STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CASEY FLETCHER,

Petitioner,

vs.

NO: 11 WC 44029
15 IWCC 332

ASPLUNDH TREE EXPERT CO.,

Respondent.

CORRECTED DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causation, temporary total disability, permanent partial disability, wage differential, vocational rehabilitation, medical expenses both current and prospective, and penalties and fees, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Findings of fact and Conclusions of Law

1. Petitioner testified he lives in Aurora. He was currently unemployed and he was last employed with Respondent until June 21, 2012. He was initially hired by Respondent on October 29, 2002. Respondent prunes trees as a contractor for Naperville Electric. Petitioner's employment was exclusively within Naperville. Respondent did not have an office there and Petitioner operated out of a car dealership where Respondent parked its trucks. Every morning he would be given his assignment of where to trim trees. Besides climbing and trimming trees, he also controlled traffic and cleaned debris. He had been foreman for six years, which entails the same activities but also includes delegation of duties and paperwork.

2. Petitioner further testified that on October 13, 2011, he was "cutting a tree down in an alleyway and part of the tree had fell into the resident's yard." The gate to the yard was locked and nobody was at home. Petitioner tried to retrieve the branch, which he estimated was 10-15,' and about 4" around, with a 10-12' pole pruner. As he was retrieving the branch he felt pain in his right wrist. He told the general foreman, Loren Peterson, that he "just tweaked the 'S' out of" his wrist. The injury occurred between 11 am and noon. He continued to work despite the pain. However, the general foreman excused him from performing his regular duties.

3. Petitioner reported to work the next day, but was unable to perform his regular duties because of the continued pain in his wrist. He was still able to delegate jobs and fill out the necessary paperwork. Petitioner continued to have pain in his wrist when he reported to work on October 21, 2011. He tried to resume his normal work activities. He had to yank the pole pruner pretty hard and he reinjured his wrist. He could not complete his task and came back to the ground. He called Mr. Peterson by radio telling him he injured his wrist again. Mr. Peterson told him to shut the crew down for the day and to rest over the weekend. He also stated he would take Petitioner to a doctor if it did not improve. On neither occasion did Mr. Peterson give him an accident report to fill out.

4. The following Monday, Mr. Peterson took Petitioner to Concentra Urgent Care. Petitioner reported the mechanisms of injury. Petitioner's hand and wrist were examined and x-rays were taken. The Concentra doctor provided Petitioner a brace and placed a 10-lb restriction on him. Respondent accommodated his restrictions. Later, Petitioner was restricted to no use of the right hand and Respondent was able to accommodate that restriction as well.

5. Petitioner also testified he had physical therapy which did not help his condition. An MRI was ordered but not authorized. He had the MRI on December 19, 2011, but through his personal insurance and not through workers' compensation. According to Dr. Giannoulias, the MRI did not show a tear and he was stumped. He raised Petitioner's weight limit to 40 lbs.

6. Petitioner saw Dr. Velagapudi, at Castle Orthopedics, on April 26, 2012. He administered an injection, reduced Petitioner's restrictions from 40 lbs to 20 lbs, and recommended a bone scan. The parties stipulated that the results of the bone scan were consistent with ulnar lunate impingement. Petitioner continued to work with whatever restrictions were imposed on him up to June 21, 2012. However, he "definitely" continued to experience pain in his wrist.

7. Dr. Velagapudi performed surgery on June 25, 2012. He released Petitioner to work with the restriction of one-handed work on July 3, 2012. Petitioner reported to Respondent, but was not allowed to work. After the surgery all benefits stopped. The parties stipulated that Respondent eventually paid temporary total disability benefits in the amount of $29,557.89 representing the period from June 25, 2012 to August 19, 2013. He received that payment about a year after the surgery.

8. Petitioner had a Functional Capacity Evaluation ("FCE") and Dr. Velagapudi released him from care with permanent restrictions based on the results. He recommended that Petitioner have the hardware removed, but that would have necessitated him being off work for about another month. Petitioner testified that Respondent informed him that he could return to work as a "ground person" as of April 15th. He filled out the necessary paperwork and had required the drug testing. However, he was then told that the ground job in Naperville had been eliminated. Petitioner believed he was offered a position as a work planner and flagger in Gary and Valparaiso Indiana, respectively.

