respondent involved making various stops, loading, unloading, picking up freight, and making deliveries. Petitioner approximated that 90% of his job was driving and the remaining 10% was unloading/loading his truck. He testified 90% of the unloading/loading was done with a fork truck and 10% was done by hand. He worked Monday through Friday. He had various routes and would make multiple stops each day.

Petitioner drove an International single axle. He testified the air glide driver seat was fine at first but that it began leaking air. Towards the end of 2009, he testified he would bounce up and down while driving and hit his head on the ceiling of the cab because of the air leak. He also testified there were problems with the door of his trailer in late 2009 and the brakes were no good. He further testified he reported the issues with the seat, trailer door, and brakes to Respondent via driver vehicle reports (DVR), which were required to be completed at the beginning and end of each day. . Petitioner offered as evidence 16 photocopies of carbon copies of DVRs with nonconsecutive dates from June 24, 2009 through August 11, 2009. Of the 16 reports from the one-and-a-half month period in 2009, five of them mention issues with a trailer door not closing easily or getting stuck. None of the reports indicate Petitioner injured himself while opening/closing the trailer door. None of the DVRs note any issues with Petitioner's air glide driver seat. Petitioner testified he reported similar issues with his truck and trailer after August 11, 2009, but he did not have any DVRs after August 11, 2009. He testified he may have had copies at one time, but they may have been thrown away. He also testified that he took his truck to a repair shop in August 2009 but repairs were never made and Petitioner offered no documentation to corroborate this claim.

Petitioner testified he began feeling neck and low back pain while working for Respondent and it gradually got worse. He testified he first sought medical attention for his complaints in January 2010. He further testified he was unable to do daily activities in January 2010 without pain. . He testified that when he saw Dr. Masood in January, 2010, he specifically told the doctor his symptoms were from lifting doors and his general job duties with Respondent. Following a February 2010 MRI, Petitioner testified Dr. Masood diagnosed a herniated disc and the doctor felt Petitioner was in bad shape.

Petitioner testified he spoke to the general manager of the Bolingbrook facility, Tom Kovalik, about his pain. He testified the conversation occurred in Mr. Kovalik's office at the Bolingbrook facility on February 19, 2010. That day, at approximately 9:30 a.m., Petitioner testified he was preparing to load his trailer at the Bolingbrook terminal before making his run. He further testified he attempted to lift his trailer door using what he characterized was excessive force and felt a sharp pain in his back. He testified he told Mr. Kovalik about the incident the morning it occurred. Petitioner testified Mr. Kovalik asked whether medical attention was needed, but Petitioner conveyed he was already seeing a doctor for his condition. Petitioner confirmed it was

17IWCC0004

Respondent's policy to complete an incident report upon an employee's reporting of a work injury, but Petitioner testified Mr. Kovalik did not ask him to complete an incident report and he was unsure whether Mr. Kovalik eventually completed an incident report.

Petitioner's time logs indicate he worked a full, 8.75-hour day on February 19, 2010. RX # 9. Petitioner then worked 44.42 hours throughout the week of February 22—February 26, 2010, 45.08 hours throughout the week of March 1—March 5, 2010, and 34.65 hours throughout March 8—March 11, 2010. RX # 9.

Petitioner testified he spoke with Mr. Kovalik a second time about his symptoms on March 15, 2010, the Monday after the terminal closed. He testified he told Mr. Kovalik that "the back injury was not over. And that, you know, we'll have to wait and see what happens." Petitioner further testified he told Mr. Kovalik on March 15, 2010 he might never be able to drive a truck because his doctor recommended he file for disability.

Tom Kovalik

Tom Kovalik testified via deposition on March 25, 2015. RX # 6. Mr. Kovalik is employed with Respondent as a manager of partnership relations. He began working for Respondent in May 2009 as a terminal manager at the Bolingbrook facility where Petitioner worked as a daytime pickup and delivery driver. He was the only manager of the facility from the time he was hired until it closed in March 2010. As terminal manager, Mr. Kovalik managed three supervisors, two clerical workers, approximately 14 to 19 drivers, and approximately eight to 10 part-time dockmen. Mr. Kovalik was responsible for the upkeep of the building and equipment and handled personnel issues. He was also the focal point for handling workplace injuries. When work injuries were reported, Mr. Kovalik would enter the information into his computer and send it to the Safety Department and his immediate manager.

Mr. Kovalik testified Petitioner never reported he injured his back or neck at work. He testified he first became aware Petitioner was claiming a work-related injury well after the Bolingbrook facility had closed when he spoke with one of Respondent's attorneys in 2010. He testified that had Petitioner reported an injury, he would have sat down with Petitioner, assessed whether medical attention was needed, and created an incident report. Mr. Kovalik further testified that when Petitioner previously failed to report a work-related injury, disciplinary action was initiated.

Mr. Kovalik testified the Bolingbrook terminal employees were notified of its closing on or about March 15, 2010 but Petitioner was not present at the meeting. Mr. Kovalik, however, spoke to Petitioner privately later that day in his office. Mr. Kovalik conveyed to Petitioner the terminal was closing and noted:

> **I knew there were other personal matters discussed. George says he was -- he may not be working much longer at that time. I didn't really get into it. I knew that his wife was ill, and I didn't expand on anything like that. It might have been for reasons of her health. It could have been reasons for his health. I didn't develop that.**

Mr. Kovalik confirmed Petitioner did not report a work-related injury to his back or neck during the private meeting on or about March 15, 2010 or at any time while he was employed by Respondent.

Pre-2010 Medical Treatment

On direct examination, Petitioner testified, prior to his incident on February 19, 2010, he had no previous back

problems and he only complained of back pain to his family doctor possibly once or twice in the 15 years prior to February 19, 2010. He testified he never had any x-rays of his low back prior to 2010. On cross examination, however, Petitioner testified he had back strains that started getting more severe in March 2009. He also testified he was having pain in his low back during June, July, and August 2009 while he was lifting his trailer door, but it did not occur to him that his symptoms could be related to his work duties. Last, he testified he strained his back while working for UPS but "nothing was ever filed or no workmen's comp."

On September 10, 2002, Petitioner presented to Internal Medicine and Family Practice, S.C. complaining of back pain. He stated the company doctor had him doing physical therapy for 1.5 weeks but it was not helping much. On exam, he complained of tenderness over the lumbosacral area. The doctor assessed musculoskeletal pain and recommended an MRI of the thoracolumbar spine to rule out a disc herniation. PX #13, Exhibit #2.

On March 23, 2004, a handwritten progress note indicates "Rush-Copley – Aurora ER. Left-sided tingling and numbness. If admitted call Sonya." Id.

On March 21, 2009, Petitioner returned to Internal Medicine and Family Practice complaining of inability to sleep and neck pain. He was diagnosed with musculoskeletal pain. Id.

On July 25, 2009, Petitioner returned to Internal Medicine and Family Practice and complained of left shoulder and neck pain that radiated to both shoulders. Id.

On August 24, 2009, Petitioner returned to Internal Medicine and Family Practice. He complained of a cough, low back pain, and head congestion. Id.

Petitioner had a medical examination for commercial driver fitness determination on October 22, 2009. PX #1. Petitioner testified he completed the health history portion of the report and checked "No" for spinal injury or disease and "No" for chronic low back pain.

Post-2010 Medical Treatment

On January 23, 2010, Petitioner presented to Internal Medicine and Family Practice. He complained of tenderness over the cervical and lumbar spine. X-rays of the lumbar and cervical spine were recommended. PX #6. The records from this date does not note either a trailer door lifting event or Petitioner hitting his head on the inside of his cab as a source of pain.

On February 5, 2010, Petitioner presented to Provena Saint Joseph Medical Center. Cervical spine x-rays revealed moderate degenerative disc changes at C4-5 and C5-6 but normal anatomical alignment. Lumbar spine x-rays revealed very mild spondylosis which had progressed when compared to a prior study from 2007. Chest x-rays, which were completed due to chronic obstructive pulmonary disease (COPD), revealed mild changes, and a CT of the chest revealed a small 6 mm pulmonary nodule in the base of the right lung. PX #7.

On February 20, 2010, Petitioner presented to Dr. Masood. Petitioner complained of generalized neck and back pain and stated he was unable to drive a truck. X-ray results were reviewed. On exam, he complained of tenderness over the cervical and lumbar spine. The doctor ordered MRIs of the cervical and lumbar spine. PX # 6. There is no mention of any complaints of pain related to lifting a trailer door or Petitioner striking his head

on the inside of his cab in Dr. Masood's February 20, 2010 medical record.

On February 27, 2010, MRIs of the lumbar and cervical spine were completed at Provena St. Joseph Medical Center. The radiologist assessed a very tiny central disc protrusion at L4-5, without any spinal stenosis or nerve root displacement, and a mild amount of osteophyte formation in the right paracentral and right lateral location of L5-S1 causing minimal encroachment on the right neural foramen fat. Regarding the cervical spine MRI, the radiologist assessed degenerative changes at C4-5 and C5-6 with mild stenosis and posterior impression on the thecal sac but without any cord compression. Last, the radiologist assessed a mild disc protrusion at C6-7 but with no spinal stenosis. PX #7. There were no acute or traumatic findings in these diagnostic tests.

On March 20, 2010, Petitioner returned to Dr. Masood. Petitioner stated he was unable to work anymore. He complained of pain in his extremities and neck as well as back pain that radiated to his legs. PX # 6.

On April 27, 2010, Petitioner returned to Dr. Masood complaining of neck and back pain that radiated sideways. He stated he thought his pain got worse with the job he did. No specific trauma or event was outlined. Dr. Masood recommended a neurosurgical consult. Id.

On August 11, 2010, Petitioner presented to Dr. Lorenz for an initial evaluation. He stated he was in good health until February 19, 2010, when he forced a door open in the back of his truck and hurt his back. Additionally, Petitioner stated there were numerous times where he was bounced around on a malfunctioning air glide chair causing him to strike the top of the cab as he was driving. PX #9.

Petitioner completed a questionnaire in which he noted he had no previous problems with his low back, his then current pain did not radiate, and the date of his first spine pain attack was February 19, 2010. RX # 10.

On exam, Petitioner complained of significant pain with all essential movement and on touching of the upper and lower back, but the doctor noted Petitioner's neurological examination was essentially normal. Dr. Lorenz diagnosed chronic pain syndrome and opined it was probably aggravated by the single lifting incident on February 19, 2010. Dr. Lorenz recommended a repeat cervical spine MRI and a follow-up with pain management but noted Petitioner was definitely not a surgical candidate. Dr. Lorenz opined Petitioner should not work. On August 16, 2010, a cervical spine MRI was completed. The radiologist assessed degenerative changes at C4-5 and C5-6, moderate stenosis at C5-6 greater on the left, and neural foraminal and mild canal stenosis at C4-5 and C6-7. On September 1, 2010, Dr. Lorenz reviewed the cervical MRI and referred Petitioner to hematology/oncology to evaluate the etiology of the edema in C4-5 and C5-6. PX #9.

On February 10, 2011, Petitioner presented to Dr. Kevin Diel of Florala Clinic in Alabama. Petitioner noted he recently moved to the area and needed a doctor to manage multiple medications. He reported a past medical history of COPD, hypertension, rheumatoid arthritis, and depression. Petitioner did not complain of any cervical spine symptoms. Nor did Petitioner attribute any of his problems to a past event at work. The doctor assessed hyperlipidemia, asthma, anxiety, chronic low back pain, depression, insomnia, COPD, hypertension, rheumatoid arthritis, and depression. PX # 11.

On December 1, 2011, Petitioner underwent a functional capacity evaluation (FCE) upon referral from Dr. Litchfield. He stated he was lifting a defective semitrailer roll-up door on February 19, 2010 when it got stuck and he had to forcefully push up and felt a sharp pain in his low back. The therapist opined Petitioner demonstrated consistent performance throughout testing and ability to function in the sedentary physical

demand category for eight hours per day with occasional lifting up to 15 pounds. PX #10.

On December 5, 2011, Petitioner returned to Dr. Lorenz. He stated his back pain was his biggest problem and he was not concerned with his neck pain. He further stated he had not seen an oncologist. Petitioner's neurological exam was normal. Dr. Lorenz noted Petitioner had degenerative changes in his cervical and lumbar spine and opined Petitioner was not a surgical candidate. The doctor further opined Petitioner could work in a sedentary position. Dr. Lorenz recommended a Functional Capacity Assessment and a return to work within those parameters. PX #9.

Dr. Shahid Masood

Dr. Shahid Masood, an internal medicine physician, testified via deposition on March 25, 2015. PX #13. Dr. Masood testified he had been seeing Petitioner since at least 2002. Id. at 31.

Dr. Masood composed a letter to Petitioner dated March 2, 2009; however, the doctor testified that the date was a typographical error as it should have been dated March 2, 2010. PX #3; PX #13 at 17. The doctor wrote that he had reviewed the reports of the cervical and lumbar spine MRIs from February 27, 2010 along with previous medical notes and strongly recommended Petitioner apply for Social Security Disability benefits. The doctor noted the MRIs showed stenosis and disc herniations in the lumbar and cervical spine, but the doctor did not indicate that any of Petitioner's work duties had contributed to his condition. PX #3.

On April 27, 2010, Dr. Masood composed another letter in which he indicated he was treating Petitioner for back pain resulting from a herniated disc he believed may have been caused by his work duties with Respondent. PX #4. The doctor did not indicate Petitioner sustained an acute incident of trauma on February 19, 2010 while lifting a trailer door nor did the doctor note Petitioner reported any problems with the air glide driver seat in his cab. The doctor noted "[a]ccording to Mr. Campbell he had no issues of back pain or any past injuries prior to his employment with Central Freight Lines." The doctor opined Petitioner could no longer work as a truck driver or lift over 10 pounds. Id.

Dr. Masood testified he diagnosed Petitioner with spinal and neural foraminal stenosis after reviewing the February 2010 MRIs, but he admitted he did not review the actual MRI films. PX #13 at 26, 52. Dr. Masood testified he did not recall whether Petitioner reported an acute incident of trauma occurring on February 19, 2010 at his office visit on February 20, 2010 or at anytime during his treatment. Id. at 33. He further testified he did not recall Petitioner reporting any specific injury from or difficulty lifting trailer doors. Id. at 33. Dr. Masood also testified he did not recall Petitioner reporting any injuries caused by bouncing around on a malfunctioning air glide driver seat. Id. at 33-34. Dr. Masood confirmed had Petitioner reported any specific incident, he would have noted it in his reports. Id. at 34. Dr. Masood further confirmed Petitioner's low back condition was likely symptomatic in 2007 when he had his lumbar spine x-rayed. Id. at 39-40. The doctor testified he believes repetitive lifting, pulling, and pushing while working for Respondent caused Petitioner's degenerative condition to become symptomatic, yet he conceded he had no knowledge of the specifics of Petitioner's job duties. For example, Dr. Masood did not know: how much time in an average work day Petitioner spent driving, loading/unloading freight, opening/closing trailer doors, pulling dock plates, hooking/unhooking trailers, etc.; how much force was required to close and open trailer doors; and,the weight of the freight Petitioner lifted or even what freight he was hauling. Id. at 46-47. Dr. Masood confirmed he never reviewed a written job description, nor did he independently confirm the accuracy of any information Petitioner

had provided about his job duties. Id. at 45-46.

Dr. Kevin Walsh

Dr. Kevin Walsh testified via deposition on November 19, 2012. RX #5. Dr. Walsh conducted an independent medical examination on Petitioner on May 8, 2012. Dr. Walsh noted Petitioner had substantial subjective complaints of pain and discomfort in his neck and lumbar spine, a paucity of objective abnormalities, and positive Waddell signs. The doctor noted none of the imaging studies showed anything that could be related to a specific or chronic injury of the lumbar or cervical spine, but rather the studies showed degenerative changes consistent with Petitioner's age. Further, the doctor noted there was no evidence in the medical records that Petitioner suffered an aggravation or acceleration of his pre-existing osteoarthritic spine. Dr. Walsh opined Petitioner did not require any work restrictions or further treatment. Finally, Dr. Walsh opined Petitioner was most certainly not a surgical candidate.

