ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC036582
Case Name	Colleen Bennett-Houston v. State of Illinois – Illinois Department of Corrections
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0329
Number of Pages of Decision	10
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Joseph McCarron
Respondent Attorney	Bradley Defreitas

DATE FILED: 8/1/2023

/s/ Kathryn Doerries, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MC LEAN)

☐ 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)
X correct scrivener's errors	☐ PTD/Fatal denied
☐ Modify Choose direction	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

COLLEEN BENNETT-HOUSTON,

Petitioner,

vs. NO: 18 WC 36582

STATE OF ILLINOIS,
ILLINOIS DEPARTMENT OF CORRECTIONS,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission corrects a scrivener's error in the Arbitrator's decision, in the Findings section, third sentence, and strikes "July 31st, 2017", and replaces it with "November 1, 2018".

The Commission corrects a scrivener's error in the Arbitrator's decision, in the Findings section, fourth sentence, and strikes "October 31st, 2017", and replaces it with "November 1, 2018".

The Commission corrects a scrivener's error in the Arbitrator's decision, in the Findings section, sixth sentence, and strikes "July 31st, 2017", and replaces it with "November 1, 2018" and strikes "for the right wrist".

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 7, 2022, is hereby, otherwise, affirmed and adopted.

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

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

Pursuant to Section 19(f)(1) of the Act, this decision is not subject to judicial review. *820 ILCS 305/19(f)(1) (West 2013)*.

August 1, 2023

o-7/11/23
KAD/jsf

/s/*Kathryn A. Doerries*
Kathryn A. Doerries

/s/*Maria E. Portela*
Maria E. Portela

/s/*Amylee H. Simonovich*
Amylee H. Simonovich

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC036582
Case Name	BENNETT-HOUSTON, COLLEEN v. ILLINOIS DEPARTMENT OF CORRECTIONS
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	7
Decision Issued By	Kurt Carlson, Arbitrator

Petitioner Attorney	Joseph McCarron
Respondent Attorney	Bradley Defreitas

DATE FILED: 3/7/2022

THE INTEREST RATE FOR THE WEEK OF MARCH 1, 2022 0.67%

/s/ Kurt Carlson, Arbitrator
Signature

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

March 7, 2022

/s/ Michele Kowalski

Michele Kowalski, Secretary

Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF **McLean**)

☐ 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

Colleen Bennett-Houston Case # **18** WC **36582**
Employee/Petitioner/
v.
Illinois Department of Corrections
Employer/Respondent/

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Kurt Carlson**, Arbitrator of the Commission, in the city of **Bloomington**, on **November 30, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **November 1, 2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On July 31st, 2017, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

On October 31st, 2017, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

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

Petitioner's current condition of ill-being ***is not*** causally related to the accident on July 31st, 2017 for the right wrist.

In the year preceding the injury, Petitioner earned $**69,900**; the average weekly wage was $**1,344.23**.

On the date of accident, Petitioner was **63** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $8,619.63 for other benefits, for a total credit of $8,619.63.

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

ORDER

PETITIONER FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT SHE SUSTAINED AN ACCIDENT THAT AROSE OUT OF AND IN THE COURSE OF HER EMPLOYMENT ON NOVEMBER 1, 2018. ALL BENEFITS ARE DENIED.

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

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

Kurt A. Carlson

Kurt A. Carlson

MARCH 7, 2022

Colleen Bennett-Houston v IDOC
18-WC-36582

Findings of Fact

Petitioner and Perry Taylor testified at trial as to the incident on November 1, 2018. Petitioner testified as to her injury, her treatment, and current complaints. The issues in dispute are accident, causal connection, unpaid medical, TTD, and the nature and extent of Petitioner's bilateral knee injuries.

Six months before the alleged work accident, Petitioner had undergone left knee surgery.

Testimony of Perry Taylor

Mr. Taylor testified that on the date of accident he was incarcerated and that Petitioner was his chaplain within the institution. He described her accident as a "[q]uick tumble forward…[w]e were proceeding towards the – I believe, if I'm not mistaken, the chapel, which is above the gymnasium." TX 13. Mr. Taylor further testified that there were little objects on the ground and that it could have been gravel.

On cross-examination, Mr. Taylor agreed that his witness report stated they were headed toward the property office, not the chapel. He then admitted that he failed to mentioned any gravel in his witness report, Id at 15.

Testimony of Colleen Bennett-Houston

Petitioner is a chaplain at Lincoln Correctional Center and her job duties included "[to] facilitate a multi-faith religious program…supervise volunteers…the choir. I counsel individuals in custody." Id at 19.

Petitioner testified that, "We were leaving my office in clinical, heading for choir rehearsal, which is in the chapel; but before we went to choir rehearsal, I had to make a stop at property…as I'm going and I get almost halfway to the door, my feet slip and I'm going forward and I fall. There was a picnic table there, also. And as I went forward, I slipped on that gravel, fell down on my knees." Id at 19-20.

Petitioner further testified that she believed she hit the picnic table as well as slipping on the gravel. She then reported the accident to Major Calhoun who instructed her to go over to health care to get an evaluation and a package. Id at 22.

On cross-examination, Petitioner agreed that she filled out a notice of injury (Respondent's exhibit 1). When asked why she did not include in her notice of injury that she definitively slipped on gravel she replied,

> "[w]hen I went down I turned around to my clerk and I said : what is this on the ground? And it all, like I said, happened so fast. So I remember both things happening. I remember that picnic table. But my foot slipped on that gravel first and that I know." Id at 38-39.

Petitioner further testified that she slipped forward after hitting the gravel and her knee went out. When asked why her report from November 7th to OSF St. Joseph does not include any mention of gravel Petitioner did not agree that she gave that version of events to them. When asked why there was three different histories between her notice of injury and the medical records Petitioner stated-

> "I can go only go by what I know I said. Why a doctor did not put everything in that I said on 11-7 I don't know. But my testimony throughout this has been consistent, that there was gravel there as I went and slipped. There was a picnic table there that I remember my foot also hitting." Id at 41-42

Petitioner's exhibits

The medical bills were entered as Petitioner's exhibit A. The records from OSF Occupational Health in Bloomington, IL were entered as Petitioner's exhibit B. The records reflect that Petitioner reported that she tripped on table leg/gravel. She did not fall to the ground. The skin on her left knee was intact and there was no erythema/edema/eccymosis. Additionally, the Arbitrator notes that there was no left knee redness, swelling, discoloration or bruising noted by the initial medical treatment provider. Petitioner rated her pain at 7/10 in the left knee and 4/10 in her R knee. The records further reflect that an x-ray was taken of the left knee that showed no fracture. PX B-p 3.

Petitioner claims to have injured both knees for an event that did not involve a fall to the ground.

On November 13, 2018, Petitioner sought medical treatment with Dr. Joseph Newcomer (Petitioner's exhibit C, who gave her a cortisone injection in her left knee that day.

On November 26, 2018 where she was advised to continue conservative treatment which included use of a brace and medication.

Petitioner received an orthovisc injection to her left knee and right knee on December 27, 2018.

She received a second orthovisc injection to her bilateral knees on January 3, 2019. She received the third orthovisc injection to her bilateral knees. PX C. The Arbitrator notes that orthovisc injections are used to control pain related to osteoarthritis.

Petitioner continued to treat from April 8, 2011 through December 13, 2019. (Petitioner's Exhibit D) These records further reflect bilateral knee physical therapy.

The transcript of the deposition of Dr. Joseph Newcomer (treater) was entered into evidence as Petitioner's exhibit E. Dr. Newcomer opined that the accident was an aggravation of her degenerative bilateral knee condition, but this was based on the incorrect accident history that Petitioner fell on both her knees. PX E-p. 30. He further testified that he believed treatment for 4 to 6 months after the accident would be related to the fall but after that it would be related to degenerative changes. Id at 33-34. Dr. Newcomer further clarified that all treatment through April would be related and that the injection to her left knee after April was related to her significant amount of walking at Disney with her grandchildren and not to the fall. Id at 35-36. The CV of Dr. Joseph Newcomer was entered into evidence as Petitioner's exhibit F. The medical records used during the deposition of Dr. Joseph Newcomer were entered into evidence as Petitioner's exhibit G.

The work restrictions for Petitioner were entered as Petitioner's exhibit H. This record reflects that her restrictions were limited bending or twisting; no kneeling or squatting; no stairs. PX H. The amounts paid by Health Alliance for medical treatment were introduced as Petitioner's exhibit K.

The notice of injury that Petitioner filled out on November 1, 2018 was entered as Respondent's exhibit 1. Petitioner noted that she was walking to personal property when her right shoe hit the corner of the picnic table or some rocks on the ground which caused her to fall forward. The witness report of Perry Taylor was entered into evidence as Respondent's exhibit 2. Mr. Taylor wrote that he "experinced (sic) Mrs. Houston fall forward in an instant…I quickly moved to help her regain her balance." RX 2. "Regaining balance" is not the same as "helping up."

Respondent's exhibit 3 was the back wage claim that Petitioner made through her union. This record reflects that she originally claimed $14,565.47 for back pay from November 14, 2018 through February 4, 2019. The director checked the box that noted this was valid back wage claim and Petitioner was awarded $8,619.63 on June 24, 2021. RX 3.

Conclusions of Law

As an initial matter the Arbitrator notes Petitioner has the burden of proving all of his case by a preponderance of the evidence. Chicago Rotoprint v. Industrial Comm'n, 157 Ill.App.3d 996, 1000, 509 N.E.2d 1330, 1331(1st Dist. 1987).

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

The Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that an accident arose out of her employment. Specifically, the Arbitrator wonders if any compensable accident occurred. Petitioner did not consistently give a history of her accident and in fact wrote in her notice of injury that it was either a table or gravel that she slipped on. However, at trial she testified that it was definitely gravel.

More compelling, is that Petitioner testified that she fell on both knee to a concrete surface, (T. p.20, 40) but the medical records state otherwise. After the occurrence, her left knee showed no clinical signs of physical trauma.

Perhaps one can reconcile differing accident histories that vary between "rocks," "gravel" and the "leg of a picnic table," but the Arbitrator cannot reconcile the factual tension between "I fell to the ground" and "She did not fall to the ground." Neither nurse practitioner Kayla Hnilicka nor Dr. Kreiger-Johnsen recorded a fall to the ground. Each took a separate history that stated no fall to the ground took place. (Pet. Ex. B)

And how did Petitioner injure both knees without falling to the ground? It's difficult to visualize such an injury. After reviewing the entire record, Petitioner's accident history to too inconsistent to be credible.

Based upon the foregoing and viewing the record in its entirety, the Arbitrator finds that Petitioner failed to prove an accident arose out of and in the course of her employment with Respondent. All other issues are rendered moot. All benefits are denied.

Respondent is awarded a TTD credit from November 2, 2018 through November 13, 2018 and then from February 5, 2019 through February 13, 2019, if paid as such.

Issue (L): What is the Nature and Extent of the injury?

No permanency is awarded in this matter. The Arbitrator notes that Dr. Joseph Newcomer (a treater) who opined that Petitioner's current condition was more than likely related to a "tremendous amount" of walking at Disneyland later in June of 2019. (Dep T. p.36)

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	10WC039277
Case Name	Anthony Naimoli v. State of Illinois – Illinois Department of Transportation
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0330
Number of Pages of Decision	52
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Mark DePaolo
Respondent Attorney	Dan Kallio

DATE FILED: 8/1/2023

/s/Christopher Harris, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ANTHONY NAIMOLI,

Petitioner,

vs. NO: 10 WC 39277

STATE OF ILLINOIS,
ILLINOIS DEPARTMENT
OF TRANSPORTATION,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of benefit rates, temporary total disability, indemnity, and the date of maximum medical improvement 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 October 18, 2022 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.

IT IS FURTHER ORDERED BY THE COMMISSION that commencing on the second July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the ***Rate Adjustment Fund***, as provided in Section 8(g) of the Act.

Pursuant to §19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review. Therefore, no appeal bond is set in this case.

