STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Orlando Totton,
Petitioner,
vs.
Pace Bus Transportation,
Respondent,

NO: 07 WC 15294

10IWCC0566

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 30, 2009 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. The probable cost of the record to be filed as return to Summons is the sum of $35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

DATED: JUN 11 2010
MB/mam
o:6/3/10
43

Mario Basurto

James F. DeMunno

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

TOTTON, ORLANDO
Employee/Petitioner

Case# **07WC015294**

10IWCC0566

PACE SUBURBAN BUS SERVICE
Employer/Respondent

On 01/30/2009, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

CORTI ALEKSY & CASTANEDA
180 N LASALLE ST
SUITE 2910
CHICAGO, IL 60601

0560 WIEDNER & MCAULIFFE LTD
1 N FRANKLIN
SUITE 1900
CHICAGO, IL 60606

STATE OF ILLINOIS)
)
COUNTY OF DUPAGE)

☐ 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

Orlando Totton,
Employee/Petitioner

v.

Pace Suburban Bus Service,
Employer/Respondent

Case # 07 WC 15294

Wheaton

10IWCC0566

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 **Peter M. O'Malley**, arbitrator of the Commission, in the city of **Wheaton**, on **October 24, 2008 & November 21, 2008**. 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 the respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of the petitioner's employment by the respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to the respondent?
F. ☒ Is the petitioner's present condition of ill-being causally related to the injury?
G. ☐ What were the petitioner's earnings?
H. ☐ What was the petitioner's age at the time of the accident?
I. ☐ What was the petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to petitioner reasonable and necessary?
K. ☒ What amount of compensation is due for temporary total disability?
L. ☒ What is the nature and extent of the injury?
M. ☒ Should penalties or fees be imposed upon the respondent?
N. ☒ Is the respondent due any credit?
O. ☐ Other _____

Orlando Totton v. Pace Suburban Bus Service, 07 WC 15294

10IWCC0566

AGREED FINDINGS

- On **March 20, 2007**, the respondent, **Pace Suburban Bus Service**, *was* operating under and subject to the provisions of the Act.
- On this date, an employee-employer relationship *did* exist between the petitioner and respondent.
- Timely notice of this accident *was* given to the respondent.
- In the year preceding the injury, the petitioner earned $**44,441.80**; the average weekly wage was $**854.65**.
- At the time of injury, the petitioner was **59** years of age, *married* with **no** children under 18.
- Necessary medical services *have not* been provided by the respondent.
- To date, $**17,953.50** has been paid by the respondent for TTD and/or maintenance benefits.

ORDER

- The respondent shall pay the petitioner temporary total disability benefits of $**569.77** per week for **48-3/7** weeks, from **March 20, 2007** through **February 21, 2008**, which is the period of temporary total disability for which compensation is payable. Respondent is entitled to a credit for any amounts paid on account of this injury, including sick bank as well as short term and/or non-occupational disability benefits paid.
- The respondent shall pay the petitioner the sum of $**512.79** per week for a further period of **158.1** weeks, as provided in Section **8(e)10 & 8(e)12** of the Act, because the injuries sustained caused **the permanent partial loss of use of 20% of the left arm and 50% of the left leg, respectively**.
- The respondent shall pay the petitioner compensation that has accrued from **March 20, 2007** through **November 21, 2008**, and shall pay the remainder of the award, if any, in weekly payments.
- The respondent shall pay the further sum of $**79,295.45** for necessary medical services, as provided in Section 8(a) of the Act. Respondent is entitled to a credit for any and all amounts paid on account of this injury by the group insurance carrier pursuant to §8(j) of the Act, and Petitioner is to be held harmless for any claims and demands by any provider of benefits for which Respondent is receiving credit under this order.
- The respondent shall pay $**0.00** in penalties, as provided in Section 19(k) of the Act.
- The respondent shall pay $**0.00** in penalties, as provided in Section 19(l) of the Act.
- The respondent shall pay $**0.00** in attorneys' fees, as provided in Section 16 of the Act.

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

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

Signature of arbitrator

1/27/09
Date

STATEMENT OF FACTS:

Petitioner, a 59 year old bus driver, testified that on March 20, 2007 he was driving his normal bus route between Aurora and Naperville, Illinois. He noted that on the date of the alleged accident the heat on the bus he was driving was not working and that the thermometer indicated it was 24 degrees inside the bus. Petitioner testified that he informed his supervisor that it was difficult to operate the bus given how cold it was inside. He stated that at his scheduled stop at the Naperville terminal his supervisor called and told him to wait there so that they could bring out another bus.

Petitioner testified that when the replacement bus arrived he was coming out backwards from the bus to pull the door shut and was stepping down onto the curb when a passenger approached looking to get on the bus, causing Petitioner to slip and fall backwards onto the sidewalk where he struck his left elbow and left hip. He noted that he had turned to his left and was holding his lunch pail, schedule and "things" in his left hand at the time. Petitioner also indicated that the incident occurred at about 7:10 a.m. and that he was wearing his uniform pants, shirt, shoes and trench coat. He noted that he was wearing leather dress shoes that were "issued" or approved by Respondent as part of its dress code. On cross examination Petitioner indicated that he had pulled the bus up to the curb and was stepping off the bus onto the curb at the time of the incident. He agreed that the series of photos admitted at RX3 depict the bus he was driving on the date in question, and that the bus has one step, although he was unable to say how high that step was off the ground. Petitioner also conceded that there was no rain or snow on the day of the alleged accident and that as far as he could recall the ground was not wet.