Dr. Walsh testified Petitioner reported his low back pain stemmed from lifting a trailer door on February 19, 2010 while his neck pain stemmed from repetitively striking his head on the roof of his cab while driving due to a bad air seat. RX #5 at 8, 9. Dr. Walsh confirmed Petitioner denied a history of low back or neck pain prior to February 19, 2010 and Petitioner was insistent he could not drive a truck. Id. at 9, 10. Dr. Walsh further confirmed he reviewed Dr. Masood's medical records, in which there was evidence of neck pain predating February 19, 2010, as well as the actual x-ray films and MRI studies of the lumbar and cervical spine from February 2010 and the cervical spine MRI study from August 2010. Id. at 15-18, 21-22.

The doctor testified, upon physical examination, Petitioner indicated he could not perform various range of motion testing due to his reports of pain. Id. at 26-27. The doctor further confirmed the examination was somewhat prolonged as Petitioner had to stop after every range of motion test, reporting pain and discomfort before he could continue. Id. at 28. The doctor testified there was a paucity of objective abnormalities in any of the imaging studies or on physical exam to explain Petitioner's subjective complaints of pain and discomfort. Id. at 28.

Dr. Walsh further testified it was not at all likely Petitioner injured his low back or neck as a result of his work activities as the medical records did not corroborate any injury. Id. at 29. The doctor further testified the degenerative changes seen on the MRIs were consistent with Petitioner's age, and it was consistent with the degenerative process that his symptoms became worse while he was off work. Id. at 29-30.

Dr. Mark Lorenz

Dr. Lorenz testified via deposition on November 7, 2012. PX #14. Dr. Lorenz testified Petitioner reported he was in good health until February 19, 2010 at which time he was forcibly lifting a poorly maintained door on the back of his truck and felt pain his low back and neck. Id. at 8, 23. The doctor also testified Petitioner reported bouncing and striking the top of his head as he drove because of a malfunctioning air glide seat. Id. at 8. Dr. Lorenz testified he reviewed cervical and lumbar spine MRIs from February 27, 2010 and that Petitioner had "significant pain response essentially with everything that we did, all movements and even touching the upper as well as lower part of his back." Id. at 9-12. He also described Petitioner's pain complaints as "extraordinary and unexpected." Id. at 20. The doctor confirmed Petitioner's neurological examination was normal, meaning he had good motor power, good sensory findings, and normal reflexes of the lower and upper extremities. Id. at 12. Following the cervical spine MRI completed on August 16, 2010, Dr. Lorenz testified he recommended

Petitioner see an oncologist. Id. at 13.

Dr. Lorenz testified his second and last examination of Petitioner was on December 5, 2011. Id. at 14. The doctor confirmed Petitioner had not seen an oncologist and Petitioner reported he was not concerned about his neck. Id. at 14. Dr. Lorenz testified Petitioner's examination was unchanged from the previous visit and he recommended an FCE. Id. at 15. Dr. Lorenz further testified he reviewed an FCE completed on December 1, 2011 and instructed Petitioner to continue with activities at the sedentary level based on the evaluation and not to go back to truck driving. Id. at 16-17.

Dr. Lorenz testified Petitioner neither had stenosis nor joint disease, but his diagnoses were chronic back and neck pain. Id. at 17. He testified chronic pain syndrome suggests a greater pain response than one would expect for the pathology at hand and there is nothing really to assess, measure, or quantify the amount of subjective pain someone is experiencing. Id. at 20-21. The doctor confirmed chronic pain syndrome is not his area of expertise and the condition is generally handled by a pain management doctor and is a combination of physical injury, an inflammatory process, and emotional security issues. Id. at 25-26. The doctor confirmed there was nothing fixable through surgery for Petitioner. Id. at 26.

Dr. Lorenz further testified the attempt to lift a gate door on February 19, 2010, as was described by Petitioner, was a competent cause of aggravating the degenerative condition of his neck and low back. Id. at 18.

Vocational Rehabilitiation

Ms. Alla Massat, a certified rehabilitation counselor employed with Encore Limited, testified on behalf of Respondent. After reviewing Petitioner's medical, professional, and educational information, Ms. Massat testified she identified positions for which Mr. Campbell could be qualified.. She testified Petitioner may or may not need computer literacy training depending on his skill level. She then identified job openings within the sedentary demand level by contacting employers directly by phone and researching online. Within the Joliet area, Ms. Massat, identified potential jobs for Petitioner paying up to $18.24 per hour.

Steve Blumenthal, a certified vocational rehabilitation counselor, testified via deposition on behalf of Petitioner. PX #15. Mr. Blumenthal testified Petitioner was not able to return to his job as a truck driver with Respondent as he felt it was not a sedentary position and it was unlikely he could pass a DOT physical. Id. at 23. Mr. Blumenthal testified Petitioner was a candidate for vocational rehabilitation services including testing to evaluate his skills, aptitudes, and interests, computer literacy training, job readiness training, and placement services. Mr. Blumenthal opined that, if the recommended vocational rehabilitation services were provided, Petitioner could likely earn $9.76-$12.71/hour doing clerical work. Mr. Blumenthal confirmed Petitioner's experience and the skills he acquired as a truck driver would lend well to a dispatcher position, if that type of job existed in a stable labor market. Id. at 66-67. Mr. Blumenthal confirmed Petitioner did not report he had looked for any employment since he last worked for Respondent. Id. at 76-77.

Petitioner testified he was not currently working and has not worked since the Bolingbrook facility closed on March 12, 2010 as he was on social security disability. The Social Security Disability documents submitted into evidence indicate Petitioner is on disability for conditions not related to a work. He further testified he has not looked for any work since he last worked for Respondent because he is unemployable. He has a high school diploma and he completed two years of college. He testified he can email, pay bills, and use the internet on the computer. He also testified he has a Facebook account, but he does not know how to use Microsoft Office

17IWCC0004

programs. He testified he had a resume but it was created by his wife.

Petitioner testified his current neck and back pain was an 8 out of 10. He also testified his current symptoms include forgetfulness and shaky hands and he also treats for hypertension, high blood pressure, COPD, rheumatoid arthritis, and bursitis. He testified he can drive no farther than 60 miles before he starts feeling pain. He further testified he uses a cane. Petitioner testified he is currently taking various medications for anxiety, cholesterol, and pain as well as for his COPD and heart. He testified his family doctor, Dr. Diehl, manages his medications.

CONCLUSIONS OF LAW

1. With regard to the issue of accident, the Arbitrator finds that the Petitioner has failed to meet his burden of proof. In support of this finding, the Arbitrator relies on both the trial testimony and the medical evidence. Specifically, this finding is also based on Petitioner's lack of credibility when comparing his testimony to the medical evidence. The Arbitrator looks to the complete medical records of Dr. Masood which are devoid of any mention of Petitioner injuring his low back or neck at work either on February 19, 2010 or in the performance of his regular duties. When Petitioner was seen on February 20, 2010, the day after the claimed lifting event of February 19, 2010, he did not report any incident occurring the day before. In fact, Dr. Masood testified Petitioner never reported injuring himself on February 19, 2010.

In contrast, when he was seen by Dr. Lorenz on August 11, 2010, at Total Rehab on December 1, 2011, and by Dr. Walsh on May 8, 2012, Petitioner was quite emphatic that he sustained an acute injury to his low back while lifting a "defective" trailer door on February 19, 2010 and he was asymptomatic beforehand. The Arbitrator finds it blatantly incredible that Petitioner would not mention an acute incident of trauma to his primary doctor one day after it had occurred but later report its occurrence to several medical experts.

Not only is there no credible evidence to corroborate Petitioner's claim that his trailer door was broken on or around February 19, 2010, but his report that he was asymptomatic until February 19, 2010 is contrary to the evidence. In closely reviewing Petitioner's treating medical records from Dr. Masood, the first time Petitioner complained of low back or neck conditions was in 2002, which is more than eight years prior to the alleged incident of February 19, 2010. At that time, though he denied ever having a prior work-related low back injury, he was undergoing physical therapy for back pain at the request of a "company doctor" but it was not helping much.

Furthermore, there is no indication in either the testimony or the medical records that Petitioner had any complaints contemporaneous with any particular work activity. This is supported by the testimony of Petitioner's manager, Tom Kovalik, who denied Petitioner ever reported complaints or an injury related to his low back or neck. It is unbelievable that Tom Kovalik would initiate disciplinary action against Petitioner for his failure to report a previous work related injury, but then neglect to document injuries when Petitioner allegedly reported them on February 19, 2010 and March 15, 2010. Based on all these facts, the Arbitrator concludes that the Petitioner did not sustain an accident on February 19, 2010.

2. Based on the Arbitrator's findings with regard to the issue of accident, all other issues are rendered moot.

2018 IL App (2d) 170925WC-U

FILED: July 19, 2018

NO. 2-17-0925WC

IN THE APPELLATE COURT

OF ILLINOIS

SECOND DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

JOHN MAJOR, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (Thermo-Tech Windows, Appellee).	)	Appeal from Circuit Court of Kane County No. 17MR433 Honorable David R. Akemann, Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Holdridge and Justices Hoffman, Hudson, and Barberis concurred in the judgment.

ORDER

¶ 1 *Held*: The Illinois Workers' Compensation Commission did not err in finding claimant's employment was not principally localized in Illinois and that Illinois lacked jurisdiction over his workers' compensation claim.

¶ 2 On April 30, 2013, claimant, John Major, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 to 30 (West 2012)), seeking benefits from the employer, Thermo-Tech Windows. Following a hearing, the arbitrator found Illinois lacked jurisdiction over the claim. On review, the Illinois Workers' Compensation Commission (Commission) affirmed and adopted the arbitrator's decision. The circuit court of

Kane County confirmed the Commission. Claimant appeals, arguing the Commission erred in finding his employment was not principally localized in Illinois and that Illinois lacked jurisdiction over his claim. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Claimant alleged that he sustained work-related injuries to his upper extremities and neck as the result of a fall at work on August 4, 2011. On March 14, 2016, an arbitration hearing was conducted in the matter. At the outset of the hearing, the parties represented to the arbitrator that there was a dispute as to jurisdiction. Claimant's counsel asserted that pursuant to section 1(b)(2) of the Act (820 ILCS 305/1(b)(2) (West 2012)), Illinois had jurisdiction over an employee's workers' compensation claim if (1) the contract for hire was made in Illinois, (2) Illinois was the site of the accident, or (3) the claimant's employment was principally localized in Illinois. Claimant stipulated that his contract for hire with the employer was made in Minnesota and his alleged work accident occurred in Iowa. He maintained, however, that his employment was principally localized in Illinois and, thus, Illinois had jurisdiction over his claim.

¶ 5 In January 2009, claimant began working for the employer. He testified that he was an Illinois resident but he traveled to the employer's location in Minnesota "to be hired." Claimant worked for the employer as a territory sales representative and his job duties included introducing the employer's products to lumber yards and builders, supplying customers with quotes, customer service duties, performing sales presentations, and working "contractor shows." Claimant estimated that the employer had eight "territories." Initially, claimant's territory was only in Illinois and Iowa; however, by August 2011, his territory had been expanded by the employer to include South Dakota and Nebraska. At some point, claimant's territory also included parts of Indiana.

¶ 6 Claimant testified he had a home office at his Illinois residence where he performed paperwork, caught up on call logs and correspondence, ordered materials, and set his travel schedule. Claimant stated he set his own travel schedule except if there was a scheduled show that the employer wanted him to attend. He testified that, during a typical work week, he spent 25% to 30% of his time using his home office. (Claimant also estimated that he spent 2 ½ days per week working in his home office.) At arbitration, the employer submitted a computer printout from the Commission showing the employer was insured and listing claimant's home address as its Illinois address. Claimant stated the employer had no other office in Illinois other than his residence. Further, he testified he received business-related mail and packages at his home, sometimes every day and sometimes "not for a couple of weeks." The mail was sent from the employer in Minnesota and included claimant's paychecks. Claimant stored the business materials he received in his garage.

¶ 7 Claimant asserted that the employer also had no other employees in Illinois and that he serviced all of its Illinois "markets." He testified that he was supervised by, or reported to, individuals located in Minnesota. To claimant's knowledge, all of the employer's employees reported to "someone in Minnesota."

¶ 8 Claimant testified he attended annual sales meetings in Minnesota but otherwise did not go to the employer's Minnesota "plant." He traveled to meet customers and stated that his trips would begin and end at his home in Illinois. Claimant estimated that he stayed overnight outside of Illinois two to three nights a week. He stated that approximately 25% to 30% of his work-related expenses were generated in Illinois. In 2010, claimant traveled 70,000 miles for the employer. Again, he estimated that 25% to 30% of those miles were in Illinois.

¶ 9 Finally, claimant testified that the employer provided him with a car and a cell

phone. The car had Minnesota license plates and the phone had a number with a Minnesota area code.

¶ 10 On May 2, 2016, the arbitrator issued her decision, finding Illinois lacked jurisdiction over claimant's workers' compensation claim. She concluded the evidence failed to establish that claimant's employment was "principally localized" in Illinois. On March 21, 2017, the Commission affirmed and adopted the arbitrator's decision without further comment. On October 27, 2017, the circuit court of Kane County confirmed the Commission's decision.

¶ 11 This appeal followed.

¶ 12 II. ANALYSIS

¶ 13 On appeal, claimant argues the Commission's finding that he failed to prove his employment was "principally localized" in Illinois and that, as a result, jurisdiction over his claim was lacking was against the manifest weight of the evidence. He maintains the Commission failed to address all relevant factors for consideration and that its analysis excluded relevant case authority.

¶ 14 "Pursuant to the Act, Illinois may acquire jurisdiction over a claim (1) if the contract for hire was made in Illinois, (2) if the accident occurred in Illinois, or (3) if the claimant's employment was principally located in Illinois." *Cowger v. Industrial Comm'n*, 313 Ill. App. 3d 364, 369-70, 728 N.E.2d 789, 793 (2000) (citing 820 ILCS 305/1(b)(2) (West 1998)). As discussed, claimant concedes that his contract for hire was made in Minnesota and his alleged accident occurred in Iowa. He maintains only that his employment was principally located in Illinois.

¶ 15 The term "principally localized" has been defined as follows:

> " 'A person's employment is principally localized in this or another State when (1) his employer has a place of business in this or such other State and he

> regularly works at or from such place of business, or (2) if clause (1) foregoing is not applicable, he is domiciled and spends a substantial part of his working time in the service of his employer in this or such other State.' " *Patton v. Industrial Comm'n*, 147 Ill. App. 3d 738, 743, 498 N.E.2d 539, 543 (1986) (quoting 4 Larson, Workmen's Compensation Law app. H 629, 649–50 (Model Act) (1986)).

The "principally localized" definition "focuses first, and foremost, upon the situs where the employment relationship is centered" and "[o]nly in the event that such situs cannot be established is the alternative test involving domicile and substantial working time to be considered." *Id.* at 744.

¶ 16 Factors that are relevant to determining the situs of an employment relationship include the following:

> " '(1) where the employment relationship is centered, *i.e.*, the center from which the employee works; (2) the source of remuneration to the employee; (3) where the employment contract was formed; (4) the existence of a facility from which the employee received his assignments and is otherwise controlled; and (5) the understanding that the employee will return to that facility after the out-of-[s]tate assignment is complete.' " *Cowger*, 313 Ill. App. 3d at 373 (quoting *Montgomery Tank Lines v. Industrial Comm'n*, 263 Ill. App. 3d 218, 222, 640 N.E.2d 296, 299 (1994)).

"Whether a claimant's employment is principally localized in Illinois is a question of fact for the Commission and its resolution of this question will not be disturbed on appeal unless it is against the manifest weight of the evidence." *Montgomery Tank Lines*, 263 Ill. App. 3d at 222-23. A finding is contrary to the manifest weight of the evidence where an opposite conclusion is clearly

apparent. *Id.* at 223. On review, "[t]he appropriate test is whether there is sufficient evidence in the record to support the Commission's decision." *Sharwarko v. Illinois Workers' Compensation Comm'n*, 2015 IL App (1st) 131733WC, ¶ 57, 28 N.E.3d 946.

¶ 17 Here, the Commission determined that "the situs of the employment relationship [between claimant and the employer] is in Minnesota and, consequently, jurisdiction is not proper in Illinois." The record contains sufficient evidence to support that decision and an opposite conclusion from the one reached by the Commission is not clearly apparent.