August 1, 2023
O: 07/20/23
CAH/tdm
052

/s/ *Christopher A. Harris*
Christopher A. Harris

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	10WC039277
Case Name	NAIMOLI, ANTHONY v. ILLINOIS DEPARTMENT OF TRANSPORTATION
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	49
Decision Issued By	Joseph Amarilio, Arbitrator

Petitioner Attorney	Mark DePaolo
Respondent Attorney	Dan Kallio

DATE FILED: 10/18/2022

THE INTEREST RATE FOR THE WEEK OF OCTOBER 18, 2022 4.24%

/s/ Joseph Amarilio, Arbitrator
Signature

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

October 18, 2022

/s/ Michele Kowalski

Michele Kowalski, Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Anthony Naimoli
Employee/Petitioner
v.
Illinois Department of Transportation
Employer/Respondent

Case # **10** WC **39277**

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 **Joseph Amarilio**, Arbitrator of the Commission, in the city of **Chicago**, on **5/19/22 and 8/17/22**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **9/16/2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**96,050.24**; the average weekly wage was $**1,847.12**.

On the date of accident, Petitioner was **44** years of age, ***married*** with **0** dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.

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

Respondent shall be given a credit of $**732,369.45** for TTD, maintenance, and PTD, for a total credit of $**732,369.45**. Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $**1,231.41**/week for **406 6/7** weeks, commencing **9/18/2010** through **7/3/2018**, as provided in Section 8(b) of the Act. (See attached)

Respondent shall pay Petitioner permanent and total disability benefits of $**1,231.41**/week for **202 3/7** weeks, commencing **7/4/2018** through **5/19/2022**, and continuing for life, as provided in Section 8(f) of the Act as the Petitioner falls into the category of odd-lot permanent total disability. (See attached)

Commencing on the second July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the ***Rate Adjustment Fund***, as provided in Section 8(g) of the Act.

Respondent shall be given a credit of $**732,369.45** for TTD, maintenance, and PTD, for a total credit of $**732,369.45**. (See attached.)

Respondent shall pay to Petitioner reasonable and necessary medical services of $**30,346.67**, as provided in Section 8(a) of the Act. Respondent is entitled to credit for medical bills previously paid. (See attached.)

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.

OCTOBER 18, 2022

/s/ *Joseph D. Amarilio*

Signature of Arbitrator Joseph D. Amarilio

23IWCC0330

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION
ATTACHMENT TO ARBITRATION DECISION

Anthony Naimoli,	)	
	)	
Petitioner,	)	
vs.	)	No. **10 WC 39277**
	)	
Illinois Department of Transportation,	)	
	)	
Respondent.	)	

I. PROCEDURAL HISTORY

Mr. Anthony Naimoli ("Petitioner") filed an Application for Adjustment of Claim pursuant the Illinois Workers' Compensation Act ("Act") alleging that he sustained accidental injuries on September 16, 2010 that arose out of and in the course of his employment with the Illinois Department Transportation ("Respondent"). Petitioner, by his attorneys, filed a duplicate Application For Adjustment of Claim under case number 17 WC 014629. By agreement of the parties, the duplicate filing was voluntarily dismissed. The parties proceeded to trial on May 19, 2022, and August 17, 2022.

STIPULATED ISSUES

At trial the parties stipulated (1) that on September 16, 2010, Petitioner and Respondent were operating und the Illinois Workers' Compensation Act, and their relationship was one of employee and employer; (2) Petitioner sustained accidental injuries that arose out of and in the course of his employment; (3) that notice was given with the time limits stated in the Act; (4) that Petitioner's current condition of ill-being is causally connected to this injury; (5) that Petitioner's earnings during the year proceeding the injury were $96,050.24 and that his average weekly wage was $1,847.12; (6) that he was 44 years of age, single with no dependent children;

and, (7) that Respondent has paid $732,369.45 in temporary total and maintenance benefits for which it is entitled to credit.

DISPUTED ISSUES

At the time hearing, the following three issues were in dispute:

(1) Whether Respondent is liable for unpaid medical bills in the amount of pre-fee scheduled in paid medical bills in the amount of $39, 347.67.
(2) Whether Petitioner is entitled to additional TTD or maintenance benefits beyond what has been paid; and,
(3) The nature and extent of Petitioner's injury. That is whether Petitioner is an odd-lot permanent total pursuant to Section 8(f) of the Act or is Petitioner is capable of gainful employment and, thus, should receive permanent partial disability benefits pursuant Section 8(d) 2 of the Act.

At the conclusion of the trial on August 17, 2022, the parties submitted their exhibits into evidence and the Arbitrator closed proofs, taking the matter under advisement. After carefully considering all of the evidence and testimony, the Arbitrator has made his findings of fact and conclusions of law as outlined below.

Evidentiary Issue

An issue at trial concerned the admissibility of Petitioner's admitted felony conviction more than 20 years prior Petitioner's testimony for the purpose of impeachment. To determine the admissibility of a prior felony conviction for impeachment, the Illinois Supreme Court has adopted the three-part test derived from Federal Rule of Evidence 609. *(People v.*

Montgomery (1971), 47 Ill. 2d 510) To be admissible for impeachment purposes, (1) the conviction must have been for a felon, (2) it must have occurred less than 10 years before the witness' testimony, and (3) the probative value of the conviction must not be substantially outweighed by its potential prejudicial effect. This test for admissibility was subsequently extended to civil cases in *Knowles v. Panopoulos* (1977), 66 Ill. 2d 585. With these factors in mind, the first factor is satisfied but the second it not, and factor three is moot. Therefore, the prior felony conviction is not admissible for the purposes of impeachment as it was more than 10 years prior to hearing. It is admissible however as a factor in considering Petitioner's employability under the well-established principle that an employer takes the employee as it finds him. *Bocian v. Industrial Comm'n*, 282 Ill. App. 3d 519 (1996) and because the vocational counselors involved in this matter considered the felony conviction in evaluating Petitioner's employability. The Arbitrator notes that all the vocational counselors who evaluated the Petitioner's employability agreed that his felony conviction would be a barrier to obtaining gainful employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

II. FINDINGS OF FACT

Testimony of Anthony Naimoli, Petitioner

Petitioner, Anthony Naimoli, testified that he sustained an injury arising out of and during the course of his employment on September 16, 2010. On that day, while using a jackhammer on a sewer cap, the bottom of the jackhammer "blew out" and hammered into Petitioner's right knee. (TX 12) At this time, Petitioner was employed as a laborer for the Illinois Department of

Transportation (IDOT). His job included road building tasks, i.e., jackhammering, shoveling, and heavy lifting. (TX 14)

Petitioner had been a construction worker since he was 18 years of age. Other than a short time when he worked as a messenger, he had not other jobs or occupations. Petitioner was 55 years of age at the time of the trial. (TX 15)

Following his accident on September 16, 2010, Petitioner began a long period of medical treatment, lasting 10 years and continuing to the time of trial. The treatment over these years has been to both the right and left knees, though only the right knee was struck by the jackhammer at the time of the accident. (TX 15)

The injury to Petitioner's left knee did not manifest until a few years later. Petitioner had undergone a right knee replacement, which had failed. While awaiting a revision of his right knee replacement, his right leg gave out while descending stairs and he twisted his left knee, which began a course of treatment for the left knee. Petitioner underwent a Section 12 examination for his left knee prior to treatment for the left knee being authorized. (TX 17)

Petitioner underwent numerous Section 12 examination over the past 12 years, including Dr. Nikhil Verma in April 2012, Dr. Michael Lewis in August 2014, September 2107 and July 2018. These examinations preceded requests for treatment. After each examination, treatment was authorized for both the right and left knees. (TX 17-18)

During the past 12 years of treatment, Petitioner has had a number of surgeries to his knees. Petitioner listed his knee surgeries as follows:

1. May 2011: right knee arthroscopic surgery.
2. April 2014: right knee arthroscopic surgery.
3. January 2015: right knee total replacement.
4. November 2015: right knee revision of total replacement.
5. January 2016: left knee arthroscopy.

At the time of the hearing, two additional surgeries were pending, another revision surgery to the right knee and a total replacement for the left knee. All of his surgeries had been approved by the Respondent. (TX 18-24)

All of Petitioner medical care, though performed by different practitioners, came through a single chain of referral. (TX 25-26)

At the time of trial, Petitioner had decided not to access surgery for his left knee replacement or right knee revision. This is because of the difficult rehabilitation involved, especially immediately following either surgery, which would place additional strain on the opposite knee. (TX 27-28)

At the time of trial, both knees would routinely swell, as large as bowling ball at times. The left swells more than the right. (TX 28)

Petitioner raised his left pant leg and the Arbitrator noted swelling. (TX 29)

Petitioner met with a vocational counselor in November of 2018, who had been hired by the State. He had a second meeting with a second counselor from the same company in October of 2020. He never received a report from either meeting. He never received a request to participate in any formal training or job placement as a result of either of these meetings. (TX 31)

Petitioner had a third meeting with Edward Pagella which lasted about 1½ to 2 hours. The earlier meetings had lasted about 40 minutes each. (TX 32-33)

The second meeting with the Coventry person took place in December of 2020. It was a long meeting. He had been looking for work at that time. Toward the end of the meeting, he asked the vocational counselor what he might be qualified for. She told him that there was nothing that he could do.

Mr. Pagella also told him there was no work that he could do. (TX 33-35)

Though he was told by two vocational counselors that there was no work for him, he looked for work pursuant to the advice of his attorney. He documented his work search by filling out sheets his attorney had given him. His work search yielded two interviews, neither of which resulted in jobs. Petitioner was under the impression that he was not hired because of his physical restrictions. (TX 36-37)

Petitioner's current treating physician, Dr. Howard Freedberg of Suburban Orthopedics, has advised that he do no work whatsoever. Various other physicians have given him significant restrictions, including no standing more than 10 minutes, no kneeling, no bending, no crawling, no walking more than a few hundred feet, etc. (TX 37-38)

When he exceeds his restrictions, his knees begin to swell and continue to swell unless he stops his activity. If he persists too long, he is unable to walk the following day. (TX 38-39)

Petitioner continues to be on medications. He takes Celebrex every day for inflammation. He also takes Vicodin and Tramadol for pain a few times per week. These medications ease his pain somewhat, but also make "a little woozy." (TX 39-40)

Petitioner then described some of the general services and care that he received from some of the medical providers. Dr. Richard Hayes began his treatment and referred him to an orthopedic surgeon, Dr. Christos Giannoulias, who performed his first arthroscopic surgery at Lakeshore Surgery Center. Dr. Von Stamos saw him at Evanston Hospital. Suburban Orthopedics (Dr. Freedberg) has been managing his care since 2017. Athletico Physical Therapy performed post-surgical therapy for him, possibly following his first surgery. Soul Care Services provided after-surgery care for him at the request of the State. Achieve Physical Therapy performed post-surgery physical therapy services. ATI Physical Therapy performed a functional capacity evaluation. (TX 41-43)

During the time following his September 16, 2010 accident and to the time of trial, and during the pendency of the case, there have been several occasions when his benefits (TTD) were suspended or terminated. There was no reason that he could point to. On these occasions, he would call his attorney, who filed motions on his behalf. Each time, his benefits would be re-started. However, each time the TTD benefits were re-started, they did not go back and pay the prior missing TTD benefits. (TX 44-45)

He has never declined or refused to participate in a supervised job search. He has never been told that there is a stable labor market available to him. (TX 45)

One vocational specialist did not tell him anything. The second specialist and Mr. Pagella told him there was no job he could perform. (TX 47)

He currently has many unpaid medical bills. Petitioner again described some of the unpaid providers. Suburban Orthopaedics, Prescriptions RX and WCRX Solutions as providers of prescribed medications, Modern Pain Consultants (Dr. Khan) provided pain treatment. However, he discontinued pain treatment with Dr. Khan by his own choice. (TX 48-49)

Though he has been prescribed additional surgeries to both knees, Petitioner testified that he does not wish to undergo the further surgeries that have been prescribed for him:

> "I don't really want to go through it again because, one, they can't do one unless they do both, from what I understand, I'm not a hundred percent, because I can't rehab one properly without the other one getting blown up or reinjured more. And basically, if they did both of them, I might have to go into a rehab facility because I wouldn't be able to walk. So, I'm not really looking forward to doing that, and basically the pain involved and the time involved, I'm trying to put it off as long as I can." (TX 50-51)

Petitioner currently walks with a limp. The limping started five or six years ago and is constant. There is no time that he does not limp. (TX 51-52)

Cross Examination

Petitioner is a laborer. He has been in the laborer's union since 1984. He got the IDOT job through his union. The job started as an 11-month temporary job. Petitioner had been working about 3 years for IDOT at the time of the accident. (TX54-55)

He documented a job search from approximately June of 2017 to September of 2017, and from March of 2022 until the time of trial. During these periods, he applied for about 150 jobs. (TX 54-58)

Petitioner has had no other source of income during the 12 years that he has been on TTD benefits. He does not receive Social Security disability and he receives no union pension or benefits. (TX 58)

He has undergone a number of vocational evaluations. He owns a laptop but uses the internet very seldomly. (TX 59)

In the year 2000, Petitioner plead "guilty" to one count of mail fraud in Federal Court. The charge involved fraudulent health care payments through the union. (TX 60)

Medical Records

The arbitrator has reviewed the medical records admitted into evidence by the parties. As the records represent approximately 12 years of medical services, they are summarized and placed into chronological order as follows:

9/20/10 **Richard Hayes, M.D. (PX 1)**
Initial evaluation for right knee; injured when a jackhammer broke apart. C/o pain and instability.
RX: MRI

10/27/10 **Edgebrook Radiology/Eugene Kovalsky MD (PX 1)**
MRI right knee
IMPRESSION: Relatively large joint effusion, mainly @ the anterior joint compartment. The etiology could not be definitively established; however, the different diagnosis would include trauma & degenerative joint changes. There is

a mild degree of degenerative arthritis @ the articulating surfaces of the knee, mainly @ the medial compartment. The study is otherwise normal.