Petitioner testified that following the incident he called dispatch, told the dispatcher that he fell and was told that someone would relieve him. He indicated that Respondent's safety training manager Darlene Portillo subsequently came and took him to Tyler Medical Services. Ms. Portillo testified that she took Petitioner to Tyler Medical Services because it was the closet clinic and the person she had to contact for on-the-job injuries was not available to tell her otherwise. Later, when she learned that Petitioner should have gone to Concentra, she directed Mr. Totten to that facility.

Petitioner indicated that he did not believe Ms. Portillo asked about the incident on the ride to Tyler Medical Services. Similarly, Ms. Portillo could not recall whether she discussed the matter with Petitioner at that time. However, Ms. Portillo testified that she did eventually go through the report of injury with Petitioner given that his answers on the form were not in complete sentences. She noted that she had given him a blank report and asked him to complete it. She indicated that she did not tell Petitioner what to fill out. Ms. Portillo testified that during their conversation Petitioner agreed that at the time of the incident he was walking from one bus to another and fell on what she thought was a public sidewalk. She stated that she had no other discussions with Petitioner thereafter regarding the accident.

Petitioner testified that on the date of the accident he was not feeling ill or faint. He noted that he was taking blood pressure and diabetes medication at the time of the incident and that he had been doing so for about 20 years for both problems. Petitioner denied ever feeling faint while taking these medications, and noted that his leg did not feel weak on the morning of the accident.

Petitioner identified the accident report admitted as RX2. He noted that it was his handwriting and signature on this document. The report shows a date of accident of March 20, 2007 at 7:11 a.m. and that Mr. Totton was "... changing bus[,] walking from one bus to the other" when he "... fell on the sidewalk [and struck his left] elbow and [left] hip on the sidewalk." (RX2). Petitioner agreed that he could have gone into more detail in this report, and that he did not know whether he informed Ms. Portillo, who also signed the report, that he was coming out backwards. In addition, he indicated that he did not tell Ms. Portillo that he had papers with him at the time. However, Petitioner noted that he was not asked these questions, and instead was simply handed the report and

told to fill it out. He also testified that he completed the accident report after he had already sought treatment at Tyler Medical Clinic. Ms. Portillo later confirmed this fact as well.

Petitioner testified that following the incident he tried to continue working his shift, but the pain was too much and he asked his supervisor to get someone to relieve him. Ms. Portillo thereupon took him to Tyler Medical Services on the date of the accident at which time he was placed on work restrictions. The history of injury recorded at that time was as follows: "[p]atient presents for an initial evaluation of a work related injury. Patient states that while at work while trying to get off the bus, when he missed a step and fell on his left elbow and left hip ..." (PX1). X-rays of the left elbow were unremarkable. (PX1;PX2). However, x-rays of the left hip were interpreted as revealing "... a deformity at the femoral head and neck junction of the left hip. Although an impacted fracture can have this appearance, the trabecular lines appear intact. This deformity may have been from a previous injury." (PX1;PX2). No dislocations, osteoarthritic changes or other significant changes were seen in the left hip. (PX1;PX2). Petitioner was instructed to follow up with his primary care physician and given the following work restrictions: no work with the left hand and forearm, no work at unguarded heights, no operating machinery with left hand, no operating fork lifts, no driving clutch vehicle, no commercial driving, climbing limited to stairs, no work involving the use of the left arm. (PX1).

Ms. Portillo agreed that she had received the record of Tyler Medical Services, but could not recall the history contained therein. Ms. Portillo also conceded that she never contacted Petitioner for clarification.

On March 21, 2007 Petitioner visited Dr. Ronald Gregus at Concentra Medical Center, the company clinic, at the direction of Ms. Portillo. At that time the following history was recorded: "The patient states that while at work on 3/20/07, he was changing buses when he stepped down and missed the curb falling backward onto his left hip." (PX3). Bilateral x-rays of the hips revealed "... deformities, presumably due to old healed slipped capital femoral epiphyses. No acute fracture or dislocation or destruction is seen. Clinical correlation is advised. Findings secondary to healed fractures cannot be ruled out." (PX3). Petitioner was diagnosed with a hip contusion, and an MRI was ordered to rule out a fracture of the left hip. (PX3). Petitioner was provided with a cane, prescribed medication and restricted to no activity. (PX3). An "Injury/Illness Flowsheet" form, in addition to reflecting the above diagnosis of left hip contusion and ordering a left hip MRI, also notes "[c]ongenital deformity of hips[,] possible fracture." (PX3).

Petitioner returned to Concentra on March 23, 2007 at which time it was noted that Mr. Totten "... feels the pattern of symptoms is improving slightly with medications." (PX3). The assessment remained hip contusion, and once again an MRI was ordered. (PX3).

Ms. Portillo acknowledged receiving reports from Concentra, but could not recall reading a history of injury while stepping down from a bus in those records. Once again, Ms. Portillo agreed that she never contacted Petitioner to explain any conflict or clarify how the accident had occurred.

Claims adjustor Andrea Dolanski testified at the request of Respondent. Ms. Dolanski indicated that she was assigned Petitioner's claim and that she noted that she spoke with Petitioner via telephone about the incident two or three days after the event, or on March 23, 2007. Ms. Dolanski indicated that she recorded the conversation and that Petitioner was made aware of this fact.