¶ 18 Initially, claimant contends the Commission failed to address or consider three of the five relevant factors involved in determining the situs of the employment relationship. We disagree. The Commission set forth all five factors in its decision and the record otherwise fails to reflect that it ignored any factor or relevant consideration. Rather, the Commission determined the evidence simply did not weigh in claimant's favor. We can find no error in that determination.

¶ 19 Evidence showed claimant received his paychecks from Minnesota and that Minnesota was where the employment contract was formed. Thus, factors two and three clearly weigh in favor of Minnesota as the situs of the employment relationship. Sufficient evidence was also presented to show that the fourth factor—the existence of a facility from which the employee received his assignments and is otherwise controlled—weighed in favor of Minnesota. As the Commission noted, claimant received his territorial assignments from Minnesota. Evidence further reflected that claimant always reported to someone located in Minnesota and nowhere else, he was provided with a car with Minnesota plates, and he was given a cellular phone with a Minnesota area code. All of the business and promotional materials claimant received at his home office came from Minnesota and claimant attended annual sales meetings in Minnesota.

Finally, although claimant typically set his own travel schedule, the employer did direct him to attend certain shows. We find this evidence sufficiently demonstrates that claimant received his assignments from Minnesota and was otherwise controlled from that State rather than Illinois.

¶ 20 As claimant points out, the evidence also shows that claimant worked out of a home office in his Illinois residence and that his periods of travel would begin and end at his home. Thus, he maintains factors one and five—concerning the center from where an employee works and the facility that an employee returns to after completing out-of-state assignments—weigh in favor of Illinois as the situs of the employment relationship. However, even accepting that these factors favor Illinois, we cannot find that an opposite conclusion from that reached by the Commission is clearly apparent. In setting forth its decision, the Commission noted the following statement of law:

> " 'In some kinds of employment, like trucking, flying, selling, or construction work, the employee may be constantly coming and going without spending any longer sustained periods in the local state than anywhere else; but a status rooted in the local state by the original creation of the employment relation there, is not lost merely on the strength of the relative amount of time spent in the local state as against foreign states. An employee loses this status only when his or her regular employment becomes centralized and fixed *so clearly* in another state that any return to the original state would itself be only casual, incidental and temporary by comparison. This transference will never happen as long as the employee's presence in any state, even including the original state, is by the nature of the employment brief and transitory.' " (Emphasis added.) *Cowger*, 313 Ill. App. 3d

at 374 (quoting 9 A. Larson & L. Larson, Workers' Compensation Law § 87.42(a), (b)(1998)).

¶ 21 As discussed, the original employment relationship between the parties began in Minnesota. Although claimant resided in Illinois and operated in large part independently in his employment as a sales representative, performing many of his work duties in Illinois, a significant amount of control was still exercised over claimant from the employer's Minnesota location. Thus, in this instance, we cannot say that claimant's employment became "so clearly" fixed in Illinois such that Minnesota lost its status as the situs of the employment relationship. Ultimately, the majority of factors weigh in favor of finding that the parties' employment relationship was centered in Minnesota.

¶ 22 Claimant also challenges the Commission's decision on the basis that its analysis excluded relevant case authority. In particular, claimant contends that his case is most factually similar to *Associates Corporation of North America v. Industrial Comm'n*, 167 Ill. App.3d 988, 522 N.E.2d 102 (1988), and that the Commission should have relied on that case in determining the principal location of his employment. However, claimant's case turned on its own unique set of facts. A review of this court's decision in *Associates Corporation of North America* does not warrant a different result than that reached by the Commission, which was supported by the record and not against the manifest weight of the evidence.

¶ 23 III. CONCLUSION

¶ 24 For the reasons stated, we affirm the circuit court's judgment, confirming the Commission's decision.

¶ 25 Affirmed.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

John Major,
Petitioner,

17IWCC0165

vs.

NO: 12 WC 14982

Thermo-Tech Windows,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, jurisdiction, medical expenses, permanent disability, temporary 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 May 2 2016, is hereby affirmed and adopted.

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

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

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

DATED: MAR 2 1 2017
o3/8/17
KWL/rm
046

Kevin W. Lamborn

Charles J. DeVriendt

Joshua D. Luskin

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

17IWCC0165

MAJOR, JOHN
Employee/Petitioner

Case# 12WC014982

THERMO-TECH WINDOWS
Employer/Respondent

On 5/2/2016, 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 0.40% 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:

1836 RAYMOND M SIMARD PC
221 N LASALLE ST
SUITE 1410
CHICAGO, IL 60601

5001 GAIDO & FINTZEN
JUSTIN KANTER
30 N LASALLE ST SUITE 3010
CHICAGO, IL 60602

17IWCC0165

STATE OF ILLINOIS)
)SS.
COUNTY OF KANE)

- [ ] 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

John Major
Employee/Petitioner

v.

Thermo-Tech Windows
Employer/Respondent

Case # 12 WC 14982

Consolidated cases: N/A

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Barbara N. Flores**, Arbitrator of the Commission, in the city of **Geneva**, on **March 14, 2016**. After reviewing all of the evidence presented, the undersigned Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On August 4, 2011, Respondent *was not* operating under and subject to the provisions of the Act conferring jurisdiction in Illinois as explained *infra.*

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 as explained *infra.*

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

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

In the year preceding the injury, Petitioner earned $53,856.40; the average weekly wage was $1,035.78.

On the date of accident, Petitioner was 48 years of age, *single* with 2 dependent children.

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

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

Respondent shall be given a credit of $0 for TTD, $0 for TPD, $0 for maintenance, and $0 for other benefits (i.e., mileage expenses), for a total credit of $0.

Respondent is entitled to a credit of $0 under Section 8(j) of the Act. AX1.

ORDER

As explained in the Arbitration Decision Addendum, the Arbitrator finds that jurisdiction is not proper in Illinois. Thus, all remaining issues are rendered moot and Petitioner's claim for benefits is denied.

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

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

Signature of Arbitrator

May 2, 2016
Date

MAY 2 - 2016

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION *ADDENDUM*

John Major
Employee/Petitioner

v.

Thermo-Tech Windows
Employer/Respondent

Case # **12** WC **14982**

Consolidated cases: **N/A**

FINDINGS OF FACT

The issues in dispute at this hearing include jurisdiction, accident, causal connection, Respondent's liability for certain unpaid medical bills, Petitioner's entitlement to periods of temporary total disability benefits commencing on May 30, 2012 through June 15, 2012, July 15, 2014 through July 24, 2015, March 31, 2015 through April 15, 2015 and April 13, 2015 through April 15, 2015 as well as the nature and extent of the injury. Arbitrator's Exhibit[1] ("AX") 1. The parties have stipulated to all other issues. AX1.

Employment Relationship

Petitioner worked as a Territory Sales Representative for Respondent beginning in January 2009. His initial territory was Iowa and Illinois, and also depended on "what accounts were given to" him. By the time of the August 4, 2011 incident, Petitioner's sales territory expanded to include South Dakota and Nebraska. Petitioner believed the territory may have also included Indiana at that time. Petitioner's job responsibilities included introducing Respondent's window products to lumber-yards and builders by providing quotes, doing sales presentations and working contractor shows.

According to Petitioner, Respondent never had an office in Illinois other than his home office. See PX14 (Respondent's Verification of Coverage form indicating Petitioner's home address as its business location in Illinois). Petitioner initially traveled to Respondent's office, located in Minnesota, to be hired. He initially reported to a supervisor, Bob Brenneman, and later reported directly to Respondent's president, both of whom were located in Minnesota. Respondent would send Petitioner promotional apparel and paychecks from Minnesota to his home office in Illinois. Respondent also provided Petitioner with an automobile for his sales calls, which was registered in Minnesota, as well as a cell phone with a Minnesota area code phone number. Petitioner was required to stay in hotels overnight while on sales calls and he estimated he spent two or three nights per week in hotels, which may or may not have been located in Illinois.

Petitioner maintained his office at his residence in Elgin, Illinois. In a typical week, Petitioner estimated that he was in his home office 30% of the week ordering materials and promotional materials, processing paperwork and taking specifications on window drawings and turning those into e-quotes. He also estimated that 25-30% percent of his work-related expenses, for which Respondent reimbursed him, were generated in Illinois and 25-30% of the miles he traveled were in Illinois.

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

Prior 2011 Incident at Work

In late March or April of 2011, Petitioner testified that he had an incident at work while working in Manchester, Iowa at a ProBuild dealership. He explained that he was setting up a display when he felt twinge in his left elbow. Petitioner testified that he did not think much of it at the time, but as days and weeks passed he experienced tingling and a loss of muscle mass in the left hand and elbow as well as excruciating pain.

Petitioner then saw a chiropractor, Curt Buss, D.C. (Dr. Buss), on June 14, 2011. PX5. Petitioner reported "aching, burning tingling and numb discomfort in his cervical region, right upper thoracic area, left upper thoracic area, right shoulder, left shoulder, right arm, left arm, right elbow, right wrist and left wrist." *Id.* These symptoms reportedly had a gradual onset and had "been present for the past several years and are most noticeable the entire day." *Id.* Petitioner also reported that the "symptoms become aggravated by: almost any movement, walking, sitting, bending ... standing, sleeping, lifting, running, climbing stairs, carrying, pushing, pulling, driving, reading, watching tv, household chares, gardening, exercising, working and dancing." *Id.* In addition, Petitioner provided a history that he "wrestled since he was [a] very small child and has 'beat his body up over the years.'" *Id.* Petitioner further reported that he engaged in weight training and that his work required him to sit 8-10 hours per day as well as light-to-moderate lifting. *Id.*

On physical examination, Dr. Buss noted that Petitioner was tender to touch at the cervical, cervical dorsal and thoracic regions with severe spasms of the neck and bilateral trapezius muscles. PX5. Digital thermography revealed imbalances at C2, C6, T1, T2, and L4; a surface EMG confirmed spasms at right atlas, left atlas, right C3, right C5, left C5, right C7, right T1, left T1, right T2, right L5 and left S1. *Id.* Loss of range of motion of the cervical spine was noted. *Id.* at 5. A cervical compression test was positive bilaterally, indicative of radicular pain. *Id.* X-rays further confirmed degenerative disc disease at C5, C6, and C7. *Id.*

Among other diagnoses, Dr. Buss diagnosed Petitioner with: (i) cervical/brachial syndrome; (ii) brachial neuritis or radiculitis; (iii) paresthesia; (iv) cervicalgia; (v) cervical segmental dysfunction or somatic dysfunction; and (vi) muscle weakness. *Id.* He recommended chiropractic treatment three times per week for the following four weeks. *Id.*

On June 14, 2011, Petitioner also saw his primary care physician, Dr. Neubauer reporting bilateral forearm pain and paresthesias as well as neck stiffness. RX6. Dr. Neubauer's records reflect that he performed a physical examination, which revealed tenderness in the neck, bilateral elbow tenderness and some distal paresthesias associated with palpation. *Id.* Dr. Neubauer diagnosed Petitioner with cervical radiculopathy and possible bilateral "nerve impingement vs elbow impingement." *Id.* He referred Petitioner for a consultation with a specialist noting that Petitioner would likely need an orthopedist as well as a neurologist and recommending a cervical spine MRI versus an orthopedic consultation. *Id.*

Petitioner testified that after undergoing chiropractic care he noticed that his left hand and elbow were a lot better. He explained that his muscle mass was back, his grip was back, he did not have as much tingling and his condition was improving.

August 4, 2011

On August 4, 2011, Petitioner testified that he was with a client, Mike Erickson, picking up damaged product from a work site in Iowa. They placed the damaged product in the back of a pickup truck and were leaving the work site when they noticed that the screens were blowing around. Petitioner explained that they decided to put these screens inside the pickup truck and pulled the truck over. It was at this time that Petitioner testified he

stepped off a ledge off the gravel road and fell about 20 feet into a ditch that he did not see because of grass and gravel. He explained that he tumbled hard and was grabbing for something and he finally caught himself about two-thirds of the way down, maybe on a tree. Petitioner testified that he knew immediately that he hurt his elbow and left hand again as well as his neck.

Petitioner also testified that he did not immediately seek medical attention after the incident on August 4, 2011. He explained that, between August 4, 2011 and August 31, 2011 he was icing and elevating his neck, left elbow and left hand. He then began elevating and icing his right elbow and wrist, which began to swell approximately five days to one week after the incident at work. Petitioner also testified that he felt sharp pain in the left elbow, wrist, thumb, and fingers. In his neck, he felt tightness, pain and experienced headaches. Petitioner testified that he thought he could take care of the problems himself and did not hear back from human resources so he was in "limbo" and sought medical care after he could not sleep anymore, etc.

Petitioner provided notice of the incident to Respondent alleging an injury to the left elbow and left hand only. RX5.

Medical Treatment

The medical records reflect that Petitioner sought medical care following the incident on August 31, 2011 at Delnor Express Care and saw Dr. Jonathan Parker (Dr. Parker). PX6. Dr. Parker noted the following chief complaint:

> ... Patient stated that four months ago he felt a twinge in left elbow. Patient hand went numb but came back. In left elbow. Patient stated that one month ago (Aug 5th) he fell again and is having trouble with grab[b]ing things in left hand. Also patient is having swelling on right hand. Patient said when he fell he felt a burning sensation in both forea[rm]s and hands. Patient has no feeling on medial side of forearms into fifth phalange.

Id. Dr. Parker further noted the following history of present illness in pertinent part:

> ... History as above, pt states he was pulling a large display off a truck above his head, during his job 4 months ago, and felt a twinge in left elbow with some numbness in hand developing a few days later, these symptoms persisted on/off for a few months, then got significantly better. However, the left hand numbness persisted, and he noticed a weakening and atrophy of his left hand near his thumb. On Aug 5, or there about per pt, he fell off a truck while working, landing on the ground, stiking his elbow, though he is not absolutely sure, he felt the same pain in the left elbow, but "100 times worse" along with numbness in left 4/5th pinkie. Also, he noticed since then, his right hand has been swollen and he has had numbness in the right thumb, 2nd and 3rd fingers of right hand. He came in today because he is worried about the right hand, that it will "end up like the left hand, and I want to nip this in the bud." He denies fevers, weight loss, headache, vision change, or neuro-muscular symptoms in places other than his UE. He does have a h/o a "bad neck" but denies recent trouble with it, and no pain of the neck after the falls as described above.

Id. Dr. Parker diagnosed bilateral neurologic symptoms with significant atrophy of the left hand, which he was "unsure if this is due to work injury or a progressive disease, given the bilateral nature." *Id.*

The following day, Petitioner saw Dr. Robert Swartz (Dr. Swartz) on September 1, 2011. PX7. Dr. Swartz noted the following history in pertinent part:

> ... He is here regarding left much greater than right upper extremity issues. Approximately four months ago, he had a shooting pain that went down into his fourth and fifth fingers. This would come and go at times. He would shake it out and it seemed to just go away. Then about a months ago, he fell and rolled a bit and had more pain and, since that time, constant numbness in the same distribution on the left. It comes and goes on the right. He has had an occasional neck ache but no shoulder symptoms and none in the elbow, wrist or fingers. He has noticed that the muscles are starting to disappear in the left hand, and he has trouble straightening out his fourth and fifth fingers. He does complain of some sleep symptoms.

Id. On examination, Dr. Swartz noted obvious atrophy in the muscles of the left hand with an extension lag in the ring and little fingers of the left hand, but concluded that his provocative examination did not indicate any specific symptoms. *Id.* Dr. Swartz referred Petitioner for a neurology consultation and EMG evaluations of the arms. *Id.* He diagnosed Petitioner with significant ulnar neuropathy with some degree of already permanent nerve injury demonstrated by his intrinsic atrophy. *Id.*

Petitioner testified that, following a denial of his workers' compensation claim, he considered pursuing further medical care through Blue Cross Blue Shield provided by his wife's employer, but he nevertheless delayed seeking further medical care. See also PX15 (October 27, 2011 workers' compensation claim denial letter).