9. Petitioner indicated that initially he did not take those offers because one was not union, he would lose seniority, there would be a cut in pay, and the distance required for travel; "it was like 84 miles one way from his home to Valparaiso." Later he tried to accept the work planner job in Gary after the deadline Respondent imposed, but his four phone calls were not returned. Petitioner has not returned to work with Respondent or anyone else within his restrictions. He was currently working with Vocamotive and wanted to continue. He has applied for "numerous" jobs through the agency and on his own.

10. Petitioner also testified that his wrist was "unfortunately" "pretty much the same way as before the surgery to a point. It's just that the steady pressure is relieved off the bone, but certain movements still cause it pain." He has a little limited range of motion. He takes over-the-counter Aleve "pretty much almost every day." His right hand has ¼ strength of the left. He writes with his left hand, but his right hand is his "power;" he is somewhat ambidextrous.

11. On cross examination, Petitioner testified as foreman he supervised the crew and delegated tasks. As foreman he was require to have a Class B CDL. He operated a boom on the truck which involved using hand levers about once a week or so. He used a computer in supervisory jobs. He did "not really" recall Dr. Giannoulias telling him his lunate capitate condition was degenerative in nature. Petitioner agreed he was able to work for a week after the first accident. He did not seek medical attention during that period and had no treatment between 1/19/12 and 4/26/12. He was able to work with restrictions up to his surgery and Respondent accommodated his restrictions.

12. Petitioner agreed that the FCE rated him capable of working at a medium physical demand level. Petitioner filed a grievance through the union to get his job back with Respondent. He did not look for work with any other employer for four months. He agreed that he was offered a job in Gary on August 5th @ $19.71 an hour and had until August 19th to accept it. He did not contact the person about accepting the job within that time period. He did not contact him until September 17th to accept the job. He was also offered a job as a flagger at the same rate of pay previously and turned down that job.

13. Petitioner worked his entire career with Respondent in Naperville. He applied for the job in Naperville and got it. However, he knew that other Respondent's employees were sent to different locations, but "pretty much within their region."

14. Petitioner became aware that Naperville was within the Indiana region, but he did not know why. Petitioner disagreed that he worked for another tree company in the summer of 2013. Getting a Class A CDL was not part of his vocational plan. Petitioner agreed that he previously worked in collections, as a forklift driver, a warehouse worker, and for Caterpillar as a supervisor for about two years.

15. Petitioner agreed he was referred to Vocamotive by his lawyer. He told the counselor that he had full range of motion in both wrists at the initial interview. Petitioner agreed that he was not unemployable and would "love to find a job." He disagreed that the jobs Respondent offered in Indiana were within 70 miles of his home.

16. On redirect examination, Petitioner testified that the FCE indicated he could lift 40 lbs occasionally; medium physical demand level requires a 50 lbs lifting capability. There are some medium level jobs he cannot perform. While he was at work after the first accident, he was told not to strain his right hand. He was able to climb the smaller trees but not the larger ones. He was not required to lift anything. Dr. Giannoulias imposed a 40-lb restriction when he released Petitioner from his care on January 19, 2012. Respondent accommodated that restriction through April of 2012. He was still having pain in his wrist which was why he sought treatment from Dr. Velagapudi.

17. Petitioner also testified that there were negotiations about his returning to his job in Naperville before he was offered the first job in Indiana. He would have accepted a job in Indiana if it included reimbursement for mileage. He agreed to accept the job in Gary after a pretrial conference. However, Respondent's representative never returned his calls.

18. Petitioner stated that every once in a while he has some pain in his wrist when turning a steering wheel. He has gripping restrictions and all tractor-trailers have manual transmissions. He has not tried to drive a manual transmission "up to this point." Respondent's employees are transferred temporarily to address storm damage.

19. On re-cross examination, Petitioner agreed he might have indicated on his job application that he was willing to travel; he said "anything to get the job, man." On re-redirect, Petitioner testified he was still willing to travel.