11/2/10 **Richard Hayes, M.D. (PX 1)**
F/u right knee pain; MRI shows large ant effusion. Questionable ACL tear. Referred to ortho.

11/22/10 **Richard Hayes, M.D. (PX 1)**
F/u right knee pain; still has not seen ortho; waiting for approval from WC.

1/5/11 **Richard Hayes, M.D. (PX 1)**
F/u right knee severe pain; here for hydrocodone refill.

1/24/11 **G & T Orthopaedics & Sports Medicine/Christos Giannoulias MD (PX 2)**
HPI: Pt injured his right knee at work. He states that he has been having pain & swelling intermittently.
PE: R Knee: There is tenderness over the medial & anteromedial joint line; pain w/ circumduction and w/ varus & valgus stress. There is slight effusion today. ROM is from 0-120°. Sensation & pulses are present.
IMPRESSION: R knee pain
PLAN: He has not had any treatment. I'm going to send him for supervised course of PT. I discussed w/ him that if the therapy does not work & the fact that he already planned injections of Dr. Hayes. If these are not working, then we will proceed w/ a diagnostic arthroscopy. He expressed understanding & I will see him in 4-6 weeks for recheck. Work status, sitting work only.

5/2/11 **G & T Orthopaedics & Sports Medicine/Christos Giannoulias MD (PX 2)**
CC: Knee pain
HPI: He continues to have pain & swelling in his knee. He has been having difficulty w/ going up & down stairs. He gets locking.
IMPRESSION: Knee chondromalacia w/ mechanical symptoms.
PLAN: @ this point, he has not done well w/ conservative care. My recommendation would be to procced w/ arthroscopy to address clinical aspect of his complaints. He would like to proceed.

5/18/11 **Lakeshore Surgery Center/Christos Giannoulias MD (PX 3)**
POSTOPERATIVE DX: 1. R knee Grade II and III chondromalacia of the trochlea. 2. R knee extensive multiple compartment synovitis w/ multiple loose cartilage bodies. 3. R knee Grade II chondromalacia of the weight-bearing surface of the medial femoral condyle.
PROCEDURE: 1. R knee arthroscopy w/ patellofemoral & trochlear chondroplasty & medial femoral condyle chondroplasty. 2. R knee extensive arthroscopic 2 compartment synovectomy w/ removal of loose bodies.

6/1/11 **G & T Orthopaedics & Sports Medicine/Christos Giannoulias MD (PX 2)**
HPI: he is 2 weeks out from surgery. He is here today for postoperative follow-up.
PE: R knee: Reveals well-healed incisions. The sutures are removed. There is moderate effusion. ROM is from 5 to 80°. Calf is soft & nontender. Toes are wiggling without pain. Homans is negative.
PLAN: We will get him into supervised course of PT. He is instructing to remain off work & I will see him in 2 weeks for recheck.

8/1/11 **G & T Orthopaedics & Sports Medicine/Christos Giannoulias MD (PX 2)**
HPI: He is approximately 2 & half months out from his surgery; complained of some swelling on & off & having some difficulty w/ going downstairs. He has had 12 sessions of therapy.
PLAN: I gave him intraarticular injection w/ 2 cc of Depo-Medrol & 6 cc lidocaine to see if it calms down some of this inflammation. He is instructed to continue working on therapy to work on his deficits especially w/ quadriceps atrophy. I will see him in 3-4 weeks for recheck.

1/30/12 **G & T Orthopaedics & Sports Medicine/Christos Giannoulias MD (PX 2)**
HPI: It has been approximately 5 months since I have seen him last. He has been having some swelling & some pain over the last several months.
PE: R knee: reveals tenderness over the medial joint line. There is tenderness w/ patellofemoral compression. There is no instability w/ varus or valgus stress. There is negative McMurray's test. There is moderate effusion.
PLAN: I did give an injection w/ 2 cc of Depo-Medrol & 6 cc of lidocaine today. I am going to send him to repeat MRI to evaluate the cartilage surfaces. He does have some chondromalacia that was present on his arthroscopy. He expressed understanding. I will see him after the MRI is completed.

2/16/12 **Edgebrook Radiology/George Kuritza MD (PX 2)**
MRI of right knee
IMPRESSION: 1. Medial meniscal tear involving primarily the midbody. Lateral meniscus appeared intact. 2. Intact collateral & cruciate ligaments. 3. Small effusion.

3/5/12 **G & T Orthopaedics & Sports Medicine/Christos Giannoulias MD (PX 2)**
HPI: Pt did have the MRI performed. I do not see any evidence of medial meniscus tear as reported by radiologist. I do see smaller meniscus; this is post-surgical. The majority of symptoms are chondromalacia that is evident on multiple sessions of the MRI. I discussed that I could try another cortisone injection to see if this helps w/ some of the symptoms. I gave him an injection w/ 2 cc of Depo-Medrol & 6 cc of lidocaine. Ultimately if the symptoms persist, more aggressive surgical options like knee replacement would be the answer for him. @ this point, we will see how he does w/ conservative care. We also talked

about the option of Hyalgan injections as well. He expressed understanding & I will see him in 4 weeks for recheck.

3/26/12 **G & T Orthopaedics & Sports Medicine/Christos Giannoulias MD (PX 2)**
Pt states the cortisone injection did give him substantial relief.
IMPRESSION: Knee chondromalacia
PLAN: discussed the option of Hyalgan; wants to hold off on any additional treatment @ this time; has not been able to work as there is no light duty.

5/7/12 **G & T Orthopaedics & Sports Medicine/Christos Giannoulias MD (PX 2)**
We are going to start Hyalgan injection secondary to persistent pain.
PLAN: Hyalgan was injected into the R knee. Return next week for 2nd injection.

5/14/12 **G & T Orthopaedics & Sports Medicine/Christos Giannoulias MD (PX 2)**
HPI: second Hyalgan injection administered.
PLAN: I will see him over the next week or two for the final decision.

6/11/12 **G & T Orthopaedics & Sports Medicine/Christos Giannoulias MD (PX 2)**
He is here today for his 3rd Hyalgan injection
PLAN: He does feel a little bit better, but he still has some good days & bad says. I will see him in a month for recheck. I discussed w/ him that if the symptoms persist or if he is not doing well, he will be a candidate for knee replacement. He expressed understanding & I will see him in 4 weeks for recheck.

7/16/12 **G & T Orthopaedics & Sports Medicine/Christos Giannoulias MD (PX 2)**
Pt is here today a month after his Hyalgan injections. He has good days & bad days. He is having a pretty good day today. The main issue is w/ him doing prolonged walking or kneeling activities. He does get increased pain & swelling.
PE: R Knee: reveals no effusion. He has crepitation w/ flexion & extension over the medial joint line & patellofemoral joint. He has no instability w/ Varus or valgus stress. His sensation is intact. Pulses are present.
IMPRESSION: R knee osteoarthritis
PLAN: I will have him back in another month to 6 weeks foe a recheck. I discussed w/ him the only real option @ this point is total knee replacement. He would like to think about this option. He expressed understanding of the treatment plan.

8/20/12 **G & T Orthopaedics & Sports Medicine/Christos Giannoulias MD (PX 2)**
He is still having good days & bad days. The main issue now so is that he is not able to work secondary to the fact that he has a heavy job. They are making decisions as to whether or not he can have sedentary type of job. @ this point, he is still having pain over the medial & patellofemoral joint w/ compression. He has crepitation as well.

PLAN: I refilled his anti-inflammatories. I prescribed a Voltaren gel today. He can use that to his R knee to help w/ some of the symptoms. Ultimately, I do think that he is going to need a knee replacement. Return in 3 weeks.

9/17/12 **G & T Orthopaedics & Sports Medicine/Christos Giannoulias MD (PX 2)**
Pt is not doing very well. He has decided that he wants to proceed w/ joint replacement. I do believe that, @ this point given the fact that he has failed cortisone injections, Hyalgan injection, multiple courses of PT, & work restrictions that this is the next appropriate step. He has been dealing w/ this problem for over 2 years. He has found an orthopedic surgeon in his area. I did give him a referral & I will see him in the future as needed.

10/13/12 **Richard Hayes, M.D. (PX 1)**
F/u for occ C/P and left shoulder pain. Probable rotator cuff tear, workman's comp injury that is worsening. Needs right knee replacement. Given ortho referral.

11/13/12 **Richard Hayes, M.D. (PX 1)**
Pt presents due to left shoulder pain; felt his right knee buckle and fell injuring left shoulder. C/o severe pain over the supraspinatus and mid humerus.
RX: x-ray.

9/30/13 **G & T Orthopaedics & Sports Medicine/Christos Giannoulias MD (PX 2)**
Pt returns today for f/u. He did go get his opinion from an orthopedic surgeon @ Rush who is not recommending any replacement secondary to minimal arthritis on his x-rays. Anthony continues to have pain w/ going up & down stairs, difficulty w/ activities of daily living.
PE: PE reveals tenderness over the medial joint line, crepitation throughout the ROM, crepitation throughout the patellofemoral motion.
IMPRESSION: Knee arthrosis
PLAN: I discussed w/ him that in 2011 on his imaging as well as his arthroscopy pictures, he had grade 3 chondromalacia patella of the trochlea & patella. He had grade 2 to 3 chondromalacia of the medial compartment. I can only imagine this is worsened since that time. His orthopedic surgeon that he recently saw recommends sport medicine consultation referral. I'm not sure what a sports medicine physician can do outside of a knee replacement. I don't believe that he is a candidate for any cartilage transplantation procedures as he has global disease & is not located in 1 particular area. He has had cortisone injections. He has had Hyalgan injections. He has failed these. I'm sending him to another joint replacement specialist to get another opinion & we will see how he does w/ this.

12/20/13 **Van Stamos, M.D./Illinois Bone & Joint Institute (PX 4)**
Initial eval for right knee pain due to work injury on 9/16/10. He has undergone an arthroscopy of the right knee in 2011, injections with corticosteroid and

hyaluronic acid (with Dr. Christos Giannoulias), none of which have been effective in resolving his symptoms. He's seen Dr. Brett Levine at Rush for an IME [we don't have this report]. Dr. Giannoulias has suggested a total knee arthroplasty. Currently, pt is c/o episodic pain in the right knee, feels like the knee gives out at times. He is taking Celebrex and hydrocodone but neither really work. He reports severe pain in the right knee when these episodes occur.
PE: Walks with reciprocal heel-to-toe gait; right show a well-healed incision from previous arthroscopy. No effusion; full extension; flex to beyond 130 degrees, no instability to valgus or varus stress. I cannot reproduce these symptoms he describes of intermittent episodes of knee giving out. Full ROM of the hip without discomfort.
X-rays of the right knee taken today show some lateral tilt of the patella, some ossification near the patellar tendon insertion. Hip seen in x-ray shows some mild degenerative joint disease.
A review of Dr. Giannoulias' operative report shows he was found to have some chondromalacia as well as some loose bodies, which were removed.
DX: right knee pain of uncertain etiology. I am not convinced that a TKA is an option and ma not completely resolve his problem.
RX: repeat MRI of the right with a scan that has at least a 1.5 tesla magnet to see if there may be any residual loose bodies in the knee. No work.