On April 19, 2012, Petitioner saw Kishore Santwani, D.O. (Dr. Santwani) as Suburban Neurology Group as referred by Joseph Neubauer, M.D. (Dr. Neubauer) from Fox Valley Family Physicians. PX8. Dr. Santwani noted the following history in pertinent part:

> ... his symptoms began in May of 2011. He was working and moving a display when he noticed a sharp pain radiating from his left medial elbow to his left hand. Subsequent to that, he would notice that with left elbow flexion, he would notice pain and a "pinching" feeling in his left elbow which could be alleviated partially by pressing a specific spot near his left medial epicondyle. In August of last year, he fell down a hill and hit his neck and head without any loss of consciousness. He did not seek medical evaluation at that time. Subsequent to this fall, he notices a sharp increase in his left elbow pain and also notices pain radiating from his right elbow to his right second and third fingers as well as neck pain. He also started to notice decreased strength in his right hand and felt that he was clumsy with his right grip. Starting June or July of last year, he started to notice atrophy in the left hand intrinsic muscles. He states that he did see an orthopedic doctor who recommended what sounds like ulnar transposition surgery but patient deferred on getting any surgery at that point.
> ...

Id. Dr. Santwani diagnosed Petitioner with bilateral distal upper extremity dysesthesias with left hand intrinsic atrophy/weakness and differential diagnoses including a left cubital tunnel syndrome/ulnar neuropathy versus cervical radiculopathy versus less likely brachial plexopathy. *Id.*

Petitioner underwent an MRI of the cervical spine as ordered by Dr. Santwani on April 20, 2012 that revealed C5-6 diffuse bulging/osteophyte complex with moderate to severe central canal stenosis, moderate bilateral foraminal narrowing and C7-T1 disc bulging. PX8. The interpreting radiologist noted degenerative changes. *Id.* Petitioner also underwent bilateral upper extremity EMG/NCV studies on April 27, 2012. *Id.* The results were abnormal showing severe axonal, ulnar sensorimotor neuropathy on the left as well as evidence of moderate, predominantly axonal bilateral median neuropathies across the wrist (carpal tunnel syndrome), and mild acute C6 radiculopathy on the left. *Id.*

Petitioner then saw a neurosurgeon, John Brayton, M.D. (Dr. Brayton) on May 18, 2012 as referred by Dr. Santwani. PX9. Dr. Brayton noted a history from Petitioner including an "... initial onset of pain and aching in March 2011 after lifting, but primarily his symptoms occurred when he fell backward in August 2011 falling in a ditch and incurring injury to his neck and both upper extremities especially on the left." *Id.* After an examination, Dr. Brayton diagnosed Petitioner with a combination of C6 radiculopathy attributable to a C5-6 herniation, osteophyte and spondylosis as well as C7 and C8 radiculopathy association with neuroforaminal stenosis with superimposed severe ulnar entrapment neuropathy on the left. *Id.* Dr. Brayton also indicated that "[t]here is also the possibility of damage that occurred in the ulnar nerve concurrent with the fall, but it appears that his symptoms have been worsening consistent with progressive entrapment of the ulnar nerve." *Id.*

Dr. Brayton recommended surgery, which Petitioner subsequently underwent on May 30, 2012. PX9. Specifically, Dr. Brayton performed a C5-6 anterior cervical decompression and fusion with left C6-7, C7-T1 anterior microforaminotomy and left ulnar nerve decompression and transposition. *Id.* Post-operatively, Petitioner underwent physical therapy at West Physical Therapy beginning on July 24, 2012. PX10. Petitioner was discharged from physical therapy on December 28, 2012, at which time he was instructed to continue a home exercise program. *Id.*

In late November 2012 and into January 2013, Petitioner complained to Dr. Brayton's nurse of hand numbness. PX9. Petitioner was referred for an additional EMG, which he underwent on January 15, 2013. *Id.* As noted by Dr. Santwani, in comparison to Petitioner's prior EMG/NCV studies, this study showed similar findings, but the acute denervation in the left ulnar innervated muscles appeared to be mildly reduced with slightly worse right median sensory demyelination. PX8.

On February 28, 2013, Petitioner returned to Dr. Brayton who noted that Petitioner's neck pain and radicular symptoms resolved post-operatively, but he still had persistent severe ulnar neuropathy with paresis and atrophy in the left hand. PX9.

Records Review & Section 12 Examination – Dr. Butler

On July 9, 2013, Jesse Butler, M.D. (Dr. Butler) performed a review of Petitioner's treating medical records at Respondent's request. RX1; RX4 (Dep. Ex. 2). Dr. Butler issued a report in which he rendered opinions regarding the relatedness, if any, of Petitioner's physical condition with his alleged accident at work on August 4, 2011. *Id.*

Dr. Butler diagnosed Petitioner with cervical disc degeneration with multilevel stenosis at C5-6 through C7-T1 and severe ulnar entrapment neuropathy on the left. *Id.* He noted that Petitioner's upper extremity complaints began in March of 2011 and there was a recommendation for an ulnar transposition as early as June or July of 2011. *Id.* He attributed Petitioner's conditions to prior ulnar nerve issues dating back to March of 2011 as well as pre-existing degeneration in the cervical spine. *Id.*

Dr. Butler indicated that Petitioner's chiropractic note from June of 2011 clearly establishes pre-existing issues in the cervical spine and bilateral upper extremities before the claimed August of 2011 claimed accident. *Id.* He also noted that Dr. Parker's note from August 31, 2011 reflects Petitioner's denial of a history of a "bad neck" when he had seen a chiropractor for neck issues in June and that "[i]t would be unusual for someone to have a fall onto the left elbow and 26 days later have significant intrinsic atrophy of the hand. The ulnar atrophy speaks to a chronic issue that clearly preceded the August 5, 2011 incident. The atrophy develops over months and was likely a result of chronic ulnar nerve entrapment that may have begun in the patient through (sic) in

March of 2011. The bilateral neurologic symptoms are related to the chronic stenosis of the C5-6 level. The left sided complaints are related to the ulnar nerve entrapment and the left sided symptoms and the left sided degenerative foraminal stenosis of C6-7 and C7-T1. None of these conditions are work related." *Id.*

On January 8, 2014, Petitioner submitted to an evaluation with Dr. Butler at Respondent's request. RX2; RX4 (Dep. Ex. 3). After reviewing noting his prior review of Petitioner's treating medical records, taking a history from Petitioner and performing a physical examination, Dr. Butler rendered opinions regarding the relatedness, if any, of Petitioner's physical condition with his alleged accident at work on August 4, 2011. *Id.*

Dr. Butler diagnosed Petitioner with cervical spinal stenosis and ulnar neuropathy on the left as well as some possible ulnar neuropathy on the right. *Id.* He maintained his opinion that Petitioner's conditions were wholly unrelated to any accident at work. *Id.*

Continued Medical Treatment

Petitioner underwent another EMG/NCV study on March 25, 2014. PX8. Dr. Santwani noted that, when compared to the January 15, 2013 study, Petitioner's "median neuropathies appear to have progressed and the right ulnar sensory findings are new." *Id.*

Dr. Brayton recommended surgical intervention. PX9, PX12. On July 18, 2014, Dr. Brayton performed a right-sided carpal tunnel release with concurrent Guyon's canal decompression. *Id.*

Second Section 12 Examination – Dr. Butler

On January 8, 2015, Petitioner submitted to a second evaluation with Dr. Butler at Respondent's request. RX3; RX4 (Dep. Ex. 4). After reviewing noting his prior review of Petitioner's treating medical records and prior medical evaluation, as well as taking additional history and reviewing additional medical records, Dr. Butler rendered opinions regarding the relatedness, if any, of Petitioner's physical condition with his alleged accident at work on August 4, 2011. *Id.*

Dr. Butler updated Petitioner's diagnoses to ulnar neuropathy of both upper extremities and bilateral carpal tunnel syndrome. *Id.* He maintained his opinion that Petitioner's conditions were wholly unrelated to any accident at work. *Id.*

Continued Medical Treatment

Dr. Brayton later performed a left sided carpal tunnel release with concurrent Guyon's canal decompression on March 31, 2015. PX9, PX12. Dr. Brayton performed a final surgery on April 14, 2015 to decompress and transpose the ulnar nerve at the right elbow. *Id.* Dr. Brayton discharged Petitioner from care on May 14, 2015 with instructions to continue with a home exercise program. *Id.* Petitioner testified that he has had no further medical care and that he continues to work for Respondent.

Deposition Testimony – Dr. Brayton

On October 15, 2015, Dr. Brayton provided testimony at an evidence deposition taken by agreement of the parties. PX13. Dr. Brayton testified that he is board certified neurosurgeon. *Id.*, at 5-6. Dr. Brayton testified

generally about the medical treatment that he rendered to Petitioner and the relatedness, if any, of Petitioner's physical condition with an accident at work on August 4, 2011. See generally *Id.*

Dr. Brayton opined that there was a causal connection between the accident of August 4, 2011 and the need for surgery to the cervical spine. *Id.*, at 19. He testified that Petitioner had a pre-existing spondylosis of the cervical spine, but the injury caused severe nerve root compression. *Id.*

Dr. Brayton also opined that there was a causal connection between Petitioner's left ulnar nerve entrapment and the accident. *Id.*, at 19-21. Specifically, he testified that he was aware that there was some atrophy and paresis prior to August 4, 2011, but he opined that the accident caused these conditions to progress dramatically following the accident. *Id.* Dr. Brayton opined that the right sided symptoms were causally related to the accident for the same reasons as the left side. *Id.*, at 21.

Dr. Brayton explained that Petitioner's EMG findings were consistent with an acute progressive denervation which suggested that any pre-existing condition was made much worse by the accident. *Id.*, at 22.

On cross examination, Dr. Brayton acknowledged that Petitioner was previously a high level competitive wrestler who continued to be active with conditioning, weight lifting and wrestling. *Id.*, at 24. He testified that Petitioner's left ulnar nerve entrapment and deep scar tissue could be attributable to the accident of August 4, 2011 or be consistent with a chronic condition found in a competitive wrestler or weightlifter. *Id.*, at 26. However, he added that he could not definitively determine the cause of the deep scar tissue just by looking at it in surgery. *Id.*, at 27. Ultimately, Dr. Brayton testified that Petitioner's ulnar nerve pathology was not solely a chronic ongoing pathologic condition. *Id.*, at 29.

Deposition Testimony – Dr. Butler

On January 6, 2016, Dr. Butler provided testimony at an evidence deposition taken by agreement of the parties. RX4. Dr. Butler testified that he is board certified in orthopedics and independent medical examinations, and specializes in orthopedic spine surgery. *Id.*, at 5. He estimated that he performs 250 spinal surgeries per year. *Id.*, at 6.

Dr. Butler maintained the opinions contained in his three reports that Petitioner's cervical spine and bilateral upper extremity conditions were not causally related to the August 4, 2011 incident in question. *Id.*, at 14. In support of his determination, Dr. Butler cited to: (i) Petitioner's pre-existing symptomatology; (ii) abnormal findings of the cervical spine from the June 2011 evaluation with Dr. Buss; and (iii) the abnormal findings of the ulnar nerve following the August 4, 2011 incident, which are chronic and long-standing, and reflect months, if not years, of ulnar nerve compression. *Id.*, at 14. Rather than the result of trauma, Dr. Butler explained Petitioner's conditions were attributable to degenerative changes, exacerbated by Petitioner's outside activities:

> ... it's fairly well known that heavy weightlifting can lead to degenerative issues of the cervical spine and also degenerative changes in the shoulders, elbow, wrists.

Id., at 23.

Dr. Butler's testimony and reports further explain that, whereas Petitioner's alleged accident date was August 4, 2011, the medical records he reviewed reflect that Petitioner had "rather extensive" complaints as of June 14, 2011. *Id.*, at 7. He noted that the treating records of Dr. Swartz of September 1, 2011 from Midwest

Orthopaedic Institute also demonstrated Petitioner "had significant atrophy of the intrinsic muscles of the left hand and even an extension lag of the fourth and fifth fingers indicating that he was developing somewhat of a papal sign, which consists of a long-term compression and atrophy of the ulnar nerve". *Id.*, at 10. Dr. Butler described these as "end stage findings" and the function of the hand was unlikely to improve even with surgery. *Id.*, at 17. According to Dr. Butler, atrophy of the hand muscles takes quite some time to develop, unless there was a stab would or an acute laceration of the ulnar nerve – which was not present in this case. *Id.*, at 15.

Dr. Butler reviewed the operative report for the left elbow surgery performed by Dr. Brayton, and commented that the constricting band compressing the ulnar nerve:

> ... is something that based on chronic, repetitive stress of the upper extremity, from his wrestling, his weightlifting, activities of daily living, this band developed and led to severe compression and damage to his ulnar nerve.

Id., at 22.

Per Dr. Butler, the bilateral neurologic symptoms were related to the chronic stenosis at C5-6, and the left sided complaints were related to the ulnar nerve entrapment and the left-sided degenerative foraminal stenosis of C6-7 and C7-T1. *Id.*, at 14; RX1.

With regard to Petitioner's right upper extremity, Dr. Butler further specified that EMG studies, performed on January 15, 2013 and March 25, 2014, revealed a progressive deterioration of function of the peripheral nerves involving the median and ulnar nerve at the right wrist. *Id.*, at 24. The median neuropathy is not traumatically induced – these are related to underlying degenerative conditions not to a trauma. Moreover, such a progressive worsening of function could not be attributed to a traumatic incident three years prior, in Dr. Butler's opinion. *Id.*, at 24; RX3.

Additional Information

Regarding his current condition, Petitioner testified that is "beat up" and he has to make adjustments in his daily activities. He also testified that he continues to have pain in his neck, elbows and hands with good days and bad days. Petitioner testified that he has had a lifestyle change including how he dresses. He also experiences shooting pains in his neck radiating into his shoulders that can be bad or not so bad. Petitioner also experiences headaches and has difficulty sleeping. He explained that he has lost 90% of the grip in his hands and he drops things. Petitioner acknowledged that he was a college wrestler, but explained that he only wrestled for eight years. He continues to lift weights, but no longer uses free weights to maintain his shape and only uses machines now.

Petitioner acknowledged that he had prior workers' compensation claims or work-related injuries beginning on April 1, 1989, in an incident in which he fell through the second floor of a lumber-yard warehouse. RX6. The injuries for which Petitioner received workers' compensation recoveries included the following:

(i) April 1, 1989 (90 WC 38050; 20% right arm; 40% right leg);
(ii) June 28, 1991 (92 WC 48760; 20% right arm; 25% left leg; 25% right leg);
(iii) June 6, 1997 (97 WC 36796; 35% left arm; 5% left hand; 35% left leg; 24% 8(d)2);
(iv) April 10, 2002 (03 WC 17403; $20,000.00 compromise);
(v) January 20, 2004 (06 WC 31114; $1,000.00 compromise).

ISSUES AND CONCLUSIONS

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

In support of the Arbitrator's decision relating to Issues (A) and (O), whether Petitioner and Respondent were operating under, and subject to the jurisdiction of, the Illinois Workers' Compensation Act, the Arbitrator finds the following:

The threshold issue in this case is whether Petitioner's alleged accident of August 4, 2011 occurred under the jurisdiction of the Illinois Workers' Compensation Act (Act). Without admitting that Illinois has jurisdiction over the claim, Respondent stipulated that an employer-employee relationship existed between the parties on August 4, 2011. Petitioner stipulated that jurisdiction over the alleged August 4, 2011 incident does not exist based on Petitioner's contract for hire, which was made in Minnesota, or the situs of Petitioner's injury, Iowa. Rather, Petitioner alleges that Illinois has jurisdiction over his claim under the "principally localized" theory delineated in the Act.

Specifically, Section 1(b)2 of the IWCA states:

> Every person in the service of another under any contract of hire, express or implied, oral or written, including persons whose employment is outside of the State of Illinois where the contract of hire is made within the State of Illinois, persons whose employment results in fatal or non-fatal injuries within the State of Illinois where the contract of hire is made outside of the State of Illinois, and persons whose employment is principally localized within the State of Illinois, regardless of the place of the accident or the place where the contract of hire was made, and including aliens, and minors who, for the purpose of this Act are considered the same and have the same power to contract, receive payments and give quittances therefor, as adult employees.