20. On questioning from the Arbitrator Petitioner testified he believed he was terminated by Respondent because he did not return to work after his FMLA leave. He was sent material for COBRA insurance. He applied for, and received, unemployment benefits. He no longer received unemployment benefits after he "received his back pay." As foreman for Respondent, he did the same job activities as other members of the crew. He has a plate and seven screws in his forearm.

21. Sergio Benavidez was called by Petitioner pursuant to subpoena. He was employed by Respondent on October 13 and October 21, 2011 in Naperville. He worked with Petitioner, who was his foreman. On October 13th, Petitioner's "boss," the general foreman, told Petitioner to get a branch out from a yard with a pruner; it was heavy.

22. After Petitioner started lifting the branch, Mr. Benavidez and the general foreman, Mr. Peterson, raised it over the 6' fence. Petitioner told the general foreman that his wrist hurt and "he [jokingly] told him to stop jagging off." Mr. Peterson then told Petitioner to take it easy. On October 21, 2011, Mr. Peterson told Petitioner to cut a branch of an oak tree. Petitioner tried but could not complete the task "because his hand was hurting." Thereafter, Petitioner continued to complain about pain in his wrist. He saw Petitioner come to work with a cast on his arm.

23. Lisa Helma testified she works for Vocamotive. She was referred to Petitioner by his lawyer. She interviewed Petitioner and evaluated his medical records including his FCE. Dr. Velagapudi agreed with the assessment in the FCE. Petitioner reported pain associated with raising his arms, gripping, twisting, and torquing motions, as well as driving. He reported decreased grip strength and a grinding and popping sensation over the hardware in his wrist. Petitioner did not complete high school but did later obtain a GED. Petitioner indicated he was not keyboard proficient and did not have any software skills. He used a computer at Caterpillar but simply to look up parts. He did not have any skills in mechanical repair.

24. Ms. Helma also testified a Class B CDL license can be valuable depending on the physical capabilities of the holder. Most jobs associated with the license involved medium physical demand capacity. Petitioner's restrictions do not qualify him for all medium physical demand jobs. Medium physical demand required up to 50 lbs occasional lifting and 25 lb frequent lifting, while Petitioner's maximum occasional and frequent lifting was rated at 40 and 20 lbs respectively. In addition, in the experience of the witness a lot of the jobs actually involve greater than medium physical demand. Petitioner also worked as a debt collector and forklift operator, which is also classified as at least medium physical demand job if not higher.

25. Ms. Helma prepared an initial assessment and recommended "testing by a certified vocational evaluator." However, that testing was not done because no rehabilitation plan was authorized. Vocamotive does not do such testing in house; it is outsourced. Petitioner's job as tree trimmer was classified as a semi-skilled heavy demand level job.

26. Ms. Helma concluded Petitioner did not have any transferable skills. She also concluded that the jobs Respondent offered Petitioner did not provide him a stable labor market. 59.3% of flaggers in Illinois work only part time and the mean hourly wage was $9.93. The only posting for such a job she found within 75 miles of Naperville was in Michigan City Indiana and that required the candidate to lift 50 lbs. In addition, in her experience, flaggers often also work as laborers, which require a very heavy physical demand capability. She could not find any reference to "job planner" positions.

27. Ms. Helma opined that based on her labor market survey, Petitioner would be qualified to work jobs that would pay between minimum wage and $10 an hour. He would benefit from vocational rehabilitation services. Besides the testing, she recommended computer training and "job seeking skills instruction and placement activities."

28. Petitioner has provided Ms. Helma job search reports. Petitioner is conducting a job search based on her targets as well as those identified in a job analysis report by Mr. Minnick, a vocational rehabilitation counselor retained by Respondent. He identified target jobs including bus driver and truck driver. Mr. Minnick simply identified available jobs without noting their requirements. She also thought other bus/truck driving jobs would exceed his 40-lb restriction. Some truck driving jobs required a Class A CDL, which requires a DOT physical and some required previous driving experience, which Petitioner did not have. Petitioner also did not have retail experience which would disqualify him for some jobs targeted by Mr. Minnick. She disagreed with Mr. Minnick's assessment of Petitioner's transferable skills.