In the statement, Petitioner noted that on March 20, 2007 he had called to change buses because his bus had no heat, that he was "... coming off the bus trying to tell [a passenger who was coming to get on] to get on the bus behind as we was switching buses" when he "... stepped off the buss and missed the curb." (RX4). Petitioner was recorded as saying that he had "[s]tepped down on the curb and missed the curb and fell on the sidewalk... I stepped partially on the curb and the other part I slipped off the curb and that's what caused me to fall",

landing on his left elbow and left hip. (RX4). The statement also reflects that Petitioner specifically denied ever injuring his elbow or hip previously. (RX4).

Ms. Dolanski stated that she has not spoken to Petitioner since this conversation. She testified that the claim was denied because it was determined that Petitioner was not at any greater risk than the public given that he was stepping off a curb at the time. In addition, Ms. Dolanski indicated that there was some discrepancy between what Petitioner had told his employer and what he had told her.

On March 30, 2007, at the suggestion of his attorney, Petitioner visited Dr. Eric P. Chassin at Hinsdale Orthopaedic Associates, S.C. On that date, Dr. Chassin recorded that Petitioner was "in excellent health, with no symptoms whatsoever in his left hip until 03/20/07 when he fell at work, where he was a bus driver, and since then has had debilitating left hip pain." (PX4). In addition, Dr. Chassin noted that Petitioner "... had a history of a deformity, a very remote deformity in both of his hips as a child, but he is very clear to state that he has had no symptoms whatsoever throughout his life because of that condition." (PX4). Following his examination, and review of pelvic x-rays which he noted revealed evidence of "an old subscapular femoral epiphysis on both sides" as well as severe degenerative changes on the left, Dr. Chassin was of the opinion that Petitioner "requires total hip arthroplasty for management of his pain." (PX4). Finally, Dr. Chassin opined that "within [a] reasonable degree of medical and surgical certainty ... [Petitioner] has suffered an aggravation of a pre-existing condition ..." (PX4).

Petitioner returned to Tyler Medical Services for an evaluation on April 2, 2007. (PX1). At that time she was examined by Dr. Marie Nicole Beauvoir. (PX1). The diagnosis was post-traumatic arthritis in left hip and left elbow contusion. (PX1). Dr. Beauvoir noted that "[b]ased on the physical exam and review of orthopedic's [Dr. Chassin's] release to return to work with no restrictions, examinee may return to work with no restrictions. This is also based on the fact that examinee operates a commercial vehicle that is automatic and he does not use his left lower extremity; he only uses his right lower extremity to operate the bus." (PX1). Dr. Beauvoir recommended this full duty release despite having previously noted that Petitioner "understands that he cannot take the Hydrocodone while driving a commercial vehicle" and her instruction that Mr. Totten "... is not to take the Hydrocodone when he is at work." (PX1).

On April 3, 2007 Petitioner returned to Dr. Chassin who noted that "Orlando Totten is having such pain that he is unable to continue working... We will have him off of work at this point." (PX4).

Petitioner returned to Dr. Chassin for surgical recheck on April 23, 2007, and eventually underwent surgery on April 25, 2007 consisting of a left total hip arthroplasty. (PX4).

Petitioner visited Dr. Chassin on June 7, 2007 at which time Dr. Chassin noted that Petitioner's left hip was "doing beautifully" but that "[h]is left elbow and hand are bothering him since the fall." (PX4). Dr. Chassin indicated that Petitioner was to begin weight bearing as tolerated and wean himself from assistive devices. (PX4). Dr. Chassin referred Petitioner for an EMG, which was performed on June 14, 2007 and which was interpreted as evidencing left cubital tunnel syndrome and mild diabetic polyneuropathy. (PX4).

On July 5, 2007 Petitioner visited Dr. Kenneth L. Schiffman, also at Hinsdale Orthopaedic, pursuant to a referral by Dr. Chassin. (PX4). At that time Dr. Schiffman recorded a history of injury on March 20, 2007 when Petitioner turned and fell directly on his left elbow while getting out of his bus. (PX4). Following his examination, Dr. Schiffman's opinion was left ulnar neuropathy at the cubital tunnel. (PX4). Dr. Schiffman noted that "... there is little to do other than either wait and watch and see if this gets better or plan to undergo surgery in the way of an ulnar nerve decompression and transposition." (PX4).

On July 31, 2007 Petitioner returned to Dr. Chassin who noted that Mr. Totten was "coming along slowly but surely" with respect to his left hip, now three months post surgery. (PX4). Dr. Chassin recommended continued physical therapy to work on flexibility and strengthening, with a return visit in six weeks. (PX4). In the meantime, Petitioner was to remain off work. (PX4).

On August 17, 2007 Petitioner visited Dr. Schiffman who noted Petitioner's continued complaints of numbness and tingling in his small and ring fingers in addition to new complaints of numbness and tingling in his index and middle fingers. (PX4). Dr. Schiffman could provide no explanation for the numbness in the index and middle fingers and referred Petitioner to either Dr. Disanto or Dr. Bijari in consultation. (PX4). Dr. Schiffman indicated that if this consultation revealed "nothing other than ulnar neuropathy and it is moderate to severe, I would like to recommend surgery." (PX4). Furthermore, while noting that Petitioner was "off work for therapy for his hip[,] I would not restrict him from driving in regard to his arm at this time." (PX4).

On August 29, 2007, Dr. Schiffman noted that Petitioner "has seen Dr. Simon, the neurologist, whose opinion is that Mr. Totton's problem is ulnar neuropathy of the cubital tunnel and nothing else." (PX4). Dr. Schiffman recommended that they proceed with scheduling ulnar nerve transposition surgery. (PX4).