1/28/14 **MRI of River North (PX 4)**
MRI of the right knee
IMP: small tear of the posterior horn of the medial meniscus; articular cartilage defects throughout.

2/14/14 **Van Stamos, M.D./Illinois Bone & Joint Institute (PX 4)**
F/u; reviewed MRI results; recommend repeat arthroscopy of the right to see if there might be something such as a loose body or fragmentation that is giving him his symptoms. Would also evaluate the ACL at that time.

4/22/14 **Evanston Hospital (PX 5)**
POSTOPERATIVE DX: 1. R knee medial meniscus tear. 2. Grade 2 & 3 chondromalacia of lateral femoral condyle. 3. Small patch of grade 2 chondromalacia of lateral femoral condyle. 4. Extensive chondromalacia of patellofemoral joint including areas of grade 2 & 3 changes throughout the entire trochlea, as well as grade 2 & 3 changes of the patella.
OPERATION PERFORMED: 1. R knee arthroscopy w/ partial medial meniscectomy. 2. Chondroplasty of medial femoral condyle. 3. Chondroplasty of the lateral femoral condyle. 4. Chondroplasty of patellofemoral joint.

4/25/24 **Van Stamos, M.D./Illinois Bone & Joint Institute (PX 4)**
F/u; post-op visit; incisions healing nicely; sizeable effusion present indicative of hematoma in the knee.

RX: use ice; if effusion does not quiet down, will aspirate the knee. Return in a couple of weeks; start PT after next week.

6/4/14 **Van Stamos, M.D./Illinois Bone & Joint Institute (PX 4)**
F/u; still has a felling of the knee shifting at times; PT causes his knee swell quite a bit afterwards.
PE: incisions are well-healed; small effusion present; reasonable flexion of knee past about 90 degrees.
RX: If no improvement, will consider total knee arthroplasty. Discussed that if this is done, at age 47, most likely he will not be able to continue to work in high-impact activities which would preclude his working on a road crew. He will discontinue PT at this time and give this a little time to recover; return in 4-6 wks. He can RTW in a sedentary type of position with minimal standing and walking.

7/7/14 **Illinois Bone & Joint Institute/Van Stamos MD (PX 4)**
Pt reports his R knee continues to give him troubles where he has recently had some swelling in his R knee.
PE: On exam, he has well-healed incision from previous arthroscopy. He has moderate-sized effusion present. He has pain w/ palpation of the knee. No calf tenderness. No evidence of DVT.
PLAN: I have suggested he wait until we are @ least 3 months following surgery & make a decision regarding additional treatment. He is not in a path toward total knee arthroplasty at this point. Regarding his work status, he should continue w/ his current work status. We also discussed the long-term prognosis w/ or without knee replacement. We will see how he does over the next several weeks. We did discuss the potential for total knee arthroplasty. He understands the ramifications of that given the work level that he does as well as his age.

8/8/14 **Illinois Bone & Joint Institute/ Van Stamos MD (PX 4)**
Pt returns to discuss his R knee. He reports that things have gotten worse since I last saw him; he had an episode where his knees swelled up & he saw his PCP, who aspirated the knee. He reports if he stands on his knee for more than 20 minutes, it will swell up & become quite painful. He is also starting to complain of the L knee starting to bother him because he is tending to favor his R.
PE: On examination of his R knee, he has well-healed incision from previous arthroscopy. He has small joint effusion. He is able to straight leg raise against gravity. No calf tenderness. No evidence of DVT.
IMPRESSION/PLAN: He would like to consider total knee arthroscopy. I think that this is reasonable despite the fact that he is relatively young & has a high-demand type work. He does understand the consequences of knee replacement. He is scheduled to undergo an independent medical evaluation on 8/12/14. If he is approved for total knee arthroplasty, we will make arrangements for this & I will see him one more time in the office to go over the details. Regarding his

work status @ this point, he should continue w/ his current status doing sedentary type

8/12/14 **Illinois Bone & Joint Institute/Michael Lewis MD (RX 3)**

IME **PRESENT HISTORY:** Pt was seen in our offices on 8/12/14. He states that while @ work on a construction crew for State of Illinois road repair, he was using a jackhammer which malfunctioned & hit him on his R knee. He states that he fell to the ground. He states that since that time he has had persistent pain in his R knee. He has undergone 2 arthroscopic surgeries & b/c of the severity & persistence of his symptoms, was told by his treating orthopedic surgeon that a total knee replacement is recommended. He states that his knee buckles & he falls to the ground. He states that this has occurred on numerous occasions, approximately every 3 to 6 weeks. He states that it's less likely to occur when he wears a knee brace. He states that he has not returned to work since his injury on 9/16/10. He states that prior to his injury he had no history of previous complaints related to his R knee. He states that he had been working doing his heavy construction road repair work for several years without difficulty prior to his injury of 9/16/10. He describes his pain as worsening to a moderate to severe severity. He states that the pain is constant. It's worse w/ walking & stair climbing & somewhat improved w/ rest, heat, cold, elevation & medication. He takes Vicodin & Celebrex for the pain. Pt complained a pain disability questionnaire w/ a total score of 120.

PE: There is a functional ROM to the cervical, dorsal, & lumbar spine & both upper extremities & to both hips & ankles. Exam of the L knee reveals full extension w/ further flexion to 130°. Examination of the R knee reveals -5° of full extension w/ further flexion to 100°. There is no knee joint effusion or ligamentous instability. There is peripatellar tenderness & medial joint line tenderness. He does walk w/ a R lower extremity limp. Calf circumference is 14 inches bilaterally & thigh circumference 4 inches proximal to the knee joint is 16 inches bilaterally. Sensation to light touch is intact in both lower extremities. Knee jerks & ankle jerks are +1 & bilaterally symmetrical. Muscle strength is 5/5 in all muscle groups in both lower extremities.

DIAGNOSTIC STUDIES: x-Rays were taken of the R knee in our offices on 8/12/14. These included AP lateral, AP weightbearing, & skyline views of the R knee. Narrowing of the medial compartment was noted to be present. A prominent tibial tubercle compatible w/ an old Osgood-Schlatter was noted to be present as well as slight lateral patellar tilt.

PLEASE SPECIFY THE DIAGNOSIS & CAUSE OF THE CURRENT CONDITION.
Current diagnosis is status post medial meniscectomy & abrasion chondroplasty of the medial & lateral femoral condyle & patellofemoral joint. Although the degenerative arthritis present in the medial & lateral femoral condyle & patellofemoral joint may have preexisted pt's alleged injury of 9/16/10, he was able to perform his regular daily tasks, including heavy construction work for several years without any complaints of pain or heavy construction work for

several years without any complaints of pain or treatment referable to his R knee prior to his alleged injury. He reports that his symptoms have persisted since that injury, & that he has been unable to work since it occurred. He reports no subsequent or intervening injuries. Records available for this examination begin n December of 2013 & therefore cannot be used to corroborate his history prior to that point. On that basis, it's my opinion that the current condition has been caused by or accelerated by his alleged injury of 9/16/10.
DO THE OBJECTIVE FINDINGS SUPPORT THE SUBJECTIVE COMPLAINTS? Pt does have significant subjective complaints referable to his R knee as noted in his history. He does have objective findings including a torn medial meniscus & degenerative arthritis of the medial & lateral femoral condyle & patellofemoral joint as found @ the of surgery on 4/22/14.In addition, x-rays taken in our offices on 8/12/14, reveal narrowing of the medial compartment of the R knee. In addition, pt does have limited ROM to his R knee.
HAS THE PT REACHED MMI? IF NOT, WHEN DO YOU EXPECT MMI TO BE REACHED? In my opinion, pt has not reached MMI. Pt still has significant subjective symptoms w/ objective findings relative to his R knee.
IS THE PT CAPABLE OF WORKING? IIF ONLY W/ PHYSICAL RESTRICTIONS, PLEASE SPECIFY THOSE PHYSICAL RESTRICTIONS, PLEASE SPECIFY THOSE PHYSICAL RESTRICTIONS, INDICATING THE ANTICIPATED DURATION & WHETHER THE RESTRICTIONS ARE THE RESULT OF THE WORK-RELATED INJURY IN QUESTION. He is capable of working in a light duty capacity w/ no prolonged walking, knee bending, or climbing. In my opinion, he is capable of working @ the present time & then would be @ MMI, as previously stated, approximately 4-6 months following a total knee replacement.

9/22/14 **Illinois Bone & Joint Institute/ Van Stamos MD (PX 4)**
Pt returns discuss his R knee. Since his last visit, he has really gotten to the point where he would like to consider knee replacement. Once again, we discussed his option. Apparently, since I saw him, he had an IME w/ Dr. Lewis on 8/19/14.
IMPRESSION/PLAN: I discussed w/ him that he is @ a point now where we would simply observe this versus consider total knee replacement. We will need to help take care of this to decrease the risk of early failure. We also discussed what are reasonable activities after knee replacement & how this may affect his ability to work. He would like to proceed. Therefore, we will start planning for R total knee arthroplasty done is the near future. We need to check his x-rays & see if they are up to date including a long

1/20/15 **Evanston Hospital (PX 5)**
POSTOPERATIVE DX: 1. Degenerative joint disease, R knee. 2. Status post R knee arthroscopy.
PROCEDURE: R total knee arthroplasty

2/18/15 **Van Stamos, M.D./Illinois Bone & Joint Institute (PX 4)**
F/u post right TKA; he is making progress with this; gradually decreasing his use of Percocet but still taking 3 times a day, which is not surprising.
PE: Incision healing nicely; has small to moderate sized effusion; full extension; flexion to at least 115 degrees.
X-rays taken today sow him to be status post TKA w/cemented posterior-stabilized knee design components which are fixed and in good position; alignment appears appropriate.
DX: continue with PT; return in about 9 weeks for repeat x-rays.

3/27/15 **Van Stamos, M.D./Illinois Bone & Joint Institute (PX 4)**
F/u; presents earlier than originally scheduled because of some concerns brought up by the therapist. He did not initiate PT until nearly a month after I last saw him—apparently there were issues with WC. Therapist has concerns about laxity of the right knee.
PE: healing nicely; small effusion; full extension; flexion beyond 130 degrees. In full extension there is good stability with valgus and varus stress; in flexion, there is some laxity, but it seems to be within reasonable limits. In flexion there is reasonable stability.
X-rays taken today show everything is appropriate.
RX: there is some slight laxity evident; muscle tone is pretty weak as well; recommend he participate in therapy more aggressively. Return as previously scheduled.

5/1/15 **Van Stamos, M.D./Illinois Bone & Joint Institute (PX 4)**
F/u; he is making progress overall; swelling is going down but still has some effusion present which is becoming less and less of a problem. Still has sensation of the knee shifting at times.
PE: there does appear to be some laxity in extension and slightly in flexion, though not severe. Also appears to be some slight shift, almost as if there is some incongruity of the femoral and tibial components.
X-rays are benign.
RX: continue with strengthening; return in 3 months. If issues persist, we will obtain a CT scan of the right knee. Continue on sedentary restrictions.

8/14/15 **Van Stamos, M.D./Illinois Bone & Joint Institute (PX 4)**
F/u; he has been compliant with PT but persists in not being able to trust his knee; feels it gives out at times as if there is not good support medial and lateral.
PE: slight hyperextension but not much different from the contralateral side. Has good stability but does appear to have some mid flexion laxity, more than what he previously had.
RX: we discussed options, he really feels he needs a thicker polyethylene insert based on what he is experiencing; also discussed revision surgery indicating we

might need to revise femoral component. He would like to proceed with revision surgery.