29. On cross examination, Ms. Helma agreed that the first goal of vocational rehabilitation would be to return a client to his previous employment. Alternative employment from the employer within a client's restrictions would only eliminate the need for vocational rehabilitation as long as it represented a stable job market. She did not review an official job description of flagger for Respondent. She was not aware of the pay Respondent was going to pay Petitioner to work as a flagger. She did not contact Respondent to determine the job duties of a job planner. She agreed that Petitioner's jobs included supervising and interacting with customers; those are skills. Ms. Helma had no knowledge of Petitioner seeking employment other than with Respondent prior to her initial evaluation. She was not familiar with any "tree companies" and did not contact any about work planning positions. She was unaware that Respondent had 1,200 work planners on staff.

30. On redirect examination, Ms. Helma testified she believed Respondent was a national company and would not know where the work planning positions were located. A salary of $19.71 an hour would exceed the normal pay for work only as a flagger without a connection to other labor. His pay would be less if he lost that job with Respondent. Petitioner worked for Rent-A-Center for two months in which he had interaction with customers; "it takes a minimum of three months to develop a skill." She still opined that Petitioner would benefit from vocational rehabilitation training/counseling to obtain suitable employment within his restrictions.

31. On re-cross examination, Ms. Helma testified she did not contact Respondent about activities involved in work planning positions and did not know the internal stability of that position or the position of flagger in Respondent's company. She did not inquire about such positions at other tree trimming companies, but did an internet job search.

32. On re-redirect examination, Ms. Helma testified she did not find any work planning positions in her internet search. It would not be customary in her profession to contact tree companies through the yellow pages. Petitioner informed her that the jobs offered were no longer available, which was why he came to Vocamotive.

33. On re-re-cross examination, Ms. Helma testified she was not aware that Petitioner turned those jobs down.

34. Stephen Williams testified he worked for Respondent for 10 years, seven as a general foreman and the last three as regional manager. Respondent is a billion dollar company with 38,000 employees. He testified he puts 9,000 miles a month on his vehicle working for Respondent. He has employees who travel 80 one way to work every day. They do large circuits in Indiana on a contract with NIPSCO. "Once the circuit is complete" his "job is actually to bid more work," which is why he has his "work planners go out there and actually measure the trees, shoot the footage of the pole spans. They document exactly what" the witness needs to price a job. If an employee specifies a travel limit, Respondent tries to accommodate it. Petitioner's job application indicated he was willing to travel and in the question as to how far, he answered "open." Mr. Williams interpreted that answer to indicate "he'd go wherever we want him to go within the region or if there's a storm emergency."

35. Mr. Williams related that Respondent had only two contracts in which the trimmers are based in a single location; one in Naperville and one in Monticello Indiana. Those crews can be sent all over the US for storm duty. Last year they sent crews from Naperville to New York for storm duty. Such duty usually lasts two-four weeks, working seven days a week. Mr. Williams thought Petitioner probably had the opportunity to work storm duty, but he never was on it. Mr. Williams testified that a foreman had to know the business, deal with customers, utilities, and homeowners, and manage the crew. To the best of his knowledge Petitioner satisfies all the requirements needed to be a foreman.

36. Mr. Williams also testified it is not unusual for employees to drive 60-70 miles each way to a job. A job can take a couple of days or a couple of months. The employees would have to drive back and forth each day. Respondent does not reimburse for mileage; it is the nature of the business. Employees can carpool and they accept the travel because they can work overtime.

37. Mr. Williams further testified that if Respondent lost the Naperville contract, the workers would be offered jobs in Indiana because Naperville and Indiana is his region. Since the alleged injury, the witness has offered Petitioner three jobs. By letter dated May 21, 2013, he offered Petitioner a job as flagger in Valparaiso. It is cheaper to have his employees flag rather than outsourcing. Petitioner refused that job. He believed Petitioner had a week to respond to that offer. He was notified about the issue of mileage, but he had guys that travel that mileage all the time, and it was all highway miles. Petitioner turned down the job citing the length of commute.

38. By letter dated June 3, 2013, he offered Petitioner another flagger job in Valparaiso. Petitioner was given two weeks to respond, and he again rejected it. He uses flaggers every day somewhere in his region. It is actually a very skilled position because he has to know "proper radio communication," the laws of each state, where to stand, and that no one is allowed in the work zone when he is flagging. The flagger position with Respondent is "very stable." The duties of a flagger definitely comply with Petitioner's restrictions. There is no heavy labor involved in flagging for Respondent. The flagger job paid $1.32 cents an hour less that Petitioner's previous job.