On September 13, 2007 Dr. Chassin noted that Petitioner was "walking well with just a minimal limp" and that "[i]t would be very difficult to tell he has ever had a problem with his hip in the first place, let alone a hip replacement." (PX4). Dr. Chassin released Petitioner to return to work full duty with respect to his left hip while noting that "he has another condition in his elbow, which is keeping him off work. For now work status will be dependent on how he progress from that standpoint." (PX4).

In a progress note dated September 14, 2007 Hinsdale Orthopaedic Associates orthopedic technician Mike Depa indicated that "Dr. Schiffman was asked and stated that Mr. Totton's restrictions would be minimal lifting, gripping with his left upper extremity and also would be restricted that he could not drive a bus." (PX4).

Dr. Schiffman eventually performed surgery on Petitioner's left elbow on October 15, 2007, said surgery consisting of a left ulnar nerve transposition. (PX13). Following surgery, Petitioner underwent therapy. Petitioner was authorized off work by Dr. Schiffman during this period. (PX4).

Dr. Chassin testified by way of evidence deposition on November 12, 2007. (PX14). At the time of his initial examination on March 30, 2007 Dr. Chassin noted severe degenerative changes or arthritis in Petitioner's left hip and recommended hip replacement. (PX14, p.10). When asked about conservative care, including physical therapy, Dr. Chassin stated that "[i]f you think you might get some functional improvement, you try it. But in the case of a hip that's completely shot, there is not really much of an indication. You're just stalling the inevitable." (PX14, p.11). Dr. Chassin was of the opinion, given the absence of symptoms throughout his life and prior to the fall, that Petitioner had suffered an aggravation of a preexisting condition, which he described as "[t]his remote abnormality that [Mr. Totten] had in both of his hips." (PX14, pp.11-12). Specifically, Dr. Chassin believed that "... what happened is [Petitioner] probably had some cartilage still in his hip remaining before the fall, and when he fell, he scraped off that last little bit of cartilage and after that had the bare bone scraping." (PX14, p.12). Dr. Chassin did concede, however, that the need for surgery could have been possible even without the fall, and that hip replacement surgery at some point was "likely." (PX14, p.29). Dr. Chassin later noted that he would "... admit that it's more likely statistically that [Petitioner] would need [a hip replacement] because of his prior hip condition, but I think the fall scraped off what little bit he had. If he had not fallen, he would not have a hip replacement today, that is my opinion, so the fall changed something. It changed his history." (PX14, p.39).

Petitioner was seen by orthopedic surgeon Dr. Joshua Jacobs at the request of Respondent for the purpose of a §12 examination. Dr. Jacobs examined Petitioner on July 23, 2007 and subsequently testified by way of

evidence deposition on December 19, 2007. (RX7). Following his review of records, including those of Dr. Chassin, Dr. Jacobs indicated that "[g]iven the fact that the patient was asymptomatic before the fall, I would have waited longer than 10 days before considering surgical intervention." (RX7, p.21). However, Dr. Jacobs later indicated that he did not believe that Dr. Chassin violated any standard of care in this regard. (RX7, p.35).

Dr. Jacobs also noted that while he did not have the benefit of seeing preoperative x-rays, "[i]f the preoperative x-rays did, in fact, show severe degenerative arthritis in the setting of a significant deformity from a slipped capital femoral epiphysis, there's a very high likelihood that that would have gone on to a joint replacement, hip replacement." (RX7, p22). Dr. Jacobs agreed that it was fair to say that hip replacement surgery was probably inevitable even without the fall given the degenerative changes noted. (RX7, p.22). However, Dr. Jacobs was unable to say whether the need for a total hip replacement would have occurred in years or months, noting even later that such a determination was not possible. (RX7, pp.37,43). More importantly, Dr. Jacobs agreed that there was nothing in Mr. Totton's medical records prior to his fall that would have led him to recommend a hip replacement at that time. (RX7, p.37). Dr. Jacobs also conceded that it was possible that patients with slipped capital femoral epiphysis ("SCFE") would never need a hip replacement unless they became symptomatic. (RX7, p.39).

In addition, Dr. Jacobs testified that he did not believe that the accident on March 20, 2007 caused the need for total hip replacement surgery, a statement he clarified on cross examination by agreeing that the fall was not the sole or major cause for the left hip replacement. (RX7, pp.23, 36-37). Dr. Jacobs conceded, however, that his opinion in this regard was based only on what he considered a medical and not a legal standard of causation. (RX7, p.36). As far as Petitioner's current condition was concerned, Dr. Jacobs indicated that he "would see no reason why that individual couldn't go back and drive a bus, as long as there wasn't a tremendous amount of lifting involved." (RX7, p.25). However, when asked about Petitioner's left arm or elbow condition, Dr. Jacobs stated that he "restricted [his] independent medical evaluation to the complaints referable to the hip." (RX7, p.25).

In a letter to Petitioner's counsel dated January 9, 2008, Dr. Schiffman indicated that he was of the opinion that Petitioner's left elbow cubital tunnel syndrome was causally related to the work injury in March of 2007. (PX4). Dr. Schiffman noted that "[t]he patient gives a clear history of falling and striking the posterior medial aspect of the elbow when he fell and would certainly be consistent with a direct contusion to the left ulnar nerve at the cubital tunnel. As is well-appreciated, a direct ulnar nerve contusion may result in a persistent ulnar neuropathy which can and, certainly in this case, did in this case necessitate an ulnar nerve transposition." (PX4).