10/28/15 **Van Stamos, M.D./Illinois Bone & Joint Institute (PX 4)**
F/u; scheduled for revision right TKA next week. He has had episodes of instability with the knee giving out and now has hurt his left knee as a result.
PE: left knee shows an effusion present; has fusiform edema traveling down the leg with calf tenderness as well.
X-rays of the left knee are normal
RX: MRI of the left knee; Doppler study of the left lower extremity.

11/5/15 **Northshore University Health System/Van Stamos MD (PX 4)**
POSTOPERATIVE DX: Laxity of R knee, status post R total knee arthroplasty
PROCEDURE: Revision R total knee arthroplasty.

12/4/15 **Van Stamos, M.D./Illinois Bone & Joint Institute (PX 4)**
F/u; 1 month status post revision right TKA. We changed his insert from a 9mm insert to a 13mm insert; he appears to have reasonable stability at this time although he initially had reasonable stability after his index operation as well. He is healing nicely.
X-rays show good results however, when actually measuring things, it appears that we added more thickness to his joint than he has on his contralateral side.
RX: continue with PT; return in 9 wks.

1/13/16 **Illinois Bone & Joint Institute/Van Stamos MD (PX 4)**
Pt returns for a couple of different issues, he is now about 2 months post status post revision R total knee arthroplasty, which does appear to be improving. His L knee is his biggest problem. He still has pain in the R knee, but the L knee has been a continual problem, which was preoperatively. We discussed options w/ him.
PE: On examination today, the R knee shows a well-healed incision. Has full extension & excellent flexion. No instability detected. He appears to have much more stability than he had previously, although he says he still feels like there is some laxity. His L knee shows some effusion present. He walks w/ severely antalgic gait. He has joint effusion present. No evidence of DVT.
RADIOGRAPH EXAM: X-ray were obtained today included AP standing, lateral & congruence view of both knees. These show him to be status post R total knee arthroplasty w/ cementless components. The components appear to be fixed & in good position. Alignment appears appropriate. No evidence of loosening or wear. There has been increase on the polyethylene articulation in the previous films. The L knee demonstrates some slight medial joint space narrowing.
IMPRESSION/PLAN: We discussed that his L knee appears to be recovering @ this point. R knee is progressing. L knee is causing him difficulty. So, I did discuss recommendation for an MRI of the knee. This had been recommended

previously as well, but this has not been approved by his workers comp carrier We again gave him RX w/ prescription for an MRI of the L knee. Regarding his work restrictions, these are unchanged. I will see him back following completion of his MRI or in about 1 month if the MRI is not done for some reason for f/u of his R knee replacement.

2/24/16 **Illinois Bone & Joint Institute/Van Stamos MD (PX 4)**

Pt returns, he is now about 3 months status post R total knee arthroplasty. He is definitely making some improvement, but he still feels some laxity. He continues to have L knee pain, which was better after the injection, but has recurred. We are still awaiting for an MRI of his L knee. He also reports some R hip pain that has now developed, where he has pain up near the trochanteric area where the abductors.

PE: Exam of R knee, well-healed incision. Minimal effusion. He has full extension of the knee & excellent flexion. There is some opening w/ valgus & Varus stress, but reasonable stability throughout the arc of motion. This is actually a little surprising b/c at the same time of his surgery, we really could not put any thicker insert & I'm a little surprised that he has stretched out like he has. L knee, excellent motion. R hip has full strength w/ some tenderness over the abductor insertion.

RADIOGRAPH EXAM: X-rays obtained include 3 views of the R knee, AP standing, lateral & congruence view. These show him to be status R post arthroplasty w/ cemented posterior-stabilized knee design components. Components appear to be fixed & in good position. Alignment appears appropriate. No loosening or wear.

IMPRESSION/PLAN: My impression is that his R knee appears to be recovering**,** his R hip demonstrates some findings of abductor tendinitis, his L knee continues to be a problem & continues to require a L knee MRI. We are awaiting approval for that. Regarding his work restrictions, he can continue w/ his current work restrictions, which are restricted duty as outlined previously. I will see him back in about 1 months' time to check on his progress.

3/30/16 **Illinois Bone & Joint Institute/Van Stamos MD (PX 4)**

Pt continues to have trouble w/ his R knee, L knee & R hip, although his R hip is manageable. R hip only seems to bother him when he first wakes up in the morning. His R knee continues to feel like it's loose @ times. His L knee continues to be bothersome. We are waiting for an MRI of the L knee.

PE: On exam today, R knee shows no significant effusion. He has full extension of the knee & a well-healed incision. He has reasonable flexion. There does appear to be some slight laxity in flexion w/ valgus & varus stress, but this is not severe. It is interesting that this is more significant than what it was @ the time of the surgery.

PLAN: I do not think that additional surgery will be helpful at this time. I recommend he continue w/ PT. It appears that he will need to continue w/

sedentary-type work restrictions for now. We are awaiting MRI of his L knee to be done. I will see him back in about a month's time for repeat evaluation. Sedentary work restrictions should be in place. The R knee will take up to a year for final recovery. We might consider a capacity assessment sometime after 6 months after surgery.

4/26/16 **Illinois Bone & Joint Institute/Alex Krasny MD (PX 4)**
MRI of left knee
IMPRESSION: 1. Tricompartmental degenerative joint disease w/ areas of moderate to high-grade chondromalacia in the medial & patellofemoral compartments. 2. Mucinous degeneration in the lateral meniscus without tear. 3. Mild blunting along the superior articular surface of the posterior horn of the medial meniscus, which also demonstrates a possible small subtle vertical tear of the body on a single coronal image.

5/6/16 **Illinois Bone & Joint Institute/Van Stamos MD (PX 4)**
Pt reports continued difficulty w/ both knees, R & L, the L knee is really bothering him quite a bit & he reports if he does any activity, it tends to swell up quite a bit. MRI o the left knee was reviewed and shows some degeneration of the lateral meniscus. We see what appears to be a small tear of the medial meniscus & underlying degenerative joint disease throughout all 3 compartments.
PE: On exam, he has a small effusion present in the L knee. R knee shows a well-healed incision. He appears to have reasonable stability @ this point, although he says it still feels loose to him. No calf tenderness. No evident of DVT. Reasonable flexion.
IMPRESSION/PLAN: We discussed the option of L knee arthroscopy in an attempt to improve his situation. He understands this may not improve it. We will therefore plan for L knee arthroscopy. We discussed there might be a role for a functional capacity assessment in the future. This will mostly be related to his R knee, but also taking into account his L knee difficulties. We will plan for L knee arthroscopy in the near future.

7/26/16 **Evanston Hospital (PX 5)**
POSTOPERATIVE DIAGNOSIS: 1. L Knee meniscus tear. 2. Significant chondral abnormalities of patellofemoral. Joint w/ grade 3 & small patch of grade 4 change. 3. Significant abnormalities of medial compartment w/ delamination of cartilage & grades 2 & 3 change. 4. Significant abnormalities of lateral compartment w/ grades 2 & 3 change throughout.
PROCEDURES: 1. L knee arthroscopy, partial medial meniscectomy. 2. Chondroplasty of medial compartment including the medial femoral condyle & medial tibial plateau. 3. Chondroplasty of lateral compartment including the lateral femoral condyle. 4. Chondroplasty of patellofemoral joint.

7/29/16 **Illinois Bone & Joint Institute/Van Stamos MD (PX 4)**
Pt returns, he is now about 3 weeks status post L knee arthroscopy.
PE: On exam, he does have a small-to-moderate effusion. It's not tense. He does report significant pain. His incisions are healing nicely. He has no calf tenderness. No evidence of DVT. Neurovascular exam is normal.
IMPRESSION/PLAN: I did show him copies of intraoperative photo & explained what he has. He does have fairly significant tricompartmental arthrosis. I recommend a course of PT. I will see him back in about 4 weeks' time. His work restrictions remain the same.

9/19/16 **Illinois Bone & Joint Institute/Van Stamos MD (PX 4)**
Pt reports he is having increasing pain in the L knee & every time he attempts to rehab it, he has more pain. He has tried using some braces, but really couldn't do it. He reports both knees are problematic, but L knee is really troubling him. He had L knee arthroscopy back in July.
PE: On exam, his L knee shows well-healed incisions. He has reasonable flexion & extension. He does have small effusion present.
IMPRESSION/PLAN: I have discussed w/ him today that clearly, he has advancing arthrosis of the L knee. We have always attributed his R knee to mechanical problem. His L knee has continued to worsen over time. He has now started to complain of some back pain as well. I believe he might be scheduled for an IME coming up soon. @ This time, I do think given his history, probably it would be wise that he be evaluated by a rheumatologist for possibility of systemic rheumatologist. He should finish up his current course of PT & then stop. Regarding his work @ a sedentary type of work w/ no more than 10 minutes standing or walking per hour. I will see him back in about 3- or 4-weeks' time for repeat evaluation.

10/19/16 **Illinois Bone & Joint Institute/Alfonso Bello MD (PX 4)**
REASON FOR CONSULTATION: Recurrent knee effusions, L knee.
HPI: Pt is a 50 y/o gentleman who is status post R total knee arthroplasty that was complicated w/ some joint instability who fell on to his L knee @ work resulting in a significant pain & swelling. He was seen by Dr. Stamos who upon further review noted significant amount of meniscal internal derangements. As such, he underwent arthroscopy for debridement. The surgery went without complication, but the pt continues to have difficulty progressing through PT w/ intermittent swelling of the L knee. He incidentally noted also that he is having similar symptoms on the R knee arthroplasty as well. He has had no previous history of antecedent infection or rheumatologic disorders. Pain is rated as 7/10. Morning stiffness is about 15 minutes & there is moderate fatigue.
OBJECTIVE: Extremities: There is tenderness w/ some guarding w/ decreased ROM to full extension. There is small suprapatellar effusion present. There is no evidence of joint instability. No present. There is full ROM. No other swollen or tender joints elicited.

DIAGNOSTIC TESTS: MRI of the R knee that was performed preoperatively demonstrates moderate osteoarthritis w/ a degenerative lateral meniscus & a tear of the medial meniscus.
IMPRESSION: Intermittent hydrarthrosis L knee, etiology is unclear, but there may be underlying rheumatologic etiology that is resulting in exacerbation of symptoms & may be slowing the typical for resolution of his underlying condition.
RECOMMENDATIONS: 1. Obtain laboratory examinations, orders were given. 2. Obtain a MSK ultrasound of the L knee, orders given. 3. Further recommendations based on the workup.

11/10/16 **Illinois Bone & Joint Institute/Mark Diamond MD (PX 4)**
MSK Ultrasound of the left knee
HISTORY: Effusion of knee. History of fall onto knee w/ swelling. Ultrasound imaging of the L knee demonstrates s small joint effusion. The extensor mechanism including quadriceps & patellar tendons are intact. The trochlea demonstrates mild irregularity & thinning of the cartilage. There is mild spurring medially. The MCL is grossly intact. There is no tendon abnormality about the lateral aspect of the knee. There is a 6x3 x 3.5 cm hypoechoic lobulated lesion extending from the joint & between the medal head of the gastrocnemius & semimembranosus tendons compatible w/ a Baker's cyst. The menisci aren't well seen.
IMPRESSION: There is a Baker's cyst posterior to the knee. The remainder the examination is essentially unremarkable.

11/16/16 **Illinois Bone & Joint Institute/Alfonso Bello MD (PX 4)**
PROBLEM LIST: Hydrarthrosis, L knee
INTERVAL HISTORY: Returns for f/u. Continues to have same swelling in the L knee as well as swelling behind the knee. He did receive his ultrasound & had a lab exam performed to evaluate for consideration of rheumatologic disorder. Pain remains @ 8.5/10. Morning stiffness is about 20 minutes & there is moderate fatigue.
OBJECTIVE: Extremities: Tenderness in the L knee with a small effusion as well as Baker cyst present. There is effusion & a Baker cyst, but no evidence for overarching synovitis or crystal-induced arthropathy.
ASSESSMENT: L knee effusion w/ Baker cyst, continues to be symptomatic, etiology of which is unclear, but there is no clear-cut evidence for a rheumatologic disorder.
PLAN: 1. An intraarticular corticosteroid injection was performed to the L knee under sterile technique, 120 mg Depo-Medrol w/ 3 mL of 1% lidocaine were injected without difficulty. The pt tolerated the procedure well & there are no complications. 2. If symptoms don't improve or if she continues to have recurrent persistent effusion, we may want to consider starting him on Plaquenil

versus an ultrasound-guided therapeutic aspiration of the Baker cyst. 3. No change in work status was provided.
F/U: The pt to f/u w/ Dr. Stamos in 2 to 4 weeks or sooner if indicated.