39. By letter dated August 5, 2013, he offered Petitioner a job as work planner stationed out of Gary also at $19.71 an hour. He had to respond by August 19th. He would report there and go where he needed work planning. He could have to drive 10 minutes to a site or up to two hours, but he would get paid for it. It was not unusual for work planners to travel such distances. Petitioner would work four, 10-hour days a week. He offered Petitioner the job because he knew the business and requirements of various trimming jobs.

40. After Petitioner failed to respond, Mr. Williams hired someone else on August 26th at a rate of $16 an hour. He received a voicemail from Petitioner on September 17th indicating he would accept the job and to return the call if it was still available. He did not return the call because the job was no longer available. The job of work planner with Respondent is very stable. No job as work planner was currently available, but if one opened up he would offer it to Petitioner. To the best of Mr. Williams' knowledge Petitioner has not been terminated and the witness filled out no such paperwork.

41. In his 10 years with Respondent, Mr. Williams has never known of an employee failing the Class B CDL medical test. It took the witness three days to obtain a Class A CDL after having a Class B. The physical exam for a Class A license is exactly the same as that for a Class B. To the best of his knowledge Petitioner had never applied for a Class A CDL.

42. Mr. Williams explained that all competing tree companies employ flaggers and work planners. Respondent is much larger than its competitors; it is "the largest of all tree companies." The bigger companies would employ full time flaggers with no additional work requirements. It takes between three and six weeks to be certified as a flagger. It would only take a couple of hours training for Petitioner to be a work planner because of his experience. One does not have to be certified to be a planner but he has to be trusted.

43. On cross examination, Mr. Williams testified that each employee in Naperville was trained as a flagger "because they have to be self-regulated." They did not hire full time flaggers in Naperville. The foremen would handle trees that the less experienced trimmers felt uncomfortable trimming. There were other foremen other than Petitioner in Naperville. If one was not working with Petitioner, he would have to handle the difficult trees. The witness did not designate crews, the general foremen did; they come from the utility. There is one general foreman in Naperville and three crews consisting of two to three people. Petitioner could not be employed as a foreman because he would have to trim trees. There are no planners assigned to Naperville. The witness would bring one in from Indiana if he needed planning work done, but the general foreman pretty much does all the planning there.

44. Mr. Williams understood that Petitioner voluntarily terminated his employment when he did not return from FMLA leave in September 2012. Mr. Williams was transferred to his current region in 2011. In that period he had not transferred any employee from Naperville to Indiana. He did not specifically tell Petitioner the duties of a work planner, "because people with experience in trees should know what a work planner position is."

45. Mr. Williams explained that in the work planning job, Petitioner would have parked his car in Gary and then taken a company truck to his job location, as he did every day in Naperville. He would be paid for the time he was driving to his job but not driving to Gary. Petitioner never called and asked about the duties of a work planner or whether he would be working four-day weeks. Respondent has work planners in the ComEd area of Illinois, but that is not in Mr. Williams' region. If Petitioner wanted to be transferred to another region he would have to contact that region and ask them. He did not know if there were openings out of his region. There is not a high turnover rate for work planners and flaggers.

46. Mr. Williams also testified that Petitioner was not returned to work in Naperville because he could no longer climb trees and they did not want another ground person in Naperville. There was already one and the position was to be eliminated after her retirement.

47. Mr. Williams agreed the fact that Petitioner filled out paperwork to apply for work with Respondent and took a drug test indicated he wanted to return to work. He would have had to take a drug test for the jobs of flagger and work planner. Those offers were conditional on his passing the drug test. Flagger and work planner are not union positions. Naperville is the only place in his region that has union employees. Those jobs include retirement and health benefits, but that was not mentioned in the offer letters.

48. On redirect examination, Mr. Williams testified that no employee is guaranteed a job for life in Naperville and there is no union agreement about such a right. Respondent has no control of the number of people employed in Naperville; the utility determines the number of workers and the distribution of jobs. The witness is not in human resources, is not expected to explain job duty information in a job offer, and has never provided such information. Mr. Williams can hire within his region outside of Naperville, but he has no authority to hire somebody in any other region. Some employees in the ComEd region have to drive an hour and a half each way to and from work.