820 ILCS 305/1(b)2 (LEXIS 2011). The phrase "principally localized" was first addressed in *Patton v. Industrial Commission*. 147 Ill. App. 3d 738 (5th Dist. 1986). In *Patton*, the Appellate Court noted the concession by Petitioner that jurisdiction did not arise from the contract for hire or situs of the injury, both in Missouri. *Id.*, at 741. The Court also analyzed the legislative intent behind drafting Section 1(b)2 of the Act. *Id.*, at 741-745.

Ultimately, the Court found that the claimant had failed to establish jurisdiction under the principally localized prong of Section 1(b)2 of the Act noting that, while the "quantity of time an employee spends in a single locale may be a factor in the determination of principal localization of employment, it is not controlling." *Patton*, 147 Ill. App. 3d at 745. The facility from which the claimant received assignments, to and from where he drove his over-the-road truck and from where he received his paychecks was located in Missouri. *Id.*, at 745-746. While the claimant "spent a good deal of his time making deliveries in Illinois, this activity still constituted less than half of his total mileage in the employ of the Respondent[, and a]lthough [claimant] is domiciled in Illinois, that, standing alone, is not sufficient to confer jurisdiction upon the Commission." *Id.*, at 746.

Petitioner makes the same concessions as the claimant in *Patton*. Specifically, that jurisdiction cannot be established due to the contract for hire or the location of the alleged accident, which occurred in Minnesota and Iowa, respectively. Similar to the facts in *Patton*, the evidence in this case does not establish that Petitioner's employment is principally localized within Illinois sufficient to establish proper jurisdiction as claimed.

The question of principal localization of employment was also addressed more recently in *Cowger v. Industrial Commission*, a case involving a truck driver who lived in Illinois and was injured in Texas. 313 Ill. App. 3d 364 (5th Dist. 2000). The Appellate Court affirmed the Commission's denial of jurisdiction in Illinois determining that a claimant's employment is "principally localized" in a state if (1) the "employer has a place of business in this or such other State and he regularly works at or from such place of business, or (2) if clause (1) foregoing is not applicable, he is domiciled and spends a substantial part of his working time in the service of his employer in this or such other State." *Id.*, at 372. The *Cowger* Court further specified that this "focuses first, and foremost, upon the situs where the employment relationship is centered,' and the alternative test involving domicile and working time is not to be considered unless the situs of the relationship cannot be determined." *Id.*, at 372-373 (internal citations omitted). "The factors relevant to the determination of the situs of the employment relationship include: '(1) where the employment relationship is centered, i.e., the center from which the employee works; (2) the source of remuneration to the employee; (3) where the employment contract was formed; (4) the existence of a facility from which the employee received his assignments and is otherwise controlled; and (5) the understanding that the employee will return to that facility after the out-of-State assignment is complete.'" *Id.*, at 372 (citing *Montgomery Tank Lines v. Industrial Commission*, 263 Ill. App. 3d 218, 222 (1st Dist. 1994)).

Moreover, certain jobs, including those in sales, are transitory in nature. *Id.*, at 374. The claimants in *Cowger* and *Patton* were both over-the-road truck drivers, which "constitute a unique class of employees whose activity, by its very nature, is transient. The fact that a truck driver may spend a significant amount of time in one State does not detract from the essentially transitory nature of the activity in which he engages." *Id.* (citing *Patton*, 147 Ill. App. 3d at 745). Similarly, citing *Larson*, the Appellate Court noted that "[i]n some kinds of employment, *like* trucking, flying, *selling*, or construction work, the employee may be constantly coming and going without spending any longer sustained periods in the local state than anywhere else; but a status rooted in the local state by the original creation of the employment relation there, is not lost merely on the strength of the relative amount of time spent in the local state as against foreign states. An employee loses this status only when his or her regular employment becomes centralized and fixed so clearly in another state that any return to the original state would itself be only casual, incidental and temporary by comparison. This transference will never happen as long as the employee's presence in any state, even including the original state, is by the nature of the employment brief and transitory." *Id.*, at 374 (citing 9 A. Larson & L. Larson, Workers' Compensation Law § 87.42(a), (b)(1998) (*emphasis* added).

The fact that Petitioner did not have to go to the office in Minnesota regularly after he was hired there does not confer jurisdiction in Illinois merely because the relative amount of time spent by Petitioner in Minnesota was minimal as compared to other states. While the evidence establishes that Petitioner did not have to work from Minnesota or return to Minnesota after his sales work was completed in any state, the evidence equally establishes that the employment contract was formed in Minnesota, Petitioner's paychecks were sent from Minnesota and Petitioner received his territorial assignments from Respondent's Minnesota facility when he was hired and at all times thereafter.

Based on the foregoing, the Arbitrator finds that Petitioner's employment is not principally localized in Illinois because the situs of the employment relationship is in Minnesota and, consequently, jurisdiction is not proper in Illinois. Notwithstanding, the evidence also establishes that Petitioner's employment is not principally localized in Illinois because, while he is domiciled in Illinois, he does not spend a substantial part of his working time in Respondent's service in Illinois.

Petitioner lived in Illinois at the time of his alleged accident. He also performed some of his work for Respondent from his home office in Illinois. However, Petitioner estimated that he was in his home office 30% of the week ordering materials and promotional materials, processing paperwork and taking specifications on window drawings and turning those into e-quotes. He also estimated that only 25-30% percent of his work-related expenses, for which Respondent reimbursed him or allowed him to use a company credit card, were generated in Illinois. Petitioner testified that the remainder of his work was dedicated to traveling in a car to states outside of Illinois in a car provided by Respondent with Minnesota plates. Respondent also provided Petitioner with a cell phone with a Minnesota area code for business use. Petitioner explained that only 25-30% of the miles that he traveled were in Illinois. Petitioner's paychecks, company car, company cell phone, travel expense reimbursements and sales materials all came from Respondent's office in Minnesota. Respondent's Minnesota office also assigned him to the territories in which he was to perform his sales duties.

Petitioner's activities in Illinois constituted less than half of his responsibilities for Respondent with his territorial assignments, resources and remuneration coming from Respondent's Minnesota facility. Petitioner's work in Illinois is only casual, incidental and temporary by comparison to his time spent working outside of Illinois. Based on the foregoing, the Arbitrator finds that Petitioner's employment is not principally localized in Illinois because he does not spend a substantial part of his working time in Respondent's service in Illinois and, consequently, jurisdiction is not proper in Illinois. Thus, all remaining issues are rendered moot and Petitioner's claim for benefits is denied.

2018 IL App (1st) 171084WC-U

Workers' Compensation
Commission Division
Order Filed: July 20, 2018

No. 1-17-1084WC

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

ZENO PIECHOWICZ, Appellant, v. ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.*, (E.B. Commercial, Inc.; American Property Management Company of Illinois, Inc.; and Brittany Place Condominium Association, Appellees).	)	Appeal from the Circuit Court of Cook County No. 2016 L 050629 Honorable James M. McGing, Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Holdridge and Justices Hudson, Harris, and Barberis concurred in the judgment.

ORDER

¶ 1 *Held*: The decision of the Illinois Workers' Compensation Commission finding that the claimant failed to prove that he sustained an employment-related accident and denying him benefits under the Workers' Compensation Act (820 ILCS 305/1 *et seq.* (West 2012)) is not against the manifest weight of the evidence.

¶ 2 The claimant, Zeno Piechowicz, appeals from an order of the circuit court which confirmed a decision of the Illinois Workers' Compensation Commission (Commission) finding

that he failed to prove that he sustained an accident which arose out of and in the course of his employment with E.B. Commercial, Inc. (E.B. Commercial), and as a consequence, denying him benefit under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2012)). For the reasons which follow, we affirm the judgment of the circuit court.

¶ 3 The following factual recitation is taken from the evidence presented at the arbitration hearings conducted on July 31, 2014, September 23, 2014, and November 21, 2014.

¶ 4 The claimant was employed by E.B. Commercial as a maintenance worker since February 1, 2012. He was assigned to work at Brittany Place Condominium Association (Brittany Place), which is comprised of 11 residential buildings and located at 2319 South Goebbert Road in Arlington Heights, near the border of Elk Grove Village. His job duties included making repairs, checking boilers and heaters, removing snow and ice, changing electrical fuses, and performing miscellaneous tasks assigned to him by his boss, Eva Ayres.[1] The claimant testified that he was given a business cell phone so that he could respond to and take care of any maintenance duties that occurred during his daytime shift.

¶ 5 On December 24, 2013, the date of the accident, the claimant testified that his only job assignment came from Scott Walczak of APMC, who instructed him to check the "heating elements" in each building and disburse fliers before leaving work. The claimant stated that, because it was Christmas Eve, Ayres told him he could leave work at 3 p.m. if all of his work was completed. According to the claimant, shortly after 3 p.m., he exited the basement maintenance office to check the heating elements in the "last building" when he slipped and fell

[1] In addition to the tasks assigned to him by Ayres, the claimant would also receive work orders from American Property Management Company (APMC), a company hired by Brittany Place to help manage its day-to-day operations.

on icy stairs. He explained that, as he was walking up the stairs, his business phone rang and he lost his balance and "fl[ew] backwards" as he attempted to answer the call. The claimant stated that he broke his glasses, watch, and cell phone, and felt immediate pain in his right hand, elbow, and ribs. After lying on the ground for 10 or 15 minutes, he gathered his watch, glasses and the broken phone pieces, and returned to the maintenance office where he washed the blood off his hands, attempted to put the phone back together, and eventually used a landline or his personal cell phone to call Ayres and his wife. Approximately 10 or 20 minutes later, the claimant closed the maintenance office and was walking toward the parking lot when he was approached by Joanna Wietocha, a realtor and former resident of Brittany Place, who asked if he was okay. The claimant told Wietocha about the accident and declined her offer to drive him home or to the hospital.

¶ 6 At 4:29 p.m., the claimant called Ayres and left the following voice mail:

> "Hi, boss. I have bad news. I fell the f*** down the stairs and almost my entire right hand is swollen. At that time, Natalia was calling me, and she heard this whole incident. My son-in-law drove here. I went; thought that everything will be ok. I left. My entire hand got swollen. Call me because I am by the hospital, and I don't know if I should go to emergency room or not. The whole right hand and this wrist. I am sorry. I am—okay. Call me. Call me on my private number because I cannot answer this one. Okay. See you. Bye-bye. Sorry."

¶ 7 At approximately 5:17 p.m. on December 24, 2013, the claimant presented to the emergency department of Lutheran General Hospital. The records of that visit stated that the claimant "presents almost 2 hr after fall from 5 steps onto ground floor. Mech fall after slip on ice." The claimant reported striking his head on the ground and briefly losing consciousness. A

CT scan of the brain revealed no abnormalities. The claimant was diagnosed with a displaced distal radius fracture at the right wrist and rib fractures were suspected but not confirmed by the x-ray.

¶ 8 The claimant sought follow-up care and, on January 3, 2014, Dr. Josephine Mo of Good Shepherd Hospital performed two surgeries on the claimant's right hand. The first surgery was a closed reduction with percutaneous pinning and placement of an external fixation for the right distal radius fracture. The second surgery was an adjustment of the fixation and a carpal tunnel release. The claimant treated with Dr. Mo post-operatively and underwent a course of physical therapy.

¶ 9 On July 11, 2014, Dr. Michael Vender performed an independent medical examination of the claimant. He diagnosed the claimant as having a comminuted inter-articular fracture of the right distal radius with a carpal tunnel release. Dr. Vender noted that the claimant had degenerative arthritis with diffuse flexor stenosing tenosynovitis. The doctor also noted that the claimant might need intrinsic releases of the digits of the right hand as well as additional surgery on the wrist. He opined that the mechanism of the slip and fall on ice was consistent with the injury. Dr. Vender also believed that the claimant could do one-handed work, with no forceful or repetitive lifting.

¶ 10 During the July 31, 2014, arbitration hearing, the claimant introduced cell phone records from his business cell phone through Sprint (Petitioner's Exhibit No. 2) and his personal cell phone through Verizon (Petitioner's Exhibit No. 3). The phone records from Verizon are one page in length and contain information regarding the date, time, and duration of each call; the phone number involved; as well as the origination and destination locations of where the call was placed. For example, the Verizon phone records state, in pertinent part, as follows:

Date	Time	Number	Rate	Usage Type	Origination	Destination	Min.
12/24	1:27P	***0165	Peak	M2MAllow	Elk Grove IL	Chicago IL	2
12/24	2:34P	***0408	Peak	PlanAllow	Arlington IL	Chicago IL	2
12/24	2:37P	***4328	Peak	PlanAllow	Arlington IL	Chicago IL	2
12/24	2:38P	***0136	Peak	PlanAllow	MT Prospec IL	Benton Hbr MI	2
12/24	2:40P	***0977	Peak	PlanAllow	Des Plaine IL	Chicago IL	5
12/24	3:11P	***9126	Peak	PlanAllow	Glenview IL	Incoming CL	1
12/24	3:43P	***6263	Peak	PlanAllow	Morton Gro IL	Incoming CL	3
12/24	4:10P	***9182	Peak	M2MAllow	Skokie IL	Incoming CL	1
12/24	4:16P	***4266	Peak	PlanAllow	Morton Gro IL	Incoming CL	2
12/24	4:37P	***5022	Peak	PlanAllow	Des Plaine IL	Incoming CL	3
12/24	4:57P	***0136	Peak	PlanAllow	Glenview IL	Incoming CL	3

The claimant testified that the phone records show that he called his daughter, wife, and Ayres at 4:10 p.m., 4:16 p.m., and 4:37 p.m., respectively. The phone records from Sprint contain similar information regarding the claimant's cell phone activity on December 24, 2013; however, it does not include cell phone location data.[2]

¶ 11 During cross-examination, the claimant was extensively questioned about the "origination" location identified in the Verizon phone records. The claimant's phone bill states that a phone call originated in Elk Grove Village at 10:40 a.m., but the claimant disputed being in Elk Grove Village, stated that it "is very close to Brittany Place" and "it depends on what tower I catch." The claimant admitted he ran an errand at lunchtime to PNC Bank and that a phone call placed at 11:55 a.m. originated in Morton Grove, Illinois, which is near the PNC

[2] The cell phone records were admitted into evidence without objection or redaction. At no time did any of the parties present expert witness testimony to explain the significance of Verizon's cell phone "origination" location data.

Bank. The claimant also stated it was "possible" that he was driving back to work when he placed calls at 12:14 p.m. and 12:19 p.m., both of which originated in Des Plaines. Between 12:48 p.m. and 1:27 p.m., the claimant placed six additional calls from his personal cell phone, which originated in Elk Grove Village, near Brittany Place; the claimant confirmed that he made those calls while at Brittany Place.

¶ 12 The phone records further show that the claimant placed calls at 2:37 p.m. originating in Arlington Heights, at 2:38 p.m. originating in Mount Prospect, at 2:40 p.m. originating in Des Plaines, and at 3:11 p.m. originating in Glenview. The claimant again admitted that it was "possible" he was driving away from Brittany Place at the time those calls were made. He also conceded that he was not at Brittany Place, but "had already left for the hospital" when he received three phone calls originating in Morton Grove and Skokie at 3:43 p.m., 4:10 p.m., and 4:16 p.m. When asked why his cell phone never "hit a cell phone tower near Elk Grove Village or Arlington Heights after 2:30 p.m.," the claimant stated "I don't know how that is, the telephone—how they transfer the stations. I don't know how they do that, but I was at work."

¶ 13 The claimant also provided inconsistent testimony about whether his accident resulted in his business cell phone breaking and becoming inoperable. In particular, the claimant acknowledged that the cell phone records from Sprint show that he used his business phone to call his wife at 4:05 p.m. and Ayres at 4:28 p.m. He explained, however, that only the battery fell off his phone and he was able to "put it together."

¶ 14 The claimant further provided varying testimony as to whether Walczak called him or saw him in person at Brittany Place when he instructed him to check the boilers and distribute flyers. The claimant acknowledged, however, that the boilers were checked twice a week, on Mondays and Thursdays. He also admitted that the boiler room logs show that he checked the

boilers and heaters in all eleven buildings on December 23, 2013, the day before the alleged accident, and the boiler logs have no entries on December 24, 2013. And, when the claimant was asked why he returned to the maintenance office before checking the boilers in the final building, he stated that he was retrieving a step ladder and light bulbs to replace the lights in an exit sign. He stated that he "always" takes light bulbs and a ladder when "check[ing] a building," though he was not carrying either of these items at the time of his fall. Instead, he stated that he set the stepladder down at the bottom of the stairs.