12/21/16 **Illinois Bone & Joint Institute/Van Stamos MD (PX 4)**
Pt returns to discuss his knees, he is status post R total knee arthroplasty, subsequent revision total knee arthroplasty & persists in having some trouble w/ the R knee, but definitely it's better than what it was before his most recent surgery. His biggest issue is right now is his L knee, which continues to trouble him. He has these recurrent effusions & had seen Dr. Bello recently. I suggested a workup for possibility of a systemic arthritide [plural of arthritis]. It appears that he does not test + for systemic arthritide. Dr. Bello tried an injection into the L knee, which helped for a few weeks, but he had recurrence of the effusion.
PE: On examination today, he walks w/ a very abnormal gait pattern. He has stiff-legged gait bilaterally. There is an effusion present in the L knee. Full extension of the knee & reasonable flexion. R knee demonstrates stability w/ evidence of previous knee replacement w/ a well-healed incision.
IMPRESSION/PLAN: Once again, I am having a difficult time determining the true etiology of his symptoms. I still suspect there may be some type of systemic problem leading to his issues. However, his blood test seems to be negative for true rheumatoid arthritis. I discussed from standpoint of things that I can offer him might include knee replacement on the L knee, but I would not recommend this given his current status as well as the outcome he had on the R knee. Given all the issues he is having, I have suggested that he f/u w/ Dr. Bello for consideration of trying a medication that is typically aimed @ systemic arthritide to see if this will help w/ his consistent inflammation in the L knee. Regarding his work status, it appears that he is not able to do his normal job & will continue to be off of his normal work. It would probably make sense @ some point in the near future to proceed w/ a functional capacity assessment to see what his abilities are, to see if there is a job that would be available for him.

4/24/17 **Richard Hayes, M.D. (PX 1)**
Here for referral to ortho Dr. Freedberg due to bilateral knee pain; pt's right knee was replaced and has continued to have pain and swelling; right knee has also been painful and edematous; gait has become more difficult as well as weight bearing.
PE: decreased ROM and decreased weight bearing right knee; a "clunk" is heard when he moves the knee side to side. Left knee +popliteal cyst, pain is along the medial aspect. +McMurry and Steinman
Referred to Dr. Freedberg.

4/27/17 **Suburban Orthopaedics/Howard Freedberg MD (PX 6)**
CC: Pt is a 50 y/o male who complains of bilateral knee pain.

HPI: Onset date: 9/16/10. Cause/mechanism: Traumatic. Jack hammering @ work for the State of IL, bottom of jack hammer blew out struck R knee & the jack hammer landed on R knee. + Pain & went home next grew to size bowling ball. Pt states that he has constant bilateral knee pain. He states pain is increased by standing for long periods of walking. Pt complains of swelling weakness & discomfort. Pt states he has stiffness to L knee after sitting he describes as aching. Pain is relieved by lying down. Pt states the frequent pain to the R hip. Pt rates 10/10 at its worst.
PE: Lower extremity exam w/ knee focus: R: Ligaments: + grade 1 Valgus/Varus. Mild tenderness in the medial patella facet. Mild tenderness in the medial femoral condyle, lateral femoral condyle lateral joint line & medial joint line. L: + tenderness in the medial femoral condyle, lateral femoral condyle, medial joint line & lateral joint line. + medial/lateral McMurray's test.
IMPRESSION: Bilateral knee pain & knee effusion.
RECOMMENDATIONS: Medications: recommended & ordered has Vicodin from prior surgery still L, A3. Cryotherapy: recommended as needed. Home exercise program: recommended & ordered. PT: Discussed as a potential future option. Injection discussed as a current option. **Injection Procedure:** 80 mg of Triamcinolone injection into the R knee joint. The injection was performed using sterile technique without any complications.
WORK STATUS: *Light duty*

5/16/17 **Suburban Orthopaedics/Howard Freedberg MD (PX 6)**
MRI of the left knee
IMPRESSION: 1. Suspected small vertical tear of the posterior horn of the medial meniscus. 2. Multifocal chondromalacia in all 3 compartments of the knee, as detailed above. 3. Mild bone marrow edema in the medial femoral condyle & medial tibial plateau without fracture.

5/25/17 **Suburban Orthopaedics/Howard Freedberg MD (PX 6)**
Pt presents to the office for a f/u & MRI review of L knee. Pt states he continues to have pain & bilateral knee swelling. Pt states he continues constant bilateral knee pain. Pt states has increased pain w/ prolonged activity. Pt states he has occasional tingling to L knee. Pain level 5/10.
PE: Lower extremity exam w/ knee focus: R: Ligaments: + grade 1 Valgus/Varus. Mild tenderness in the medial patella facet. Mild tenderness in the medial femoral condyle, lateral femoral condyle lateral joint line & medial joint line. L: + tenderness in the medial femoral condyle, lateral femoral condyle, medial joint line & lateral joint line. + medial/lateral McMurray's test.
IMPRESSION: Bilateral knee pain & knee effusion.
RECOMMENDATIONS: Medications: recommended & ordered has Vicodin from prior surgery still L, A3. Cryotherapy: recommended as needed. Home exercise program: recommended & ordered. PT: Discussed as a potential future option. Injection discussed as a current option. **Injection Procedure:** 80 mg of

Triamcinolone injection into the R knee joint. The injection was performed using sterile technique without any complications.
WORK STATUS: *Light duty*

7/27/17 **Suburban Orthopaedics/Howard Freedberg MD (PX 6)**
Pt presents to the office to review his Lab results. He states that he is doing about the same since his last office visit. He states that he has good days & bad says. He states that @ that the moment he has worsening pain to his L knee. He states that he has popping & clicking to his R knee. He states that he has popping to his L knee but states that it's not as his R knee. He states that there is swelling to his knees. After injection had some improvement for 2 days & now no relief at all.
PE: Lower extremity exam w/ knee focus: R: Mild tenderness in the medial/lateral femoral condyle, & medial/lateral joint line. L: + tenderness in the lateral/medial femoral epicondyle & medial/lateral joint line. + Medial/lateral McMurray's test.
IMPRESSION: Bilateral & knee effusion.
RECOMMENDATIONS: Medications: Recommended & ordered has Vicodin from prior surgery. Home exercise program: recommended & ordered.
WORK STATUS: *Light Duty*

9/19/17 **Illinois Bone & Joint Institute/Michael Lewis (RX 4)**
IME
HPI: Pt was re-examined in our offices on 9/19/17, for IME. He states that while @ work on 9/10/11., a construction crew for the State of Illinois, Road Repair, he was using a jackhammer, which malfunctioned & hit him on the R knee. He states that he fell to the ground & subsequently he has had persistent pain in his R knee. He states that he fell to the ground & subsequently he has had persistent pain in his R knee. He subsequently underwent 2 arthroscopic surgeries & a total knee replacement. He states that he continues to complain of pain & instability in his R knee. He describes the pain as moderate-to-severe, worse during after activity, worsening & improved w/ rest, cold & elevation. He occasionally uses Percocet, once or twice a week for pain. He complains of pain in his L knee. These symptoms are present on a daily basis & worse after activity. He notes swelling in the L knee, which worsens during the day. Has not returned to work since his original injury on 9/16/10. The examinee has undergone R knee arthroscopies, a R knee total knee replacement & a revision total knee replacement. The pt states that his R knee was aspirated approximately 3 weeks ago & he was told that the fluid demonstrated an elevated white count.
PE: Orthopedic exam reveals an alert male who is 5'9" tall weighs 214 lbs. There is a functional ROM to the cervical, dorsal, & lumbar extension w/ further flexion 120°. Examination of the R knee reveals -5°of full extension w/ further flexion to 110°. There is no knee joint effusion or ligamentous instability in the R or L knee. There is no point tenderness in the peripatellar area or medial or lateral joint line of the R or L knee. He walks w/ a mild R lower extremity limp. Calf circumference

is 14' bilaterally high circumference 4" proximal to the knee joint is 17" bilaterally. Sensation to light is intact in both lower extremities. Knee jerks & ankle jerks are 1+ & bilaterally symmetrical. Muscle strength 5/5 in all muscle groups in both lower extremities.
X-RAYS: X-rays were taken of the R knee including APM< lateral, skyline, & bilateral weightbearing.
WHAT IS THE CURRENT DIAGNOSIS OF THE CURRENT CONDITION? My diagnosis is status post R total knee replacement.
IS THERE CAUSAL RELATIONSHIP BETWEEN THE CLAIMANT'S CURRENT OBJECTIVE FINDINGS & THE REPORTED ACCIDENT? IF NOT, WHAT ARE THEY THE RESULT OF? In my opinion, there is causal relationship between the claimant's current objective findings & reported the accident. My opinion is based on the claimant having no symptoms referable to his R knee prior to his alleged injury on 9/16/10.
HAS THE MEDICAL TREATMENT INCURRED TO DATE HAS BEEN REASONABLE & NECESSARY? In my opinion, the medical treatment incurred to date has been reasonable & necessary.
IS ANY ADDITIONAL MEDICAL TREATEMENT NECESSARY? IF YES, PLEASE PROVIDE A DETAILED TREATMENT PLAN INCLUDING ANY DIAGNOSTIC TESTS & SURGICAL PROCEDURES. If these tests are + for a R knee infection, surgery to address this infection may need to be considered.
WHAT ARE THE CLAIMANT'S WORK & LIFE CAPABILITIES? @ the present time, the pt is capable of working but w/ a limit of 10 minutes standing & 20 minutes of sitting @ 1 time.
IF MMI HAS BEEN REACHED, PLEASE PROVIDE AN AMA DISABILITY RATING? As previously stated if further testing does not reveal the presence of an infection in the R knee joint, the pt in my opinion would be at MMI & at that time an impairment rating would be appropriate.

11/30/17 **Suburban Orthopaedics/Howard Freedberg MD (PX 6)**
Pt presents to the office to review his IME w/ Dr. Lewis. Pt states he continues to have bilateral knee pain worse on the L. Pt states he has R hip pain that radiates from R knee. Pt states he has constant clicking/popping of R knee when walking. Pt states that he is taking Motrin & Advil. Pt rates pain as 9/5/10.
PE: Lower extremity exam w/ knee focus: R: Mild tenderness in femoral condyle, lateral femoral condyle, medial joint line & lateral joint line. L: + tenderness in medial femoral condyle. Lateral femoral condyle, medial joint line, lateral joint line. + Medial/lateral McMurray's test.
IMPRESSION: Bilateral knee pain & knee effusion.
RECOMMENDATIONS: Medications: Recommended & ordered has Vicodin from prior surgery still left, A3. Cryotherapy: recommended as needed. Immobilization: discussed as a future potential option. Home exercise program: recommended & ordered. PT: discussed as potential future option.
WORK STATUS: *Light Duty*

1/18/18 **Suburban Orthopaedics/Howard Freedberg MD (PX 6)**
Pt states that the knees are not doing too bad. Pt states he has R hip pain that radiates from R knee. Pt states he has constant clicking/popping of R knee when walking. He states that he has swelling to his L knee when on it for too long. Pt states he has constant bilateral knee pain. He states pain is increased by standing for long periods & walking. Complains of swelling & discomfort. Pt states he has stiffness to L knee after sitting he describes as aching. Pain is relieved by lying down. Pt states he has frequent pain to R hip that wakes him @ night. He states R knee pain radiates up to R hip. Pt rates pain as 10/10 @ its worst.
PE: Lower extremity exam w/ knee focus: R: Mild tenderness in the medial femoral condyle, lateral femoral condyle & lateral joint line. L: + tenderness in the medial femoral condyle, lateral femoral condyle, medial joint line & lateral joint line. + Lateral/Medial McMurray's test.
IMPRESSION: Bilateral knee pain & knee effusion
RECOMMENDATIONS: Medications: recommended & ordered Norco. Cryotherapy: recommended as needed. Immobilization: discussed as potential future option. Home exercise program: recommended & ordered. PT: discussed as a future option.
WORK STATUS: *Light Duty*