49. On re-cross examination, Mr. Williams agreed that while union membership does not provide any job guarantees, there were different termination procedures for union and nonunion employees; "union boys get more protection." There was a union grievance regarding Petitioner's termination. He has not worked in the ComEd region and the general foreman generally takes care of Naperville. He was not personally familiar with the ComEd region but they had more than 400 employees there. He has not had any discussion with human resources about Petitioner.

50. On re-redirect examination, Mr. Williams testified Petitioner's local union is based in Illinois and not Indiana. He was sure it was possible for Petitioner to seek employment in Illinois through his union. He could have applied for jobs with Respondent within Illinois. The witness has no say in the actions of the union and it would be Petitioner's responsibility to seek help from his union to obtain employment in Illinois. He had no knowledge of Petitioner seeking such help.

51. The medical records indicate that Petitioner treated at Concentra, on Respondent's referral, from October 31, 2011 through January 19. 2012. An MRI taken on 12/11/11, showed mild to moderate joint effusion and ulnar lunate degeneration. Dr. Giannoulias noted that Petitioner's symptoms had not improved with six physical therapy sessions and an injection.

52. On January 19, 2012, Dr. Giannoulias diagnosed lunate-capitate degenerative changes and noted that most of the symptoms were degenerative in nature. He had no pain over the TFCC. Dr. Giannoulias informed Petitioner that the condition would ultimately bother him with heavier activities. He recommended a 40-lb lifting/pushing/pulling restriction with no repetitive squeezing. Petitioner indicated that restriction could be accommodated at work. Dr. Giannoulias released him from care prn.

53. Thereafter, Petitioner sought treatment from Dr. Velagapudi at Castle Orthopedics. He ordered a bone scan and imposed a 20-lb lifting restriction. The bone scan was "compatible with provided history of right lunate impingement." On June 25, 2012, Dr. Velagapudi performed right ulnar shortening osteotomy for ulnar lunate abutment.

54. On November 19, 2012, Dr. Vender, a board certified orthopedic surgeon, testified by deposition. He performed a review of Petitioner's medical records at Respondent's request and later physically examined him. He noted the MRI showed changes in the lunate bone, which is associated with end-stage ulnar abutment indicative of a long developing degenerative process. "When you have a condition that is already present, use will change the level of symptomology. You'll have symptomology variance. You'll have ups and downs, temporary changes in the level of symptoms depending on how you use it." Dr. Vender opined that it had nothing to do with work, but anything he did with his hands.

55. Dr. Vender opined that Petitioner did not really suffer a sprain which represents a true acute injury. Rather he experienced TFCC wore out due to the chronic pressure of the underlying ulnar abutment syndrome. That is "the first thing that gets worn out" from the long-term pressure.

56. On cross examination, Dr. Vender disagreed that ulnar deviation can cause ulnar abutment; it is a degenerative condition. However, anything of sufficient force can aggravate it. Lifting something heavy is a normal activity and not an injury. He agreed that if somebody "were to rotate in a supinated, beyond what was normal" that could cause injury. A healthy joint can withstand normal repetitive stress indefinitely. A trauma "of sufficient magnitude that causes separate tissue damage to the wrist, aside from the underlying condition" could aggravate the condition.

57. On redirect examination, Dr. Vender testified he did not believe the medical records showed that Petitioner sustained any separate tissue damage. One would expect significant swelling from a sprain and some swelling would be present from the underlying condition. Knowledge of the height of the fence or that Petitioner used a utensil would not change his opinion he did not sustain a separate injury.

58. On re-cross examination, Dr. Vender did not remember whether the medical records identified swelling. He reviewed the MRI which showed some effusion. However, that may not be considered swelling if it were simply from his underlying condition. Dr. Vender agreed that Petitioner could not return to his job as tree trimmer after his physical examination, which was conducted after the surgery.