Petitioner underwent a functional capacity evaluation on February 11, 2008. The test was viewed as "valid' and revealed functional capabilities of "Modified MEDIUM Physical Demand Level", suggesting that Petitioner was capable of occasionally lifting and carrying over 50 lbs. from waist level and above, the term "modified" being used given that floor to chair lifting was not performed given Mr. Totton's hip replacement restrictions. (PX11).

On February 20, 2008, Dr. Schiffman noted that while Petitioner "still feels some soreness or tenderness at the area of his incision at this left elbow ..." the functional capacity evaluation "... suggests that Mr. Totton is functioning at a level that would allow him to return to work as a bus driver." (PX4). As a result, Dr. Schiffman released Petitioner to return to work without restrictions effective the following day. (PX4).

Petitioner subsequently returned work for Respondent on February 22, 2008. He is currently still working in this capacity, performing his regular duties. Petitioner noted that he last saw Drs. Chassin and Schiffman on May 29, 2008. He has not seen either doctor since that date. In addition, Petitioner testified that he had never injured his left elbow or left hip or received treatment for same prior to the accident in question. Petitioner also denied sustaining any other accidents to left elbow and left hip.

Currently, Petitioner notices that before his shift is over he has stiffness and pain in his left elbow. He stated that he no longer wears a brace on his left elbow, as he had done before the surgery. Petitioner also noted that his left hip is painful when he sits for any length of time and that he finds it difficult to walk for more than a block without feeling pain. He indicated that the pain goes down to the top of his knee and the front part of the thigh, and that he gets real sharp pains in the left leg.

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

An employee's injury is compensable under the Act only if it arises out of and in the course of the employment. 820 ILCS 305/2 (West 1994). Both elements must be present at the time of the claimant's injury in order to justify compensation. *Potenzo v. Illinois Workers' Comp. Commission*, 378 Ill. App. 3d 113, 116, 881 N.E.2d 523, 526, 317 Ill.Dec. 355 (Ill. App. Ct. 2007); citing *Illinois Bell Telephone Co. v. Industrial Commission*, 131 Ill. 2d 478, 483, 546 N.E.2d 603, 137 Ill. Dec. 658 (1989).

Injuries sustained on an employer's premises, or at a place where the claimant might reasonably have been while performing his duties, and while a claimant is at work, are generally deemed to have been received in the course of the employment. *Caterpillar Tractor Co. v. Industrial Commission*, 129 Ill. 2d 52, 57, 541 N.E.2d 665, 133 Ill. Dec. 454 (1989); *Wise v. Industrial Commission*, 54 Ill. 2d 138, 142, 295 N.E.2d 459 (1973).

In this case, there is no doubt that the claimant's injuries were sustained in the course of his employment, given the nature of Petitioner's job as a bus driver and the fact that Mr. Totten was on his assigned route and precisely where he was expected to be at the time of the accident. The issue then becomes whether Petitioner's injuries arose out of his employment.

Arising out of the employment refers to the origin or cause of the claimant's injury. "For an injury to 'arise out of' the employment its origin must be in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Potenzo*, 881 N.E.2d at 527; citing *Caterpillar Tractor Co.*, 129 Ill. 2d at 58. There are three types of risks which an employee might be exposed to, namely: 1) risks distinctly associated with the employment; 2) risks which are personal to the employee; and 3) "neutral risks which have no particular employment or personal characteristics." *Potenzo*, 881 N.E.2d at 527; citing *Illinois Institute of Technology Research Institute v. Industrial Commission*, 314 Ill. App. 3d 149, 162, 731 N.E.2d 795, 247 Ill. Dec. 22 (2000).

In the present case, Petitioner testified that he was coming out backwards from his malfunctioning bus to pull the door shut and was stepping down onto the curb when a passenger approached looking to get on board, causing Petitioner to slip and fall backwards onto the sidewalk where he struck his left elbow and left hip. He noted that he had turned to his left and was holding his lunch pail, schedule and "things" in his left hand at the time. He also conceded that there was no rain or snow on the day of the alleged accident and that as far as he could recall the ground was not wet.

These factors would appear to show that Petitioner was exposed to what can best be described as a "neutral" risk, or one that was not distinctly associated with his employment or personal to himself. And while the risk of injury from stepping off a bus onto a curb in and of itself is certainly one that is common to the public at large, the fact remains that as a bus driver Petitioner was exposed to such a risk of injury regularly and far more frequently than members of the general public given the very nature of his job. Furthermore, the fact that Petitioner was allegedly carrying his lunch pail, schedule and other papers at the time of the accident increased his risk of injury.

The Arbitrator also finds Petitioner's testimony as to the basic facts of the case to be credible – namely, he was disembarking from his malfunctioning bus when a passenger approached, causing him to slip and fall on the curb and onto the sidewalk, falling onto his left hip and arm. The fact that every history or statement given by Petitioner did not consistently contain every last detail of the accident beyond this basic description – such as whether or not he was walking out backwards or even whether he was carrying anything at the time -- reflects more on Respondent's cynical attempt to split hairs than on Petitioner's credibility as a whole. Along these lines, the evidence shows Respondent's safety training manager, Darlene Portillo, picked Petitioner up and drove him to Tyler Medical Services following the incident yet apparently did not feel the need to discuss the incident with him at that time. After his visit to Tyler Medical Services, Petitioner was given a blank accident report to fill out without instructions. He provided answers that he admitted could have been in more detail and which Ms. Portillo said were in incomplete sentences. Claims adjustor Andrea Dolanski eventually took a statement from Petitioner but did not see fit to follow up or seek clarification thereafter. Both Ms. Portillo and Ms. Dolanski agreed that they had received copies of both the Tyler Medical Services and Concentra reports, but could not recall any specifics from those records that would have either supported or refuted any claimed inconsistencies. More importantly, the medical histories themselves consistently reflect that Petitioner was injured at work while getting off a bus. More to the point, there is absolutely no indication that Petitioner was injured in any other manner other than at work, on the date in question, when he fell while getting off the bus.