5/17/18 **Suburban Orthopaedics/Howard Freedberg MD (PX 6)**
Pt states his pain is the same, the L knee being worse. He states his R hip is now starting to bother him as well. Pt continues w/ swelling on bilateral knees but predominantly the L. Pt states that he has constant bilateral knee pain & states that the pain is increased by standing for long periods & walking. Pt complains of swelling weakness & discomfort. Pt states that he has stiffness to L knee after sitting he describes as aching. Pain is relieved by laying down. Pt states he frequent pain to R hip that wakes him @ night. He states R knee pain radiates up to R hip. Pt rates pain 10/10 @ worst.
PE: Lower extremity exam w/ knee focus: Moderate: L: Moderate effusion/swelling. + Tenderness for medial femoral condyle, lateral femoral condyle, medial joint line & lateral joint line. + Medial McMurray's test. + Lateral McMurray's. R: Mild tenderness in the lateral femoral condyle, medial joint line & lateral joint line.
IMPRESSION: Bilateral knee pain
RECOMMENDATIONS: Recommended & ordered Norco & Terocin [**Terocin** is a brand-name topical pain reliever for arthritis, back pain, muscle pain, joint pain, strains, nerve pain, tendonitis, and osteoarthritis]. Cryotherapy: Recommended as needed. Home exercise program & PT.
WORK STATUS: Restricted work duty

6/28/18 **Suburban Orthopaedics/Howard Freedberg MD (PX 6)**
Pt states he has constant bilateral knee pain. He states pain is increased by standing for long periods & walking. Pt complains of swelling weakness & discomfort. Pt states he has stiffness to L knee after sitting he describes as aching. Pain is relieved by laying down. Pt states frequent pain to R hip that wakes him @ night. He states R knee pain radiates up to the R hip. Pt rates pain as 10/10 @ its worst.
PE: Lower extremity exam w/ knee focus: R: Mild tenderness in the medial femoral condyle, lateral femoral condyle, medial joint line & lateral joint line. Ligaments: + grade 1 valgus/varus. L: Moderate atrophy. Positive tenderness in the medial femoral condyle, lateral femoral condyle, medial joint line, lateral joint line. + Medial McMurray's Test & lateral McMurray's test.
IMPRESSION: Bilateral knee pain. R knee effusion.
RECOMMENDATIONS: Recommended & ordered Norco & Terocin. Home exercise program recommended & ordered. PT discussed as a potential future option.
WORK STATUS: *Light duty*

7/3/18 **Illinois Bone & Joint Institute/Michael Lewis MD (RX 5)**
IME **PRESENT HISTORY:** He states that while @ work 9/16/10, he was using a jackhammer, which malfunctioned & struck him in the R knee. He states that he fell to the ground & since that time he had persistent pain in his R knee. He underwent 2 arthroscopic surgeries followed by a total knee replacement followed by a revision total knee replacement. He states that he continues to complain of a feeling of instability in his R knee. Concerning his L knee, he didn't have any symptoms related to his L knee until just before his revision R knee surgery when he slipped b/c of giving way of his R knee, injuring his L knee. He subsequently underwent an arthroscopy of his L knee. He was found @ that time of the surgery to have tricompartmental degenerative arthritis in his L knee. He states that he continues to have episodes of swelling in his L knee. He has had multiple treatment including PT, cortisone injections, & Synvisc type injections in his L knee. He states that he takes 1 to 2 Vicodin as needed, which is approximately 1 to 2 times a week for pain.
PE: Orthopaedic examination reveals an alert male who is 5'9" tall & weighs 215 lbs. There is a functional ROM to the cervical, dorsal, & lumbar spine & both upper extremities & to both hip & ankles. Examination of the L knee reveals full extension w/ further flexion to 120°. Further examination of the L knee reveals no knee joint effusion or ligamentous instability. There is no point tenderness in the area of the L knee. Exam of the R knee reveals -5° of full extension w/ further flexion to 110°. Calf circumference is 14" bilaterally & thigh circumference 4" proximal to the knee joint is 117" bilaterally. Sensation to light is intact in both lower extremities. Knee jerks & ankle jerks are 1+ & bilaterally symmetrical. Muscle strength is 5/5 in all muscle groups in both lower extremities.

WHAT ARE YOUR OBJECTIVE FINDINGS? My objective finding related to the R knee is minimal limitation of ROM, specifically -5° of full extension w/ further flexion to 110°. I find no evidence of erythema, atrophy, swelling or instability in the L or R knee.
WHAT IS YOUR DX OF THE CURRENT CONDITION? My diagnosis is status post R knee revision total knee replacement, & status post L knee arthroscopy w/ tricompartmental degenerative changes.
IS THERE A CAUSAL RELATIONSHIP BETWEEN THE PT'S CURRENT OBJECTIVE FINDINGS & THE REPORTED ACCIDENT? IF NOT, WHAT ARE THEY THE RESULT OF? In my opinion, there is causal relationship between the claimant's current objective findings & the reported accident. The claimant sustained an injury to his R knee as documented in the medical records on 9/16/10 & a subsequent injury to his L knee when his R knee gave away.
IS ANY ADDITIONAL MEDICAL TREATMENT NECESSARY? IF YES, PLEASE PROVIDE A DETAILED TREATMENT PLAN INCLUDING ANY DIAGNOSTIC TESTS & SURGICAL PROCEDURES. Concerns the examinee's R knee, he complains of a feeling of instability. I am unable to document instability @ the time of my examination In my experience, a further revision of his R knee without evidence of loosening of the prosthesis or clear signs of instability is a high risk of complications & is not recommended. Concerning his L knee, in my experience in the face of tricompartmental degenerative arthritis, a L knee arthroscopy is not likely to significantly improve his complaints. In my opinion, the examinee has had an extensive diagnostic evaluation on his R & L knee as well as extensive treatment related to his R & L knees. Further diagnostic testing or surgical procedures in my opinion is not recommended @ this time.
WHAT IS YOUR PROGNOSIS? Concerning the examinee's prognosis, I don't anticipate a significant improvement in his subjective complaint.
WHAT ARE THE CLAIMANT'S LIFE CAPABILITIES? The claimant has had a previous functional capacity evaluation, which has recommended standing for up 10 minutes & sitting for up to 10 minutes & sitting for up to 20 minutes & no stooping or bending. A more current functional capacity evaluation could be considered. I don't feel that the examinee is able to return to work as a laborer, but he is limited to sedentary activities.
HAS THE CLAIMANT REACHED MMI? IF NOT WHEN WILL MMI BE REACHED? In my opinion, the claimant has reached MMI.

8/16/18 **Suburban Orthopaedics/Howard Freedberg MD (PX 6)**
Pt states he has constant bilateral knee pain. He states pain is increased by standing for long periods & walking. Pt complains of swelling weakness & discomfort. Pt states he has stiffness to L knee after sitting he describes as aching. Pain is relieved by laying down. Pt states he frequent pain to R hip that wakes him @ night. He states R knee pain radiates up to R hip. Pt rates pain 10/10 @ its worst.

PE: Lower extremity exam w/ knee focus: R: Mild tenderness in the medial femoral condyle, lateral femoral condyle & lateral joint line. L: + tenderness in the medial femoral condyle, lateral femoral condyle, medial joint line & lateral joint line. + Lateral/Medial McMurray's test.
IMPRESSION: Bilateral knee pain & knee effusion
RECOMMENDATIONS: Medications: recommended & ordered Norco. Cryotherapy: recommended as needed. Immobilization: discussed as potential future option. Home exercise program: recommended & ordered. PT: discussed as a future option.
WORK STATUS: *Light Duty*

9/27/18 **Suburban Orthopaedics/Howard Freedberg MD (PX 6)**
Patient states there has been no changes since last visit. Patient states he has constant bilateral knee pain, L>R. Patient states he has stiffness to left knee and complains of catching and popping to right knee. Patient states he continues frequent pain and locking to right hip. He states this is noticeable only at night when he is sleeping. He will wake from the discomfort and will have to massage the area to loosen it up. Patient continues with swelling on bilateral knees, L>R. Pain level 4-8/10. Patient states that he is taking Norco and OTC Advil.
Restrictions: off work as he is worsening.

11/14/18 **Suburban Orthopaedics/Howard Freedberg MD (PX 6)**
Pt states knee pain has increased since last office visit. Patient states knee is swollen at the anterior and posterior aspect of the knee. Pain is increased with daily activity. Patient describes the pain as throbbing at the right knee and left knee is achy. Patient states both knees make a "popping" noise. Pain level 6/10. Taking Norco and OTC Advil.
Restrictions: off work as he is worsening.
Follow up: 1 to 2 weeks post op or 6 weeks.

1/3/19 **Suburban Orthopaedics/Howard Freedberg MD (PX 6)**
Pt states his symptoms remain the same, he continues with constant pain. Patient states knee is swollen at the anterior and posterior aspect of the knee. Pain is increased with daily activity. He continues with popping on bilateral knees. We have a copy of the IME from 7/3/18. Pain level 6/10. Taking Norco and Advil.
IME 7/3/18: Dr. Lewis. reviewed in office today and I disagree that the patient needs no further care. IME report to be reviewed by Dr. Freeburg NPV. Dr. Freedberg reviewed previous IME report and we agree with report in regards that we are reordering L knee Indium labeled Leukocyte scan reviewed and negative. R knee still has instability, and we will revise to a constrained/stabilized re-revision TKA, L knee MRI + for MMT but he also understands that he has degenerative changes in that knee but this surgery would be the lease invasive. We re-submitted for surgeries again.

P/S his dentist with removal of tooth noted bone loss and recommended eval to R/o Lyme disease and we will refer to Dr. Tiballi.
Restrictions: off work as he is worsening.
Follow up: 1 to 2 weeks post op or 6 weeks.

2/14/19 **Suburban Orthopaedics/Howard Freedberg MD (PX 6)**
Pt states his symptoms remain the same if not worse. He states both knees are painful, but the left is worse. He states he gets episodes where the knees swell up on him. Pain is increased with daily activity. He continues with popping in the right knee. Pain level 6/10 for the left and 4/10 for the right. Taking Norco and Advil.
Medications: recommended and ordered Norco (still has some left, takes very sparingly as instructed), Terocin.
Restrictions: off work as he is worsening.
Follow up: 1 to 2 weeks post op or 6 weeks.

3/28/19 **Suburban Orthopaedics/Howard Freedberg MD (PX 6)**
Pt states his symptoms remain the same. The patient notes his left knee is more bothersome than the right. He continues with intermittent swelling, improved since LOV. He notes when he rests, and elevation help ease the pain as well as swelling. The patient noted increased pain with daily activity. He continues with popping in the right knee. Denies any numbness or tingling. Continue HEP daily. Pain 5-7/10. Taking Norco PRN, Advil. Last took Norco 1 week ago and Advil yesterday.
Medications: recommended and ordered Norco (still has some left, takes very sparingly as instructed), Terocin.
Restrictions: off work as he is worsening.
Follow up: 1 to 2 weeks post op or 6 weeks.

5/30/19 **Suburban Orthopaedics/Howard Freedberg MD (PX 6)**
His symptoms have gotten worse since his last visit. He has experienced an increase in swelling episodes. He states that his pain has also become more aggressive. His bilateral knee pain is constant. His right knee pain shoots up to his right hip. He has to lie in bed 6-8 days per month because of the swelling and pain. Denies numbness and tingling. Pain 7/10. Continues to take Norco, ibuprofen and Advil.
Medications: recommended and ordered Norco (still has some left, takes very sparingly as instructed), Terocin.
Restrictions: off work as he is worsening.
Follow up: 1 to 2 weeks post op or 6 weeks.

7/11/19 **Suburban Orthopaedics/Howard Freedberg MD (PX 6)**
His symptoms continue, if not worse. His bilateral knee pain is constants, + mild swelling. He continues with pain radiation to right hip. He has to lie in bed 6-8

days per month due to his symptoms of swelling and pain. Denies numbness and tingling. Rates pain 7/10. For pain using Norco, ibuprofen, and Advil.
Medications: recommended and ordered Norco (still has some left, takes very sparingly as instructed), Terocin.
Restrictions: off work as he is worsening.
Follow up: 1 to 2 weeks post op or 6 weeks.