59. Petitioner's surgeon, Dr. Velagapudi testified by deposition on November 29, 2012, prior to Petitioner's FCE and prior to his last visit. Dr. Velagapudi is a certified orthopedic surgeon; over 50% of whose practice involves injury to the arm and mainly hand, wrist, and fingers. After his examination of Petitioner and a bone scan, he recommended an ulnar shortening osteotomy to take away about four mm sliver of bone from the ulna in order to eliminate the ulnar lunate from abutting against each other. The surgery was performed on June 25, 2012.

60. Dr. Velagapudi opined that in his work-related accidents Petitioner suffered an acute aggravation of the preexisting lunate impingement condition making it symptomatic. He based that opinion on the fact that apparently he was asymptomatic prior to his work incident. Dr. Velagapudi did not believe Petitioner would need prospective treatment. His permanent restrictions and ability to return to work in his previous job would be based on the results of the FCE.

61. On cross examination, Dr. Velagapudi agreed that edema should resolve within a year. However, he disagreed that Petitioner suffered only a temporary exacerbation because he complained of continued symptoms. Dr. Velagapudi explained that "bones together" which is the characteristic of the ulnar laminate abutment, generally "might do fine," but "if you have a sudden force between the two of them you now have an aggravation." He ordered the bone scan to determine "what the activity level is."

62. On October 31, 2013, in his last treating note, Dr. Velagapudi indicated Petitioner had an FCE on October 29, 2013 which was considered valid. "His strength testing really not anywhere as most appropriate to evaluate and that is that of 10 lbs on the affected side and 40 lbs on the opposite side." The deficit of strength on the affected side was ¼ of the other. The FCE concluded Petitioner could not return to work as a tree trimmer which was heavy labor. Petitioner was at maximum medical improvement but could consider removal of the hardware which would require him to off work for a couple of months.

63. On December 10, 2013, a vocational rehabilitation counselor, Mr. Minnick prepared a vocational assessment of Petitioner at Respondent's request. He criticized the evaluation of Ms. Helma and found Petitioner had transferable skills in management, customer service, and truck driving. He thought there was no basis for vocational testing or computer training because he already has transferrable skills. Rather he thought that Petitioner should convert his Class B CDL to a Class A which would increase his employability and earning potential. Mr. Minnick then included a Labor Market Survey. He concluded that as a Class B truck driver he could earn between $16.78 and $22.81 an hour.

In finding Petitioner sustained his burden of proving accident and causation, the Arbitrator based his decision on the weight of the testimonial evidence and medical records. He specifically found the causation testimony of Dr. Velagapudi more persuasive than that of Dr. Vender, whom he characterizes as not sufficiently familiar with Petitioner's work activity to make a causal opinion. In addition, Dr. Vender actually acknowledged that a significant trauma could aggravate his underlying condition.

Respondent argues the Arbitrator erred and that the testimony of Dr. Vender **"proved that an accident did not occur despite Petitioner's pain"** (emphasis in original). The condition was not work related because ***"anything Petitioner does with his hands could cause symptoms"*** (emphasis in original). Respondent also asserts that Petitioner's testimony was not credible. On causation, Respondent argues that Petitioner simply experienced the symptoms from his underlying condition in October of 2011, which does not connote causation.

The Commission agrees with the analysis of the Arbitrator regarding the issues of accident and causation. We note that Petitioner's report of accident was corroborated by Mr. Benavidez and Dr. Vender's opinion testimony was more persuasive than Dr. Vender. Dr. Vender seemed unclear that Petitioner had swelling soon after the accident, which would connote a traumatic injury causing tissue damage which he acknowledged could aggravate Petitioner's preexisting condition. The Commission also notes that Petitioner apparently worked in the heavy physical demand level occupation of tree trimmer for a period of nine years with the underlying condition without symptomology. It was only after the accidents that he had persistent symptoms leading up to his surgery. The Commission also agrees with the analysis of the Arbitrator that the medical treatment Petitioner received was necessary and reasonable. Therefore, the Commission affirms and adopts those portions of the Decision of the Arbitrator.