Based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner was at a place where he was reasonably expected to be in order to perform his duties as a bus driver for Respondent at which time he was exposed to a risk of injury to a greater degree than members of the general public.

Accordingly, the Arbitrator finds that Petitioner sustained accidental injuries arising out of and in the course of his employment on March 20, 2007.

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

It has long been recognized that, in preexisting condition cases, recovery will depend on the employee's ability to show that a work-related accidental injury aggravated or accelerated the preexisting disease such that the employee's current condition of ill-being can be said to have been causally-connected to the work-related injury and not simply the result of a normal degenerative process of the preexisting condition. *Sisbro, Inc. v. Industrial Commission*, 207 Ill. 2d 193, 204-206 (Ill. 2003); citing *Caterpillar Tractor Co. v. Industrial Commission*, 92 Ill. 2d 30, 36-37, 65 Ill. Dec. 6, 440 N.E.2d 861 (1982); *Caradco Window & Door v. Industrial Comm'n*, 86 Ill. 2d 92, 99, 56 Ill. Dec. 1, 427 N.E.2d 81 (1981); *Azzarelli Construction Co. v. Industrial Comm'n*, 84 Ill. 2d 262, 266, 49 Ill. Dec. 702, 418 N.E.2d 722 (1981); *Fitrro v. Industrial Comm'n*, 377 Ill. 532, 537, 37 N.E.2d 161 (1941).

It is axiomatic that employers take their employees as they find them. *Baggett*, 201 Ill. 2d at 199. "When workers' physical structures, diseased or not, give way under the stress of their usual tasks, the law views it as an accident arising out of and in the course of employment." *General Electric Co. v. Industrial Comm'n*, 89 Ill. 2d 432, 434, 60 Ill. Dec. 629, 433 N.E.2d 671 (1982). Thus, even though an employee has a preexisting condition which may make him more vulnerable to injury, recovery for an accidental injury will not be denied as long as it can be shown that the employment was also a causative factor. *Caterpillar Tractor Co. v. Industrial Comm'n*, 92 Ill. 2d at 36; *Williams v. Industrial Comm'n*, 85 Ill. 2d 117, 122, 51 Ill. Dec. 685, 421 N.E.2d 193 (1981); *County of Cook v. Industrial Comm'n*, 69 Ill. 2d 10, 18, 12 Ill. Dec. 716, 370 N.E.2d 520 (1977); *Town of Cicero v. Industrial Comm'n*, 404 Ill. 487, 89 N.E.2d 354 (1949) (It is a well-settled rule that where an employee, in the performance of his duties and as a result thereof, is suddenly disabled, an accidental injury is sustained even though the result would not have obtained had the employee been in normal health). Accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it was [illegible]

factor in the resulting condition of ill-being. *Rock Road Construction Co. v. Industrial Comm'n*, 37 Ill. 2d 123, 127, 227 N.E.2d 65 (1967). Whether a claimant's disability is attributable solely to a degenerative process of the preexisting condition or to an aggravation or acceleration of a preexisting condition because of an accident is a factual determination to be decided by the Industrial Commission. *Roberts v. Industrial Comm'n*, 93 Ill. 2d 532, 538, 67 Ill. Dec. 836, 445 N.E.2d 316 (1983); *Caterpillar Tractor Co. v. Industrial Comm'n*, 92 Ill. 2d at 36-37; *Caradco Window & Door v. Industrial Comm'n*, 86 Ill. 2d 92, 99, 56 Ill. Dec. 1, 427 N.E.2d 81 (1981).

In the present case, Petitioner, by all accounts, suffered from a degenerative condition relative to his hips. However, despite this condition, Petitioner was asymptomatic and continued to work full duty, without the need for treatment, right up to the date of the accident on March 20. 2007.

Treating orthopedic surgeon, Dr. Chassin opined that "within [a] reasonable degree of medical and surgical certainty ... [Petitioner] has suffered an aggravation of a pre-existing condition ..." (PX4). At the time of his initial examination on March 30, 2007 Dr. Chassin noted severe degenerative changes or arthritis in Petitioner's left hip and recommended hip replacement. (PX14, p.10). Dr. Chassin later explained that "... what happened is [Petitioner] probably had some cartilage still in his hip remaining before the fall, and when he fell, he scraped off that last little bit of cartilage and after that had the bare bone scraping." (PX14, p.12). Dr. Chassin did concede, however, that the need for surgery could have been possible even without the fall, and that hip replacement surgery at some point was "likely." (PX14, p.29). Dr. Chassin later noted that he would "... admit that it's more likely statistically that [Petitioner] would need [a hip replacement] because of his prior hip condition, but I think the fall scraped off what little bit he had. If he had not fallen, he would not have a hip replacement today, that is my opinion, so the fall changed something. It changed his history." (PX14, p.39).