¶ 15 Wietocha testified that she works as a real estate agent and was scheduled to show a unit at Brittany Place on December 24, 2013, at 4 p.m. As she was walking toward one of the buildings, she noticed the claimant holding his hand and asked him what happened. The claimant stated that he slipped on some stairs and injured his arm and hand. Although Wietocha offered to drive the claimant home or to the hospital, he refused, stating he could drive. Wietocha confirmed that it was "freezing" that day and there was "ice" on the "grassy area," but not on the sidewalk. She admitted she did not witness the claimant's accident and does not know where he fell.

¶ 16 At the November 21, 2014, arbitration hearing, Ayres testified that she advised the claimant on December 23, 2013, the day before the accident, that APMC was closing its office at 1 p.m. on Christmas Eve and that he would likely be able to leave work early. She stated that she called the claimant at approximately 2 p.m. on December 24, 2013, and told him he could go home, as he confirmed that "nothing was going on." According to Ayres, there was no reason for the claimant to be at Brittany Place after 2 p.m. Ayres also testified that, on December 26, 2013, she went to the maintenance office and did not see a stepladder or any debris from a broken phone, watch or glasses, or any other evidence that the claimant's accident had occurred.

¶ 17 Walczak testified that he did not speak to the claimant on December 24, 2013, and never asked him to check the boilers or heaters. He explained that the boilers and heaters are checked two times per week and, according to the boiler room logs, the claimant checked the boilers and heaters for all 11 buildings on December 23, 2013, and had no reason to check them on December 24, 2013. Walczak also denied traveling to Brittany Place to drop off fliers or otherwise asking the claimant to distribute fliers. He explained that he had the flu and a "terrible" sore throat and he distinctly recalled working from his desk at APMC's office in Schaumburg from 8 a.m. to 1 p.m. before going home. He stated that his only communication with E.B. Commercial on December 24, 2013, was an e-mail he sent to Ayres requesting that certain tasks be performed. None of the tasks, however, included checking the boilers or heaters, or distributing fliers.

¶ 18 Following the hearing, the arbitrator issued a decision, finding that the claimant did not sustain an accident arising out of and in the course of his employment. In reaching this decision, the arbitrator reasoned that the claimant "lack[ed] credibility" as he offered "multiple versions of events" and provided "inconsistent" testimony." The arbitrator further noted that the claimant's cell phone records show that he left Brittany Place shortly after 2 p.m. on December 24, 2013, and the claimant admitted "it was possible he was driving east, away from [Brittany Place]" at 2:38 p.m. Although the accident occurred "shortly after 3 p.m.," the arbitrator concluded that the claimant was not at work at the time of the alleged accident. As a consequence, the arbitrator denied the claimant benefits under the Act.[3]

[3] The arbitrator also determined that the claimant was a "direct employee of E.B. Commercial," and APMC and Brittany Place were not statutory employers under section 1(a)(3) of the Act.

¶ 19 The claimant sought review of the arbitrator's decision before the Commission. On September 7, 2016, the Commission issued a unanimous decision affirming and adopting the arbitrator's decision.

¶ 20 The claimant filed a petition for judicial review of the Commission's decision in the circuit court of Cook County. On April 10, 2017, the circuit court entered an order confirming the Commission's decision. This appeal followed.

¶ 21 We first address the claimant's contention that the Commission's determination that he failed to prove that he sustained a work-related accident on December 24, 2013, is against the manifest weight of the evidence.

¶ 22 To obtain compensation under the Act, a claimant bears the burden of proving, by a preponderance of the evidence, that he suffered an accident arising out of and in the course of his employment. *Baggett v. Industrial Comm'n*, 201 Ill. 2d 187, 194 (2002). Whether a work-related accident occurred is a question fact, and the Commission's resolution of the issue will not be disturbed on review unless it is against the manifest weight of the evidence. *Pryor v. Industrial Comm'n*, 201 Ill. App. 3d 1, 5 (1990). In resolving such issues, it is the function of the Commission to decide questions of fact, judge the credibility of witnesses, and resolve conflicting medical evidence. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253 (1980). For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *Caterpillar, Inc. v. Industrial Comm'n*, 228 Ill. App. 3d 288, 291 (1992). Whether a reviewing court might reach the same conclusion is not the test of whether the Commission's determination of a question of fact is supported by the manifest weight of the evidence. Rather, the appropriate test is whether there is sufficient evidence in the record to support the Commission's decision. *Benson v. Industrial Comm'n*, 91 Ill. 2d 445, 450 (1982).

¶ 23 Applying these standards, we cannot conclude that the Commission's finding that the claimant failed to prove that he sustained a work-related accident on December 24, 2013, is against the manifest weight of the evidence. The Commission, adopting the decision of the arbitrator, specifically found the claimant's testimony that he injured his right hand and ribs after he slipped and fell on icy stairs at work to be not credible. In assessing the claimant's credibility, it noted that the claimant "offer[ed] multiple versions of events concerning [his] accident" and failed to provide consistent testimony regarding the events that took place before, during, and after the alleged accident. For example, the claimant initially testified that the accident occurred shortly after 3 p.m. when he received a phone call from Natalia causing him to lose his balance. He later admitted, however, that it was "possible" that he was driving away from Brittany Place when he placed four calls between 2:37 p.m. and 3:11 p.m., which originated in Arlington Heights, Mount Prospect, Des Plaines, and Glenview. He also conceded that he was not at Brittany Place, but "had already left for the hospital" when he received three phone calls between 3:43 p.m. and 4:16 p.m. that originated in Morton Grove and Skokie. And, although the claimant initially testified he was in the maintenance office when he received a phone call from Natalia at 3:43 p.m., he later claimed that he was going to the hospital. On this record, the Commission could reasonably find that the claimant's inconsistent history of events belied the veracity of his testimony.

¶ 24 The Commission also supported its decision by relying on the testimony of Ayres, who stated that she called the claimant around 2 p.m. on December 24, 2013, and told him he could go home as there was "nothing going on." Likewise, the Commission found the testimony of Walczak, who denied telling the claimant to check the boilers and distribute fliers, to be credible. In fact, E.B. Commercial produced logs showing that the boilers and heaters are checked two

times per week and that the claimant checked them on December 23, 2014, the day before the accident. Based on the claimant's phone records and the testimony of Ayres and Walczak, the Commission's finding that the claimant was not at Brittany Place when the accident allegedly occurred is supported by the evidence of record.

¶ 25 Nonetheless, the claimant argues that an opposite conclusion is clearly apparent. He maintains that the Commission drew improper inferences from the location data contained within Verizon's phone records without any supporting expert witness testimony establishing the significance of that data. We disagree.

¶ 26 Initially, we note that the claimant does not challenge the Commission's evidentiary ruling, which admitted the cell phone records into evidence without objection from any of the parties. Indeed, it was the claimant himself who introduced the cell phone records to establish his telephone activity on the date of the accident and to corroborate his timeline of events. Not only did the claimant introduce the cell phone records, our review of the record reveals that the claimant never objected to any of the questions asked of him during cross-examination, regarding the location of his cell phone. Under these circumstances, the claimant cannot now complain that the Commission erred in considering evidence that was properly before it. See *Simmons v. Garces*, 198 Ill. 2d 541, 569 (2002) (plaintiffs cannot complain that the court erred in admitting evidence where they not only failed to object at trial, but introduced the evidence themselves); *Smith-Lohr Coal Mining Co. v. Industrial Comm'n*, 286 Ill. 34, 43 (1918) (a party cannot predicate error on the admission of evidence introduced by himself). Having introduced the cell phone records *in toto*, and without objection or redaction, we do not see how the claimant can shield the cell phone location data, contained within the cell phone records, from consideration by the Commission. See *Luby v. Industrial Comm'n*, 82 Ill. 2d 353, 363 (1980)

("since the exhibit which included the report was introduced *in toto* by the claimant *** [w]e do not see how he can shield the report from consideration by the Commission because of its lack of authentication").

¶ 27 And, even if the Commission erred by considering the cell phone location data, any error was harmless. In *Greaney v. Industrial Comm'n*, 358 Ill. App. 3d 1002, 1013 (2005), we noted that when an examination of the record as a whole demonstrates that the "evidence is cumulative and does not otherwise prejudice the objecting party, error in its admission is harmless." Having reviewed the cell phone records and having examined the record as a whole, it is clear that the cell phone location data was cumulative and did not prejudice the claimant. Specifically, and as discussed more thoroughly above, the Commission's finding that the claimant lacked credibility and failed to prove he sustained an accident arising out of and in the course of his employment is supported by other competent evidence.

¶ 28 Next, the claimant maintains that the Commission abused its discretion when it excluded photographs of the scene of the accident. He argues that the photographs were "properly authenticated" and should have been admitted on relevance grounds.

¶ 29 The admissibility of evidence is a matter committed to the discretion of the Commission, and its decision in the matter will not be disturbed on review absent an abuse of that discretion. *RG Construction Services v. Illinois Workers' Compensation Comm'n*, 2014 IL App (1st) 132137WC, ¶ 35. An abuse of discretion occurs when the Commission's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the Commission. *Jacobo v. Illinois Workers' Compensation Comm'n*, 2011 IL App (3d) 100807WC, ¶ 44.

¶ 30 Photographs are admissible if they have a reasonable tendency to prove or disprove a fact at issue but may be excluded when irrelevant or immaterial or if their prejudicial nature outweighs their probative value. *Boren v. The BOC Group, Inc.*, 385 Ill. App. 3d 248, 255 (2008). As demonstrative evidence, photographs should not be admitted if they are inaccurate or would mislead or confuse the trier of fact. *Id.* Before a photograph may be admitted, a proper foundation must be offered establishing: (1) the photo is a true and accurate representation of what it purports to portray; and (2) the subject of the photo was in substantially the same condition it was in at the time of the accident. *Reid v. Sledge*, 224 Ill. App. 3d 817, 821 (1992).

¶ 31 In this case, during the July 31, 2014, arbitration hearing, the claimant introduced photographs, marked as Petitioner's Exhibit Nos. 1A-D, showing the area where the alleged accident occurred. He testified that he took the photographs on January 6 or 7, 2014, and they fairly and accurately depicted the building and stairwell leading to his basement office. More specifically, the claimant stated that photographs 1A and 1D depict the eastern side of "building 2319" where his basement office is located, and shows icicles hanging from the roof. He further explained that photographs 1B and 1C show the stairs leading to the maintenance office and a handrail covered in ice. He acknowledged, however, that the photographs "do not show what [he was] actually seeing on December 24th," but that the icicles hanging from the roof and the ice on the handrail were both present on December 24, 2013. In our view, the claimant's testimony provided an adequate foundation because he has personal knowledge of the subject matter depicted in the photographs and testified that they are a fair and accurate representation of the subject matter at the relevant time. *Id.* Moreover, the photographs were relevant because they gave the Commission a basic visual sense of the area where the alleged accident occurred and corroborated the claimant's testimony. See *People v. Kubat*, 94 Ill. 2d 437, 495 (1983)

(photographs are admissible where they are relevant to corroborate oral testimony on the same subject).

¶ 32 E.B. Commercial argues that the Commission correctly excluded the photographs from evidence on grounds they were not taken on the day of the accident. We note, however, a disparity between a photograph and the object as it appeared at the time in question does not render the photograph inadmissible if the authenticating witness acknowledges the disparity and the trier of fact is not misled by it. *People v. Peeples*, 155 Ill. 2d 422, 474 (1993); *Warner v. City of Chicago*, 72 Ill. 2d 100, 105 (1978). Here, the claimant acknowledged that the photographs were taken on January 6 or 7, 2014, approximately two weeks after the alleged accident, and they "[did] not show what [he was] actually seeing on December 24th." The Commission's comment that "it was considerably colder in January than it was on the day of the accident," goes to the evidentiary weight the photographs should be given, not to their admissibility. See *id.* at 105 (photograph of sidewalk admissible to show nature of alleged defect even though it did not depict snow that was present when the plaintiff fell). Therefore, the Commission abused its discretion when it refused to admit the photographs. See *Reid*, 224 Ill. App. 3d at 821-22.

¶ 33 While we conclude that the Commission erred in refusing to admit the photographs, we consider the error to be harmless. The purpose of the photographs was to show the Commission the stairwell in which the claimant fell, and this was accomplished by the claimant's own testimony. As such, the claimant suffered no prejudice as a result of this error. See *id.* at 822 (any error in trial court's refusal to admit photographs was harmless where the purpose of the photographs was to show the jury the extent of the damage to the vehicle, and this was accomplished by the testimony of two witnesses).

¶ 34 Having found that the Commission's finding that the claimant failed to prove that he sustained a workplace accident on December 24, 2013, was not against the manifest weight of the evidence, we need not address the claimant's arguments regarding whether an employment relationship existed between the claimant and APMC and Brittany Place.

¶ 35 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County, which confirmed the Commission's decision denying the claimant benefits under the Act.

¶ 36 Affirmed.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Zeno Piechovica,

Petitioner,

16IWCC0572

vs.

NO: 14 WC 1127

EB Commerical, Inc. Brittany Place Condominium Association and American Property Mangagement,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, employment, notice, temporary total 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 February 4, 2015 is hereby affirmed and adopted.

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

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

16IWCC0572

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

DATED: SEP - 7 2016
KWL/vf
O-8/30/16
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

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

16IWCC0572

PIECHOVICZ, ZENO
Employee/Petitioner

Case# 14WC001127

E B COMMERICAL INC BPCA CONDOMINIUM ASSOCIATION & AMERICAN PROPERTY MANAGEMENT COMPANY
Employer/Respondent

On 2/4/2015, 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 0.06% 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.

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STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

16IWCC0572

Zeno Piechovicz
Employee/Petitioner
v.
E.B. Commercial, Inc., BPCA Condominium Association & American Property Management Company
Employer/Respondent

Case # 14 WC 1127

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Lynette Thompson-Smith, Arbitrator of the Commission, in the city of Chicago, on July 31, 2014, September 23, 2014 & November 21, 2014. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☒ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other Is there any liability pursuant to Section 1(a)3 of the Act?

Zeno Piechovicz
14 WC 1127

16IWCC0572

FINDINGS

On the date of accident, December 24, 2013, Respondent, E.B Commercial Inc. was operating under and subject to the provisions of the Act. There is ongoing litigation in Circuit Court regarding this finding.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent, E.B. Commercial and **possibly,** Respondent American Property Management Company.

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

Timely notice of this alleged accident was given to Respondent, E.B. Commercial.

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

In the year preceding the injury, Petitioner earned $**41,600.00**; the average weekly wage was $**800.00**.

On the date of accident, Petitioner was **62** years of age, ***married*** with **0** dependent children.

Respondent is not liable to pay any charges for any medical services.

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

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

ORDER

The Petitioner has not proven, by a preponderance of the evidence, that he sustained and accident, which arose out of and in the course of his employment, therefore no benefits will be awarded, pursuant to the Act.

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

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

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

Findings of Fact

Zeno Piechovicz (the "Petitioner") worked for E.B. as a maintenance man since on or about February 1, 2012. There are three (3) Respondents in this matter. The first is E.B. Commercial Inc., ("E.B. Commercial"), whose disputed issues are 1) did an accident occur during the course of Petitioner's employment; 2) notice; 3) causal connection; 4) medical bills; 5) prospective medical care; 6) temporary total disability; 7) marital status; and 8) the age of Petitioner at the time of the accident. *See*, AX1.

The second Respondent in this matter is American Property Management Company ("APMC"), whose disputed issues are: 1) was there an employer/employee relation; 2) did an accident occur which arose out of and in the course of Petitioner's employment; 3) was timely notice given; 4) earnings; 5) average weekly wage; 6) medical bills; 7) prospective medical care; 8) liability pursuant to Section 1(a)3 of the Act; and 9) temporary total disability. *See*, AX2.

The third Respondent in this matter is Brittany Place Condominium Association ("BPCA"), whose disputed issues are 1) the employer/employee relationship; 2) accident; 3) notice; 4) causal connection; 5) earnings; 6) average weekly wage; 7) medical bills; 8) liability pursuant to Section 1(a)3 of the Act; and 9) temporary total disability benefits. *See*, AX3.