The Arbitrator awarded Petitioner 78 and 2/7 weeks of temporary total disability/maintenance benefits, representing the period between June 21, 2012, the date Respondent no longer would accommodate his restrictions after his surgery and the date of arbitration. The Arbitrator indicated that the job offers provided to Petitioner were basically sham offers which were made only in an attempt to limit Respondent's liability. The Commission disagrees with that characterization. Mr. Williams testified persuasively about the need of tree trimming companies to hire flaggers and work planners in their operations. These are real jobs fulfilling a real need on the part of Respondent. While the offers did require considerable travel on the part of Petitioner he had indicated that he was willing to travel and the distance he was prepared to travel was "open." In addition, long-distance travel appears to be endemic in the jobs associated with the business of trimming trees and it is evident that all of the jobs Respondent offered Petitioner were well within his restrictions. Finally, although the jobs offered Petitioner involved slightly less compensation than his previous job, ($1.32 an hour), that diminishment of income is relatively minor and Petitioner did not even make a demand that he be paid his previous salary in his new job. Rather by letter from his lawyer, he declined the job offers citing only the length of commute. The Commission finds that all three jobs Respondent offered Petitioner were reasonable within Respondent's industry. Therefore, the Commission modifies the Decision of the Arbitrator terminating temporary total disability benefits as of May 28, 2012, the date by which Petitioner had to accept the first offer of work within his restrictions.

The Arbitrator also awarded Petitioner a wage differential award of $317.47 a week. He based that award on his conclusion that the jobs Respondent offered Petitioner were sham offers and on the vocational assessment of Ms. Helma from Vocamotive. As we noted above the Commission disagrees with the characterization that the jobs Respondent offered Petitioner were sham offers. On the contrary, we believe they were reasonable in the context of Respondent's industry. In addition, we do not find the vocational assessment of Ms. Helma to be persuasive. Ms. Helma was not familiar with the tree trimming industry and the job classifications applicable to the industry.

Again, Mr. Williams testified that the jobs of flagger and work planner within Respondent's operation were "very stable," and they experienced very little attrition. In order to be entitled to a wage differential award, the claimant must show inability to return to his customary employment and a diminution of earning capacity. In the case now before the Commission, Petitioner has established that he cannot return to his previous job of tree trimmer. However, he has been offered employment within the field of his previous occupation at virtually the same rate of pay. The Commission concludes that the actual offers were more relevant than Ms. Helma's vocational assessment. Therefore, the Commission finds that Petitioner has not sustained his burden of proving that he is entitled to a wage differential award and vacates that award.

Petitioner appears to have had a good result from his surgery. Dr. Velagapudi noted excellent range of motion, no impingement, and declared Petitioner at maximum medical improvement four months after surgery. The FCE rated Petitioner to be able to work at a medium level of physical demand. Petitioner did not testify persuasively about any substantial persistent ongoing impairment. In looking at the record as a whole and taking into consideration Petitioner's age, occupation, medical records, and potential future earnings, the Commission concludes that Petitioner suffered the permanent loss of 30% use of his left hand.

In awarding more than $44,000 in penalties, the Arbitrator found that Respondent had not met its burden of proving it had reasonable belief to justify the non-payment of temporary total disability benefits of 16 and 3/7 weeks or outstanding medical bills of $8,954.17. The Commission does not believe the imposition of penalties is justified here. It is clear that Petitioner had a significant preexisting condition that arguably caused his impairment. In addition, Respondent had the accident/causation opinion of Dr. Vender, who is a respected hand surgeon, even if he may have an inaccurate conception of the legal standards for determining causation under the Act. Finally, Respondent paid more than $29,000.00 in medical expenses, and more than $29,500.00 in temporary total disability benefits some of which were incurred after Petitioner refused the first offer to return to work. Therefore, the Commission concludes that Respondent's actions were neither unreasonable nor vexatious in this case and vacates the award of penalties.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $487.23 per week for a period of 48&6/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $431.51 per week for a period of 61.5 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the loss of the use of 30% of the right hand.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $$45,005.96 for medical expenses and $813.28 in vocational rehabilitation services subject to the applicable medical fee schedule under §§8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the award for wage differential pursuant to §8(d)1 of the Act is vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of penalties of $20,903.70 and $23,450.00 pursuant to §§19(k) and 19(l) of the Act, respectively are vacated.

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

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

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

DATED: JUN 5 - 2015

Ruth W. White

Charles J. DeVriendt

Joshua D. Luskin

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46