Respondent's §12 examiner, Dr. Jacobs, testified that it was fair to say that hip replacement surgery was probably inevitable even without the fall given the degenerative changes noted. (RX7, p.22). However, Dr. Jacobs was unable to say whether the need for a total hip replacement would have occurred in years or months, noting even later that such a determination was not possible. (RX7, pp.37,43). More importantly, Dr. Jacobs agreed that there was nothing in Mr. Totton's medical records prior to his fall that would have led him to recommend a hip replacement at that time. (RX7, p.37). Dr. Jacobs also conceded that it was possible that patients with slipped capital femoral epiphysis ("SCFE") would never need a hip replacement unless they became symptomatic. (RX7, p.39). In addition, Dr. Jacobs testified that he did not believe that the accident on March 20, 2007 caused the need for total hip replacement surgery, a statement he clarified on cross examination by agreeing that the fall was not the sole or major cause for the left hip replacement. (RX7, pp.23, 36-37). Dr. Jacobs conceded, however, that his opinion in this regard was based only on what he considered a medical and not a legal standard of causation. (RX7, p.36).

The Arbitrator finds the opinion of operating surgeon Dr. Chassin to be more persuasive than that of Respondent's examining physician, Dr. Jacobs. Both physicians agree that Petitioner was suffering from a severe preexisting degenerative condition in his hips, and that he likely would have required total hip replacement irrespective of the accident in question. However, the evidence likewise shows that Petitioner was asymptomatic and working full time at the time of the incident without any need for treatment or time off work due to his pre-existing condition. Certainly, the incident in question was not the sole or primary cause of the injury and ensuing need for surgery. But that is not the legal standard. Indeed, as already noted, the case law clearly dictates that the incident need only be ***a*** causative factor in the injury, and as Dr. Chassin essentially opined, the fall on March 20, 2007 was just that – the last straw that broke the camel's proverbial back. Yet this is also not a case where Petitioner's condition was so far gone that any exertion would have been overexertion, resulting in the need for a total hip replacement. Indeed, both Dr. Chassin and Dr. Jacob agree that while Petitioner would have likely needed said surgery in the future, there is no way of knowing when that eventuality would have occurred. In that respect, the

incident clearly accelerated the disease process beyond its natural progression, exposing the underlying condition and bringing it to a head, and as such it was clearly causally related to the incident at work on March 20, 2007.

With respect to the left arm, Petitioner was diagnosed as suffering from left ulnar neuropathy at the cubital tunnel. Dr. Schiffman eventually performed surgery on Petitioner's left elbow on October 15, 2007, said surgery consisting of a left ulnar nerve transposition. (PX13). In a letter to Petitioner's counsel dated January 9, 2008, Dr. Schiffman indicated that he was of the opinion that Petitioner's left elbow cubital tunnel syndrome was causally related to the work injury in March of 2007. (PX4). Dr. Schiffman noted that "[t]he patient gives a clear history of falling and striking the posterior medial aspect of the elbow when he fell and would certainly be consistent with a direct contusion to the left ulnar nerve at the cubital tunnel. As is well-appreciated, a direct ulnar nerve contusion may result in a persistent ulnar neuropathy which can and, certainly in this case, did in this case necessitate an ulnar nerve transposition." (PX4).

Based on the above, and the record taken as a whole, the Arbitrator finds that in addition to injuring his left arm Petitioner sustained an aggravation of his degenerative hip condition. Accordingly, the Arbitrator finds that Petitioner's current conditions of ill-being relative to his left hip and left arm are causally related to the accident on March 20, 2007.

WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner submitted medical bills into evidence as part of PX15. Respondent objected on the basis of foundation, causation and liability. The Arbitrator finds that the following providers provided services that were causally related to the accident in question:

Provider	Service Date[s]	Amt. Charged	Fee Schedule	Ins. Pd.	Pt. Pd.	Balance*
1) Adventist Midwest	4/20/07-4/25/07	***$3,394.00***	$8,095.33	$2,720.80	$0.00	$673.20
2) Alden of Waterford	4/30/07-5/6/07	$2,450.00	***$1,862.00***	$2,392.90	$0.00	$57.10
3) ATI/Naperville	6/11/07-6/22/07	$1,783.00	***$532.41***	$751.50	$0.00	$83.50
4) ATI/Naperville	6/25/07-8/30/07	$9,056.00	***$1,441.22***	$4,578.00	***$83.50***	$364.30
5) ATI/Bolingbrook	11/1/07-2/11/08	$11,182.00	***$8,498.32***	$1,245.18	$0.00	$9,730.00
6) Dr. Simon	8/23,11/6/07,2/5/08	$740.00	***$555.57***	$379.00	***$30.00***	$0.00
7) Com.Alliance Home Health Care	5/15/07-5/22/07	$593.88	***$451.35***	$0.00	$0.00	$0.00
8) DuPage Pathology	4/19/07-4/28/07	***$612.00***	$1,597.41	$146.60	$0.00	$465.40
9) Fox Valley Cardio	4/23/07	$219.95	***$129.43***	$93.00	$0.00	$10.00
10) Hinsdale Hosp.	4/19/07-4/30/07	$59,531.75	***$42,007.33***	$56,510.20	***$200.00***	not shown
11) Hinsdale Ortho	3/30/07-5/29/08	$17,708.00**	***$14,678.33***	$281.58	***$80.00***	$18,680.28***
12) HLG Anes Assoc.	4/25/07	***$1,848.00***	$8,016.87	$724.95	$0.00	$149.05
13) IPC of Ill.	4/25/07-4/30/07	$1,523.00	***$1,450.20***	$672.30	$0.00	$74.70
14) out of pocket expenses	multiple	N/A	N/A	N/A	***$241.68***	N/A
15) Quest Diagnostics	4/17/07	***$266.70***	$320.90	$62.10	$0.00	$6.90
16) Suburban Radiologists	4/20/07-3/31/08	***$551.00***	$1,597.59	$31.27	$0.00	$117.73
17) Superior Ambulance	4/30/07	$699.00 ****	***$382.41***	$559.20	$0.00	$164.26