Testimony of Ms. Joanna Wietocha

This witness testified pursuant to subpoena. She is a real estate agent who was showing a unit at BPCA on December 24, 2012, at approximately 3:30 or 4:00 p.m. She happened to run into Petitioner and he was holding his hand. She testified that he told her that he had fallen down stairs, hurting his arm and hand. She offered to drive the petitioner home or to the hospital and he refused her offer saying he thought he was fine and that he could drive. She then went into the lobby of the building of the unit she was showing to wait for her client. Upon cross-examination, she further testified that she called the petitioner a few times to wish him a merry christmas and that the petitioner took her phone number so that his attorney could contact her to schedule her testimony. She denied having a conversation with petitioner regarding this case and denied knowing him other than as the maintenance man at the property.

Testimony of Petitioner

Petitioner testified that began working for E.B. Commercial on February 1, 2012. He saw a job advertisement in the newspaper, spoke to Ms. Eva Ayres about the ad and was hired by E.B. Commercial as a maintenance person to repair certain jobs in the building, check the boilers, clear off the snow and exchange fuses in the boxes for machinery or fans. This process took place at BPCA. Petitioner filled out tax forms and gave them to Eva Ayres at E.B. Commercial. E.B. Commercial paid Petitioner's wages, withheld taxes and had the exclusive right to hire and fire Petitioner. E.B. Commercial set Petitioner's hours and approved his days off. Tr. 7/31/14, pp. 73-77; & Tr. 9/23/14,

pp. 81-82.

Petitioner's last day of work was on Friday, December 24, 2013, on which date he alleges an accident occurred while he was working for E.B. Commercial. He testified that he considered Ms. Ayres to be his boss and that she had called him before 12:00 p.m. and told him that he could leave at 3:00 p.m., that day, if all of his work was finished. He also testified that Mr. Scott Walczak, who worked for BPCA, told him to check the heating elements in all eleven (11) building entryways, before he left for the day and to disburse fliers in the buildings. According to Petitioner, that conversation took place at approximately 12:00 p.m., on December 24, 2012.

Petitioner testified that shortly after 3:00 p.m., on December 24, 2013, while making his rounds to check the entryway heaters in the various buildings, he slipped and fell down icy stairs, injuring his right hand. He testified that there was ice on the stairs and hand railings because the downspout was damaged and had dripped water onto the stairs and railing. He testified that he had brought this condition with the downspouts to the attention of Mr. Walczak. He also testified that when he fell, his work cell phone came apart, which he was holding in his hand, as he had just received a personal call from a friend named Natalia, at 3:43. He testified that he lay on the ground for approximately ten (10) minutes before he was able to get up. He gathered the pieces of the phone, his broken watch and glasses and went into the office. He was there between ten (10) and twenty (20) minutes and noticed swelling and pain in his hand. He further testified that as he was leaving the property, he saw Ms. Wietocha and told her that he had fallen while walking up stairs and hurt his arm and hand "real bad". Tr. 7/23/14, p.104.

At 4:29, Petitioner called Ms. Ayres and left the following voice mail:

> Hi, boss. I have bad news. I fell the fuck down the stairs and almost my entire right hand is swollen. At that time, Natalia was calling me, and she heard this whole incident. My son-in-law drove here. I went; thought that everything will be ok. I left. My entire hand got swollen. Call me because I am by the hospital, and I don't know if I should go to emergency room or not. The whole right hand and this wrist. I am sorry. I am—okay. Call me. Call me on my private number because I cannot answer this one. Okay. See you. Bye-bye. Sorry."

Upon cross-examination, Petitioner testified that he spoke with Ms. Eva Ayres on the telephone, the morning of the alleged accident and she told him that there should be nothing going on; and that he could go home at 3:00 p.m. Petitioner testified that he told Ms. Ayres that Mr. Scott Walczak had given him an assignment to check the heating in all of the buildings before he went home. Petitioner testified that he got the assignment from Scott Walczak on December 24, 2013 to check the heat in the buildings either when Scott was at the property and brought some flyers or when he called, the Petitioner could not recall. Transcript of 7/31/14, pp. 90-91; Transcript of 9/23/14, pp. 33-34, 63.

Petitioner's treatment

Petitioner testified that he initially sought treatment, that day, at Holy Family Hospital in Des Plaines and was informed by a security person that that location was no longer a hospital. He was directed to Lutheran General Hospital and after arrival at approximately 5:00 p.m., he was seen by the emergency room personnel. The hospital record at 5:17 p.m. states, "presents almost 2 hr after fall from 5 steps onto ground floor. Mech fall after slip on ice. Pt had head inj w loc, ? time of unconsciousness. No amnesia..." A note at 6:00 p.m. stated, "slipped and fell backwards down 5 steps this evening striking his head on the ground and he briefly lost consciousness...Occurred at work. Pt. is requesting an alcohol level be drawn for his job to document that he was not drinking on the job." This testing was negative and there was no indication of any alcohol involvement. Petitioner was diagnosed with a displaced distal radius fracture at the right wrist. Rib fractures were suspected but not confirmed by x-ray. A CT scan of the brain revealed no abnormalities.

On January 3, 2014, Petitioner underwent two surgeries at Good Shepherd Hospital, by Dr. Josephine Mo. The first was a closed reduction with percutaneous pinning and placement of an external fixation for the right distal radius fracture. The second was an adjustment of the fixation and a carpal tunnel release. Mr. Piechovicz has followed-up with Dr. Mo and has had extensive physical therapy. As of October 6, 2014, Dr. Mo had not released Mr. Piechovicz to return to work. She recommended a CT scan to evaluate the articular surface of the distal radius. She also suggested a functional capacities evaluation ("FCE"). Neither of these tests has been approved and Petitioner states that he has been unable to move forward with his medical care.

On July 11, 2014, Dr. Michael Vender evaluated Petitioner on behalf of the Respondents. He diagnosed a comminuted inter-articular fracture of the right distal radius with a carpal tunnel release. He felt there was degenerative arthritis with probably diffuse flexor stenosing tenosynovitis, due to the fall. He felt there were significant residuals for the fracture and that the mechanism of the slip and fall on ice was consistent with the injury. He felt Mr. Piechovicz could do one-handed work, avoiding forceful and repetitive lifting. He felt that Mr. Piechovicz might need intrinsic releases of the digits of the right hand as well as additional surgery on the wrist.

Petitioner's further testimony

Petitioner testified that October 6, 2014, was his last appointment with Dr. Mo and that he has an appointment set for January 12, 2015. He has not been released to return to work. He testified that he feels pain and no strength in the hand. He puts his swollen hand under hot water to open his fingers. He uses a ball for massage of the fingers and compensates by using his left hand.

Upon cross-examination by counsel for E.B. Commercial, Petitioner testified to telephone records from his personal cell phone through Verizon, (847)370-9826 (hereinafter "personal cell") and to his business cell phone supplied by E.B. through Sprint, (847)489-0323 (hereinafter "business cell"). Tr. 9/23/14, pp. 14-36; BP1.

It is undisputed that the business cell given to Petitioner, was used only by him. The Arbitrator finds that taken together, the cellular phone records support a finding that the petitioner's injury may not have occurred on the premises of BPCA; and therefore presents a question as to whether or not the accident arose out of and in the course of Petitioner's employment, on December 24, 2013. The following facts support this conclusion. The petitioner lives in Glenview, Illinois and BPCA is in Arlington Heights, Illinois. On the morning of December 24, 2013, the petitioner was supposed to begin working at 8:00 a.m. The personal cell records show that several calls were made by the petitioner, between 8:00 a.m. and 8:10 a.m. that originated in Glenview; and were to his bank in Niles, Illinois, i.e., the PNC Bank. He testified that his bank opens at 8:00 a.m. At 8:13 a.m., the petitioner made another call from his personal cell that originated from Des Plaines, Illinois, which is the route he testified that he takes to BPCA. The petitioner testified that, on his way to work, he would drive from Glenview, through Des Plaines and Mount Prospect to reach Arlington Heights. At 10:40 a.m., the petitioner placed a call on his personal cell that originated in Elk Grove Village, Illinois. The petitioner explained that the call's origination depended on which tower his cell phone would catch. He agreed that BPCA is very close to the border between Elk Grove Village, Illinois and Arlington Heights, Illinois. BP3.

The business cell records show that the petitioner received calls from Ms. Ayres at 9:51 a.m., 11:28 a.m. and 2:03 p.m., on December 24, 2013. Ms. Ayres' business cell phone number is (847)456-5622. BP1. At 11:55 a.m., the petitioner placed personal cell phone calls from Morton Grove, Illinois, which he testified were to his bank in Niles, Illinois. He testified that he ran an errand at lunch, which took him away from BPCA property. At 12:14 and 12:19 p.m., the personal cell phone records indicate that the petitioner was headed back toward BPCA, as those calls originated in Des Plaines. He placed six (6) additional personal cell phone calls originating in Elk Grove Village, near BPCA, between 12:48 p.m. and 1:27 p.m. The petitioner testified that he made those personal calls from BPCA.

Testimony of Mr. Scott Walczak

Contrary to Petitioner's testimony, Mr. Walczak testified that he distinctly recalled working at his desk at APMC's office in Schaumburg, from 8:00 a.m. to 1:00 p.m., because he had come down with the flue and had a terrible sore throat. He was making minimal calls and went home and was in bed on Christmas Eve and Christmas day. Mr. Walczak testified that he did not speak to the petitioner on December 24, 2013 and did not ask the petitioner or E.B. Commercial to check the boilers or the heaters on December 24, 2013. Mr. Walczak's only communication with E.B. Commercial on December 24, 2013, was an e-mail to Ms. Ayres, requesting certain tasks be performed. None of the tasks listed in the e-mail, included checking the boilers or heaters, or distributing flyers. Mr. Walczak also confirmed that based on the Petitioner's cell phone records, he had not spoken to the petitioner on the phone on December 24, 2013. Transcript of 11/21/14, pp. 18-27; APMCX4; BPCAX1.

Mr. Walczak further testified, in a credible manner, that there would have been no reason to check the boilers or the heaters because they were checked the day before. Petitioner admitted that the boilers

were checked twice a week, on Monday and Thursday. Petitioner checked the boilers and the heaters for all eleven buildings on December 23, 2013, the day before the alleged accident, and they were checked again on December 27, 2013 by Ms. Ayres, according to her testimony. The Arbitrator notes that evidence was presented that indicates that Petitioner did not make any notes or log for any check of the boilers and heaters on December 24, 2013, as is the usual custom. Tr. of 9/23/13, pp. 55-64; EBX1; Tr. of 11/21/14, p. 20.

Scott Walczak further testified that he is the manager for BPCA and that his duties include collecting assessment, paying bills, attending to tenant violations and assisting board members. He testified that he does not enter into contracts on behalf of the property and does not exercise control over the petitioner. He further testified that on the date of the alleged accident, he worked in his office until approximately one o'clock, when he went home. He testified that he never spoke to Petitioner or Eva Ayres. He stated that the boilers were checked on Mondays and Thursdays and that he never asked the petitioner to check them that day. He further stated, after being shown an e-mail message from himself to Eva Ayres that this e-mail was a "to do" list for December 24, for workers at BPCA and that the list did not include checking the boilers. Mr. Walczak stated that he did speak to Petitioner on Christmas day calling him to discuss him falling down stairs the night before, but according to Mr. Walczak's testimony, Petitioner did not tell him where the accident happened.

Upon direct-examination by counsel for BPCA, Mr. Walczak testified that the board of directors of BPCA, ("Board") may suggest vendors to be hired and that he verifies the vendors' insurance policies on an annual basis, which he did with E.B. Commercial, in January of 2013. He denied giving flyers to the petitioner for disbursement on December 24, 2013 and again denied telling him to check the boilers on that date and he testified that he stayed in his office and never with onto the property, on December 24, 2013.

Upon cross-examination, Mr. Walczak testified that he was on good terms with the board members and denied being responsible for the upkeep of the property. He further testified that the Board makes the decisions to hire and fire employees and that he only advises the Board as to how the work is being performed and by whom. He again denied being on the property proper, as he was only in his office and denied that the petitioner ever complained to him about ice forming on the gutters, railings and stairs.

Testimony of Eva Ayres

Ms. Ayres testified that she advised the petitioner a day before, i.e. December 23, 2013, that APMC was closing their office at 1:00 p.m. on Christmas Eve; and that he would likely be able to leave early that day. Ms. Ayres testified that she spoke with the petitioner at approximately 2:00 p.m. on December 24, 2013, and advised him that he could go home, as he confirmed nothing was going on at BPCA. The petitioner's business cell phone record shows that Ms. Ayres placed a call to the petitioner

at 2:03 p.m. on December 24, 2013. Ms. Ayres testified that there was no reason for the petitioner to be on the premises of BPCA after 2:00 p.m., on December 24, 2013. BP1.

The personal cell records show that by 2:34 p.m., the petitioner was making calls that originated from an Arlington Heights cell tower, rather than the Elk Grove Village cell tower closer to BPCA. Shortly thereafter, the petitioner made a call at 2:38 p.m., that originated in Mount Prospect, Illinois. Then, at 2:40 p.m., the Petitioner made a call that originated in Des Plaines, Illinois. At 3:11 p.m., the petitioner made a call that originated from Glenview, Illinois. The petitioner testified that it was possible he was driving away from BPCA; at the time those calls were made. BP1.

The Petitioner's personal cell records show he made calls that originated in Morton Grove at 3:43 p.m., in Skokie, Illinois, at 4:10 p.m. and in Morton Grove at 4:16 p.m. The petitioner explained that he had already left for the hospital. However, this is inconsistent with Petitioner's prior testimony that he was injured at BPCA in Arlington Heights between 3:00 and 3:30 p.m. This is also inconsistent with the testimony of Ms. Wietocha, petitioner's witness, Mr. Scott Walczak and with Ms. Ayres. The Arbitrator finds that the petitioner's personal cell phone records indicate that he left the property shortly after 2:00 p.m. on December 24, 2013; and that his injuries did not arise out of or in the course of his employment by E.B. Commercial.

Testimony of George Pawlukowsky

This witness testified that he is president of the board of directors ("Board") at BPCA and described his role as administrative. He further testified that it is a voluntary position; and that the Board employs vendors, i.e., American Property Management Company and that they have employed this company for approximately eight (8) years. Mr. Walczak has been the designated property manager for approximately three (3) years. He further testified that the vendors are required to "have insurance covering whatever job they're going to be doing for both any damage to the property or themselves." He stated that certificates of insurance are verified by the Board, on an annual basis and that he would see copies of these certificates, on occasion. He stated that E.B Commercial had been doing the maintenance and cleaning duties at BPCA for more than ten (10) years. This witness was shown and asked to identify a liability, insurance certificate dated August 21, 2013 through August 21, 2014, on which E.B Commercial and American Properties are listed as certificate holders. He testified that American Property Management required that E.B. Commercial procure this insurance and that each condominium owner contributes to an account managed by APMC, which is then used to pay for any services needed that do not come under the auspices of the condominium owner. Mr. Pawlukowsky testified that the board members do not have direct contact with E.B Commercial, do not pay Petitioner and have not authorized any Christmas bonus or any other monetary gift to him.

Upon cross-examination by counsel for APMC, Mr. Pawlukowsky testified that E.B Commercial was hired prior to APMC, and the Board had a contract with E.B. Commercial and BPCA, in effect on

December 24, 2013. He also testified that APMC collects assessments on behalf of the condominium association and spends them as required. Tr. 9/23/14 pp. 110-132; BPX2.

Conclusions of Law

As to disputed issue "B", was there an employee-employer relationship between the petitioner and any Respondent, the Arbitrator finds the following facts:

Section 1(a)3 of the Act provides that "any one engaging in any business or enterprise referred to in subsections 1 and 2 of Section 3 of this Act who undertakes to do any work enumerated therein, is liable to pay compensation to his own immediate employees in accordance with the provisions of this Act, and in addition thereto if he directly or indirectly engages any contractor whether principal or sub-contractor to do any such work, he is liable to pay compensation to the employees of any such contractor or sub-contractor *unless* such contractor or sub-contractor has insured, in any company or association authorized under the laws of this State to insure the liability to pay compensation under this Act, or guaranteed his liability to pay such compensation."