* Balances reflect adjustments and/or disallowances not otherwise shown in this breakdown
** Excluding fees for disability forms and monthly 1% "WC Interest Fee"
*** Includes fees for disability forms and monthly 1% "WC Interest Fee"

The Arbitrator, having found that Petitioner sustained accidental injuries arising out of and in the course of his employment and that his current conditions of ill-being relative to his left hip and left arm are causally related to said accident, the Arbitrator finds that Petitioner is entitled to medical expenses pursuant to §8(a) and the fee schedule provisions of §8.2 of the Act in the amount of $79,295.45. This amount is based on the actual charge or fee schedule amount for each provider listed above, whichever is lower, or $78,660.27, as well as out of pocket expenses totaling $635.18.

The Arbitrator further finds that Respondent is entitled to a credit for any and all amounts paid on account of these by the group insurance carrier, and that Petitioner is to be held harmless for any claims and demands by any provider of benefits for which Respondent is receiving credit under this order.

WITH RESPECT TO ISSUE (K), WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner testified that he attempted to continue to work following the accident but that the pain was too much and that he was taken to Tyler Medical Services for treatment. The evidence shows that he was taken off work at that time and was not released to return to work for both his left hip and left arm conditions until February of 2008. More to the point, the record reflects that Dr. Chassin released Petitioner to return to work with respect to his left hip as of September 13, 2007. (PX5). However, Schiffman did not release Petitioner to return to work without restrictions relative to his left arm until his visit on February 20, 2008. (PX5).

Respondent's §12 examining physician, Dr. Jacobs, opined that Petitioner could do light duty and could return to work as a bus driver as of July 23, 2007. (RX6). However, Dr. Jacobs also agreed that he did not examine Mr. Totten with respect to his left arm and had no opinions as to that condition. (RX7, p. 25).

Petitioner testified that he eventually returned to work on February 22, 2008.

Based on the above, and the records taken as a whole, the Arbitrator finds that Petitioner was temporarily totally disabled from March 20, 2007 through February 21, 2008, for a period of 48-3/7 weeks. The Arbitrator further finds that Respondent is entitled to a credit for payments made to Petitioner from his sick bank and for payments made for non-occupational benefits.

WITH RESPECT TO ISSUE (L), WHAT IS THE NATURE AND EXTENT OF THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

As a result of the accident, Petitioner suffered an aggravation of his pre-existing degenerative arthritic condition relative to his left hip necessitating total left hip replacement surgery on April 25, 2007. (PX7). Petitioner was also diagnosed as suffering from left ulnar neuropathy at the cubital tunnel. Dr. Schiffman eventually performed surgery on Petitioner's left elbow on October 15, 2007, said surgery consisting of a left ulnar nerve transposition. (PX13).

Petitioner eventually returned work for Respondent without restrictions on February 22, 2008. He is currently still working in this capacity, performing his regular duties. Petitioner noted that he last saw Drs. Chassin and Schiffman on May 29, 2008, and that he has not seen either doctor since.

Currently, Petitioner notices that before his shift is over he has stiffness and pain in his left elbow. He stated that he no longer wears a brace on his left elbow as he had done before the surgery. Petitioner also noted that his left hip is painful when he sits for any length of time and that he finds it difficult to walk for more than a block without feeling pain. He indicated that the pain goes down to the top of his knee and the front part of the thigh, and that he gets real sharp pains in the left leg.

Based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner suffered the loss of use of 20% of his left arm pursuant to §8(e)10 and 50% lose of use of his left leg pursuant to §8(e)12 and of the Act.

WITH RESPECT TO ISSUE (M), SHOULD PENALTIES BE IMPOSED UPON THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that while there should not have been a question as to the facts of the case, there was a reasonable dispute as to a question of law – namely, whether or not Petitioner was exposed to an increased risk of injury due to his job, and whether or not Petitioner's pre-existing condition was so far gone that any exertion would have been overexertion.

The Arbitrator therefore finds that a legitimate dispute existed between the parties, and Respondent's conduct in the defense of this claim was neither unreasonable nor vexatious under the circumstances. Accordingly, Petitioner's claim for additional compensation pursuant to §19(k) and §19(l) as well as attorneys' fees pursuant to §16 of the Act is hereby denied.

WITH RESPECT TO ISSUE (N), IS THE RESPONDENT DUE ANY CREDIT, THE ARBITRATOR FINDS AS FOLLOWS:

The parties stipulated that most if not all of the bills, to date, had been paid by Petitioner's group health insurance carrier, Blue Cross/Blue Shield, as provided through his employment with Respondent.

Therefore, the Arbitrator finds that Respondent is entitled to a credit for any and all amounts paid on account of this injury by the group insurance carrier pursuant to §8(j) of the Act, and Petitioner is to be held harmless for any claims and demands by any provider of benefits for which Respondent is receiving credit under this order.