First, the evidence indicates that Petitioner was a direct employee of E.B. Commercial. Secondly, Respondent, BPCA entered into a contract with Respondent, APMC whereby APMC was to operate and manage the day-to-day affairs of BPCA on behalf of the Board, including collection assessments, procuring checks to pay BPCA's vendors and utilities, fielding homeowner concerns and monitoring vendors hired by the Board. APMCX3; Tr. of 9/23/14, pp. 107, 110; Tr. of 11/21/14, pp. 8-9; Tr. of 9/23/14, pp. 112, 128; APMCX2.

APMC might supply proposals or quotes from a vendor for the Board's review, but APMC does not enter into any contracts for janitorial services, pool maintenance or other vendors' services for BPCA. Petitioner's job was general maintenance, lights, checking boilers, locks and doors and fixing things that did not require the type of specialty, i.e. plumbing or major repairs, for which the Board would call in other vendors. APMC did not provide any materials, tools or equipment to any of the employees of E.B. Commercial for work at BPCA's property and while it did not instruct E.B. Commercial how to perform its maintenance tasks, it did, at times, suggest what tasks the petitioner should do. Tr. of 11/21/14, pp. 10, 16-18, 30; Tr. of 9/23/14, p. 126.

Thirdly, the evidence demonstrates that APMC did directly or indirectly, request that E.B. Commercial's employee do particular maintenance work, i.e., the faxes and input from Mr. Walczak, telling Ms. Ayres what work needed to be done by Petitioner. BPCA contracted with E.B. Commercial to provide maintenance and cleaning services. E.B. Commercial had been providing maintenance service for BPCA for at least ten years and prior to BPCA's hiring of APMC however, APMC would

occasionally act in a supervisory role with E.B. Commercial, as one of its duties as property manager. There was evidence presented that BPCA has a paging service for homeowners to call after hours, if there is an emergency; and the paging service contacts E.B. Commercial directly. E.B. Commercial's contract with BPCA allows a set dollar amount for overtime, and if there is a request for overtime, those requests are given to the Board for approval, on a monthly basis. Tr. of 9/23/14, pp. 112, 128; APMCX2; Tr. of 11/21/14, pp. 11-12; 34-40.

APMC is the managing agent of the Board and on occasion, issues work orders to E.B. Commercial for tasks that needed to be done under BPCA's contract with E.B. Commercial; or to address homeowner concerns. If APMC is dissatisfied with the employees of E.B. Commercial or any other contractor, APMC could recommend replacement of vendors. APMC would advise BPCA's Board what issues arose, and it is up to the Board to make a decision to take action. Tr. of 11/21/14, pp. 9-10; 17-18; 40.

Pursuant to section 1(a)3 of the Act, APMC could be liable as a statutory employer if the contractor is not insured for the liability, or has not guaranteed his liability to pay such compensation. Here, it is not clear that E.B. Commercial guaranteed its liability to pay such compensation. George Pawlukowksy, Board President and Scott Walczak of APMC testified that they both checked the certificates of insurance for E.B. Commercial, to ensure everyone was covered. Mr. Pawlukowksy testified that BPCA verified E.B. Commercial's insurance prior to engagement and thereafter on an annual basis. E.B. Commercial produced the certificate of insurance, which shows effective dates from August 21, 2013 to August 21, 2014, which covers the date of the accident on December 24, 2013. The Certificate of Insurance specifically states, "This is to certify that the policies of insurance listed below have been issued to the insured named above for policy period indicated." However, there is currently as issue with the insurance company that has denies coverage for this period. The matter is in litigation, in Circuit Court. BPCAX2.

Misters Pawlukowsky and Walczak testified that the parties reasonably relied on the certificate of insurance; and believed there was a policy of insurance in effect on December 24, 2013; otherwise, there would have been a problem. The Arbitrator finds that while the petitioner is definitely an employee of the Respondent, E.B. Commercial, depending on whether this company had worker's compensation insurance, on the date of accident; Petitioner may also have been a statutory employee of APMC on December 24, 2013, the date alleged on the Application for Adjustment of Claim 14 WC 1127, filed on January 14, 2014.

The Arbitrator finds that Respondents' reliance on the certificate of insurance provided by E.B. Commercial was reasonable. Further, the Arbitrator finds that E.B. Commercial's proffer of the certificate of insurance to APMC and BPCA was effectively a guarantee of its liability to pay such compensation.

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As to disputed issue "C", did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds the following.

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

The burden is on the Petitioner seeking an award to prove by a preponderance of credible evidence all the elements of his claim, including the requirement that the injury complained of arose out of and in the course of his or her employment. *Martin vs. Industrial Commission*, 91 Ill.2d 288, 63 Ill.Dec. 1, 437 N.E.2d 650 (1982). The mere existence of testimony does not require its acceptance. *Smith v Industrial Commission*, 98 Ill.2d 20, 455 N.E.2d 86 (1983). To argue to the contrary would require that an award be entered or affirmed whenever a claimant testified to an injury no matter how much his testimony might be contradicted by the evidence, or how evident it might be that his story is a fabricated afterthought. *U.S. Steel v Industrial Commission*, 8 Ill.2d 407, 134 N.E. 2d 307 (1956).
It is not enough that the petitioner is working when an injury is realized. The petitioner must show that the injury was due to some cause connected with the employment. *Board of Trustees of the University of Illinois v. Industrial Commission*, 44 Ill.2d 207, 214, 254 N.E.2d 522 (1969); see also *Hansel & Gretel Day Care Center v Industrial Commission*, 215 Ill.App.3d 284, 574 N.E.2d 1244 (1991).
The Illinois Supreme Court has held that a claimant's testimony standing alone may be accepted for the purposes of determining whether an accident occurred. However, that testimony must be proved credible. *Caterpillar Tractor vs. Industrial Commission*, 83 Ill.2d 213, 413 N.E.2d 740 (1980). In addition, a claimant's testimony must be considered with all the facts and circumstances that might not justify an award. *Neal vs. Industrial Commission*, 141 Ill.App.3d 289, 490 N.E.2d 124 (1986). Uncorroborated testimony will support an award for benefits only if consideration of all facts and circumstances support the decision. *See generally, Gallentine v. Industrial Commission*, 147 Ill.Dec 353, 559 N.E.2d 526, 201 Ill.App.3d 880 (2nd Dist. 1990), *see* also, *Seiber v Industrial Commission*, 82 Ill.2d 87, 411 N.E.2d 249 (1980), *Caterpillar v Industrial Commission*, 73 Ill.2d 311, 383 N.E.2d 220 (1978). It is the function of the Commission to judge the credibility of the witnesses and to resolve conflicts in the medical evidence, and assign weight to the witness' testimony. *O'Dette v. Industrial Commission*, 79 Ill.2d 249, 253, 403 N.E.2d 221, 223 (1980); *Hosteny v Workers' Compensation Commission*, 397 Ill.App. 3d 665, 674 (2009).

The Arbitrator finds and concludes that the petitioner has failed to prove, by a preponderance of the evidence, that he sustained an accidental injury that arose out of and in the course of his employment by Respondent E.B. Commercial, on December 24, 2013. In support of this finding, the Arbitrator finds the following facts.

Petitioner was supposed to arrive at work on December 24, 2013 at 8:00 a.m. Petitioner's cell phone records show that Petitioner made calls at 8:02 a.m. and 8:08 a.m. that originated in Glenview and at 8:13 a.m. that originated in Des Plaines, Illinois. Petitioner's home address on December 24, 2013 was 4260 Central Road, Glenview, Illinois. BPCA was located near Algonquin Road and Goebbert Road, Arlington Heights, Illinois. Petitioner testified that he goes through Des Plaines on his route to work, and he passes through Mount Prospect and then to Arlington Heights. Petitioner also made a call at 10:40 a.m. that originated in Elk Grove Village, which he admitted is very close to BPCA. Petitioner said it was possible he was late for work and making calls from his car.

Petitioner made a call at 11:55 a.m. on December 24, 2013, originating from Morton Grove near his bank. Petitioner testified that he ran an errand at lunchtime and was back near Elk Grove Village by 12:48 p.m. Petitioner's cell phone records reflect calls made from Des Plaines at 12:14 and 12:19 p.m. and then from Elk Grove Village at 12:48 p.m.. Petitioner testified that he was at BPCA between 12:48 p.m. and 1:27 p.m., when he made six calls originating from a cell tower in Elk Grove Village.

Petitioner made two calls at 2:34 and 2:37 p.m. from Arlington Heights, which is near Brittany Place. After 2:37 p.m., however, Petitioner's cell phone records reflect calls at 2:38 from Mount Prospect, 2:40 from Des Plaines; and 3:11, from Glenview. Petitioner admitted that it was possible he was driving east, away from BPCA and further agreed that he had calls at 3:43 from Morton Grove, 4:10 from Skokie and 4:16 from Morton Grove.

According to Petitioner's cell phone records, Petitioner was at or near Mount Prospect at 2:38 p.m. and was not near Elk Grove Village or Arlington Heights at any time after 2:37 p.m. on December 24, 2013. Petitioner testified that he fell between 3:00 p.m. and 3:30 p.m. on December 24, 2013. The Arbitrator finds that Petitioner was not at Brittany Place, his assigned work location, and was no longer in the course of his employment with E.B. Commercial at the time of the accident, as claimed by Petitioner.

Ms. Eva Ayres testified that she called the Petitioner at about 2:00 p.m. on December 24, 2013 and advised him that he could go home because the Petitioner advised that nothing was going on and APMC's office was closed at 1:00 p.m. In fact, Ms. Ayres advised Petitioner a few days before that APMC was closing at 1:00 p.m. and he would be able to leave early. Petitioner's business phone records show that Ms. Ayres called him at 2:03 p.m. on December 24, 2013. Ms. Ayres testified that there was no reason for the petitioner to be on the property after 2:00 p.m. Tr. of 11/21/14, pp. 72-75. & BPCAX1.

Mr. Walczak's testimony corroborated Ms. Ayres testimony that there was no reason for Petitioner to be at Brittany Place after 2:00 p.m. Mr. Walczak confirmed that he worked from 8:00 a.m. until 1:00 p.m. Mr. Walczak further testified that the only communication he had with Ms. Ayres on December 24, 2013 was an e-mail at about 10:54 a.m. advising that if the petitioner had a half-hour, he could complete the tasks indicated, otherwise the work order for those tasks could wait until Thursday. None of the tasks listed in the e-mail were urgent.

The Arbitrator notes that the Petitioner's testimony is inconsistent, offers multiple versions of events concerning this accident and lacks credibility. Petitioner testified that he fell between 3:00 p.m. and 3:30 p.m. on December 24, 2013 while going up the stairs from the maintenance office. He testified that he had put light bulbs for the exit lights in his pocket and taken out a small stepladder that he left at the bottom of the stairs because he did not know if he would need it. He testified that at the time of the fall, his business phone rang; he pulled out the phone, went to grab the handrail, and lost his balance. Petitioner testified that when he lost his balance, the battery fell apart from the phone and he broke his wristwatch and glasses. When Eva Ayres went to Brittany Place on December 26, 2013, she did not find a stepladder at the bottom of the stairs or any debris from a broken watch or glasses or other evidence that the Petitioner's accident had occurred.

Petitioner also testified that he tried to put his phone back together but he could not do it because his hand was swollen; and didn't think he was able to make any calls with his business phone after it fell apart. However, he later agreed that he did make calls to his wife and Ms. Ayres, from the business phone when shown his cell phone records and testified that that he did put the battery back in while in the office and it took about ten minutes. Petitioner further testified that he called Ms. Eva from the landline or his private phone after the accident, but admitted later that there was no landline in the maintenance office at Brittany Place.

At 4:28 p.m., Petitioner left a message for his boss, Ms. Eva Ayres, advising her that he had fallen down the stairs, and that Natalia was calling him and heard the whole incident. Petitioner's cell phone records show that he received a call on his personal phone from Natalia, a Ukraine number, at 3:43 p.m., while presumably, in Morton Grove. Petitioner claimed that he was in the maintenance office after the accident when he received the call from Natalia. Petitioner later claimed he was going to the hospital or at the hospital when Natalia called at 3:43 p.m.

Petitioner testified that he drove himself to the hospital near Golf and Des Plaines River Road but there was no hospital there anymore so he drove to Lutheran General Hospital. Petitioner admitted that Golf and River Road was between his house and Lutheran General Hospital. Petitioner's cell phone records are consistent that he was near his home rather than at Brittany Place around 3:00 p.m. when the accident allegedly occurred according to the Petitioner.

When asked about making calls from Glenview at 3:00 p.m., Petitioner testified that he was already in the hospital at that time, yet he testified earlier that the accident occurred around 3:00 p.m. The emergency room records reflect that Petitioner was in Lutheran General Hospital at approximately 5:09 p.m. Petitioner claimed that he did not know how it was that his cell phone records showed he was nowhere near Arlington Heights after 2:30 p.m., and that he was at work. Yet, he did agree that all cell phone calls after December 26, 2013, were from Glenview where he lives. Petitioner further agreed that he had calls at 3:43 from Morton Grove, 4:10 from Skokie and 4:16 from Morton Grove. Petitioner testified that he had already left for the hospital by 3:43 p.m. At the same time, Petitioner also testified that he did not leave Brittany Place until approximately 4:00 p.m., which is inconsistent with his cell phone records and prior testimony.

Petitioner testified that as far as the U.S. government was concerned, he retired in 2013, prior to the accident. Petitioner applied for and collected social security retirement benefits as of June 2013, yet Petitioner continued to work full-time for E.B. Commercial, while receiving social security benefits.

The Arbitrator finds that there is no credible evidence that the Petitioner was involved in an accident between 3:00 p.m. and 3:30 p.m., while working at Brittany Place, on December 24, 2013. The Arbitrator further finds that Petitioner failed to prove, by a preponderance of the evidence, that he sustained an injury that arose out of and in the course of his employment with E.B. Commercial or any other Respondent.

The Arbitrator further finds that the testimony of Petitioner's witness, Joanna Wietocha, lacks credibility. Ms. Joanna Wietocha, a realtor, testified that she became acquainted with Petitioner when she was a former tenant in one of the units at Brittany Place. Petitioner gave her a mail key and did some work in her unit; and she knew she "could count on him as a handyman." Petitioner denied having called Ms. Wietocha on December 24, 2013, but then said it was possible, when his business phone records showed he called her number at 1:10 p.m. He testified that he left a message with greetings for the holidays.

Ms. Wietocha testified she called Petitioner after December 24, 2013, at what she thought was his business number, or the line everyone used that was on a board downstairs [at Brittany Place] if you have any problems with maintenance. Ms. Wietocha testified she still had Petitioner's business card and called him after Christmas. Petitioner called Ms. Wietocha and asked her for help in this case and told her that the woman he was working for did not have insurance; that he has no money right now; and the doctors had to be paid from his own pocket.

Joanna Wietocha testified that on the day of the alleged accident, she parked her car at Brittany Place at 3:30 p.m. on December 24, 2013, to show a unit to a client at 4:00 p.m. She testified that while walking to the building, she saw Petitioner walking toward the parking lot at 3:35 p.m. or 3:40 p.m. Ms. Wietocha testified that the Petitioner told her that he fell walking up the stairs, but she did not see

him fall and he did not tell her what time he fell. Petitioner testified that he "saw the lady from the realty office around 3:00, 3:30, 4:00 p.m.". Ms. Wietocha stated she offered Petitioner a ride home or to the hospital, but Petitioner said he was going to be fine, so she did not insist because she had her client coming in for the showing. Ms. Wietocha testified that she met her client at 3:50 p.m.

Ms. Wietocha's testimony, however, is inconsistent with the Petitioner's cell phone records, which indicates that Petitioner was not at Brittany Place after 2:37 p.m. As such, Ms. Wietocha's testimony lacks credibility and does not confirm that the Petitioner's accident occurred at the time and place alleged by Petitioner.

As the Arbitrator has found that the petitioner has not proven, by a preponderance of the evidence, that an accident occurred, which arose out of and in the course of his employment, all other disputed issues are moot and will not be addressed.

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ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
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SIGNATURE PAGE

Signature of Arbitrator

February 3, 2015
Date of Decision