8/22/19 **Suburban Orthopaedics/Howard Freedberg MD (PX 6)**
Pt reports his symptoms are unchanged. His bilateral knee pain is constant that varies in intensity and quality dependent on activities. He continues with pain radiation to right hip. He continues with "locking". He notes of mild instability. Denies of any falls. Denies numbness and tingling, + mild swelling. Rates pain 3-9/10. For pain using Norco, Advil. RQ RF on Norco. Norco last taken 3 weeks ago.
Medications: recommended and ordered Norco refilled, Terocin
Restrictions: off work as he is worsening.
Follow up: 1 to 2 weeks post op or 6 weeks.

10/3/19 **Suburban Orthopaedics/Howard Freedberg MD (PX 6)**
Pt reports symptoms are unchanged. His bilateral knee pain is constant that varies in intensity and quality dependent on activities and movements. He continues with pain radiation to right hip. He continues with "locking" to right hip. He notes of mild instability. Denies any falls. Denies numbness and tingling, + mild swelling to bilateral knees, L>R. Rates pain 3-9/10. For pain using Norco, Advil and patches. Last dose of Norco 3 days ago.
Medications: Norco refilled, Lenza pro, Neurontin
Restrictions: off work as he is worsening.
Follow up: 1 to 2 weeks post op or 6 weeks.

11/14/2019 **Suburban Orthopaedics/Howard Freedberg MD (PX 6)**
Pt reports his symptoms are unchanged. His bilateral knee pain continues to be constant. States his pain varies in intensity and quality dependent on activities and movements. He continues with pain radiation to right hip. He continues with "locking" to right hip + mild instability. Denies numbness and tingling, + mild swelling to bilateral knees, L>R. Pain today 5/10. For pain taking Norco, Advil and patches.
Medications: Norco refilled, Lenza Pro, Neurontin
Surgery: Discussed as potential future option left knee scope possible right knee re revision TKA with stabilized TKA.
Restrictions: off work as he is worsening.
Follow up: 1 to 2 weeks post op or 6 weeks. IME

8/6/20 **Howard Freedberg, M.D./Suburban Orthopaedics (PX 6)**

F/u; bilateral knee pain, constant; radiating up into right hip and described as locking sensation at nighttime. Taking Vicodin and Advil. Continue to await surgical authorization; no work; return after surgery or in 6 wks.

9/23/20 **Howard Freedberg, M.D./Suburban Orthopaedics (PX 6)**
F/u; c/o constant pain in both knees for the last 4 wks., left worse than right. Has moderate swelling of the left knee; pain level: left 8-9/10, right 5-6/10. Referral for pain management and consider genicular nerve blocks. Continue to await surgical authorization; no work; return after surgery or in 6 wks.

10/1/2020 **Farooq A. Khan, M.D./Modern Pain Consultants (PX 11)**
Initial eval for bilateral knee and myofascial pain; work related injury occurred on 9/16/10; right TKA. Light duty for 9 years (no standing more than 10 minutes; no sitting more than 20 minutes; no bending/kneeling/squatting; no lifting over 14 lbs.) Has since also had a revision right TKA and a left knee arthroscopy with Dr. Stamos at IBJI, however, pain continues. He sought 2nd opinion with Dr. Freedberg and is currently pending approval for additional revision of right knee as well as left TKA. Dr. Freedberg referred him to our clinic for further interventional treatment in the form of genicular nerve blocks while awaiting approval for surgical intervention. Agree with this assessment and will schedule the procedure. Return in 2 weeks.

10/15/20 **Farooq A. Khan, M.D./Modern Pain Consultants (PX 11)**
Administered bilateral genicular nerve block.

11/18/20 **Farooq A. Khan, M.D./Modern Pain Consultants (PX 11)**
Pt presents for bilateral genicular neurotomies. Pt reports at least 80% relief for 6 hrs with nerve blocks performed on 10/15/20. Will proceed with radiofrequency neurotomies given positive nerve blocks.

November 18, 2020 appears to be Petitioner's last visit with Dr. Khan.

11/19/20 **Howard Freedberg, M.D./Suburban Orthopaedics (PX 6)**
F/u; c/o bilateral knee pain; says left knee is flaring after procedure yesterday; right knee is sore and swollen. Pain level: left knee 9.5/10; right knee 6/10. Taking Vicodin and Advil.
Continue to await surgical authorization; no work; return after surgery or in 6 wks.

1/7/21 **Howard Freedberg, M.D./Suburban Orthopaedics (PX 6)**
F/u; symptoms unchanged; states he had a procedure done in November to burn his nerve but did not receive relief. Taking Vicodin and Advil.

Continue to await surgical authorization; no work; return after surgery or in 6 wks.

2/25/21 **Howard Freedberg, M.D./Suburban Orthopaedics (PX 6)**
F/u; symptoms unchanged; pt is taking ASA PRN. Continue to await surgical authorization; no work; return after surgery or in 6 wks.

4/22/21 **Howard Freedberg, M.D./Suburban Orthopaedics (PX 6)**
F/u; ongoing bilateral knee pain, left worse than right; pain level left 7/10, right 4/10. Taking Advil, Vicodin. Continue to await surgical authorization; no work; return after surgery or in 6 wks.

6/3/21 **Howard Freedberg, M.D./Suburban Orthopaedics (PX 6)**
F/u; pt c/o worsening pain in bilateral knees since his LOV, pain worse in the left than right knee. Pt taking Advil and Vicodin. Continue to await surgical authorization; no work; return after surgery or in 6 wks.

8/9/21 **Howard Freedberg, M.D./Suburban Orthopaedics (PX 6)**
F/u; no change in symptoms; continue to await surgical approval; no work; return after surgery or in 6 wks.

10/21/21 **Howard Freedberg, M.D./Suburban Orthopaedics (PX 6)**
F/u; no change; continue to await surgical approval; no work; return after surgery or in 6 wks.

12/2/21 **Howard Freedberg, M.D./Suburban Orthopaedics (PX 6)**
F/u; no change; pain is worse in the left than the right knee; constant [right] hip pain—increasing daily; swelling at right knee. Taking Advil as he ran out of Vicodin. Continue awaiting surgical authorization Off work, return after surgery or in 6 wks.

12/16/20 **Howard Freedberg, M.D./Suburban Orthopaedics (PX 6)**
F/u; left knee pain has been flaring for the past 2-3 wks.; reports constant pain in the left knee which increases with daily activity; has swelling in left knee. C/o pain in left hip which is worse than the knee; pain is constant and increases with sitting, standing, and lying down; pain radiates into the upper lateral thigh and right buttock. Pain level: [right] hip 9/10; knees 6-7/10. Pt taking Advil without much relief.
Continue to await surgical authorization; no work; return after surgery or in 6 wks.

1/27/22 **Howard Freedberg, M.D./Suburban Orthopaedics (PX 6)**
F/u; bilateral knee pain, left worse than right; c/o left hip pain. Pain level: 8/10 [right] hip; 6/7-10 left knee; 5/10 right knee. Continue to wait for surgical authorization. Off work as pain is worsening; return after surgery or in 6 wks.

4/14/22 **Howard Freedberg, M.D./Suburban Orthopaedics (PX 6)**
F/u. Pt states left knee pain has been flaring up twice a week and he has constant swelling at the knee. Continues to experience right knee pain which increases when walking and going down the stairs. Pain level: 7/10 left, 5/10 right. Pt is taking prescribed meds.
Recommend surgery (left knee TKA robotic; right knee TKA revision); recommend infectious diseases consult to rule out Lyme's Disease; refer to pain management again as he would like another opinion.
F/u 2 weeks post-op or in 6 wks. No work

According to Petitioner's testimony and the records submitted into evidence, Petitioner continues to be under the medical care of Dr. Freedberg but has not undergone surgical intervention at this time. (PX 10, PX 7, TR pp. 60-63)

Vocational Reports

Petitioner underwent a number of vocational evaluations The Arbitrator has reviewed the vocational reports admitted into evidence by the parties.

1. **Report of Creative Case Management, 11/1/2018** (RX 6) On November 1, 2018, Petitioner underwent a Labor Market Survey by Creative Case Management on behalf of Respondent. (PX6). It was determined that Petitioner was able to work at a sedentary level and fifteen employers were identified as potentially hiring for medically appropriate positions. *Id*. These included positions such as a customer service representative, dispatcher, and non-emergency medical technician with salaries ranging from $19,000 - $73,000 per year. *Id*. The case manager opined that vocational outcome in this case was regarded as "guarded" due to a number of reasons including Petitioner's time out of the workforce, limited computer skills, and that Petitioner would not pass a background check due to a previous felony conviction. *Id*.

An addendum to this report was issued after the case manager spoke with Petitioner's attorney. (See PX7). Updated information regarding Petitioner's felony conviction indicated the Petitioner was convicted on multiple counts of conspiracy to commit fraud. *Id*. This report, based upon the limitations given to Petitioner by Dr. Lewis, Respondent's Section 12 physician, indicates that Petitioner would likely need an accommodation by an employer in order to do sedentary work. It further concludes that his criminal conviction further compromises his ability to find even accommodated sedentary work.

2. **Report of Health Connection, 12/6/2019 (PX 14)** On December 6, 2019, Petitioner underwent an employability study at the request of Petitioner. This report also notes that Petitioner does not qualify for sedentary work per the restrictions of Dr. Lewis, and that Petitioner would need an accommodation in order to perform sedentary work. However, it further states that Petitioner would not be able to secure accommodated sedentary work because of the length of time he has been out of the work force, as well as his prescription medications and other reasons. Edward Pagella of Health Connection of Illinois conducted the study. Based on the physical limitations and limited vocational profile, it was determined that Petitioner "is unemployable."
3. **Labor Market Survey 9/24/2020 Petitioner** underwent an updated Labor Market Survey on September 24, 2020, at his attorney's office. (PX8). It was once again determined that the prognosis was "guarded." Respondent then requested that vocational services begin, but Petitioner denied this request. (See RX11).

4. **Report of Creative Case Management, 3/18/2022 (RX 9)** This report also opines that Petitioner could do sedentary work if an accommodation could be made for Petitioner. However, the report also indicates his prognosis for finding work would be "guarded".

Job Logs (PX 16)

Petitioner submitted job logs documenting a self-directed job search for two separate periods, June 5, 2017 through September 10, 2017 and March 2022 through May 2022. March 2022 until the time of trial. (T. P. 57; PX16).

Unpaid Medical Bills (PX 12)

The Arbitrator finds that bills from Labcorp, Suburban Orthopedics, WCRx Solutions, Persistent Rx, and Modern Pain Consultants for a total of $30,346.67 (not fee scheduled) remain unpaid. No persuasive evidence was introduced to that the medical services were not reasonable and necessary.

Petitioner's Criminal Record

Petitioner testified that in 2000, Petitioner submitted fictitious medical bills to a union health and welfare fund on behalf of members that never had any services provided to them. (*See*, PX10; PX7; TX, pp. 60-63).

II. CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law set forth below. Section 1(b)3(d) of the Act provides that, in order to obtain compensation under the Act, the employee bears the burden of showing, by a preponderance of the evidence, the nature and extent of the accidental injuries sustained that arose out of and in the course of the employment. *820 ILCS 305/1(b)3(d)*. It is well established that the Act is a

humane law of remedial nature and is to be liberally construed to affect the purpose of the Act - that the burdens of caring for the casualties of industry should be borne by industry and not by the individuals whose misfortunes arise out of the industry, nor by the public. *Shell Oil v. Industrial Comm'n,* 2 Ill.2nd 590, 603 (1954). Decisions of an Arbitrator shall be based exclusively on evidence in the record of proceeding and material that has been officially noticed. *820 ILCS 305/1.1(e)*.

The Arbitrator, as the trier of fact in this case, has the responsibility to observe the witnesses testify, judge their credibility, and determine how much weight to afford their testimony and the other evidence presented. *Walker v. Chicago Housing Authority*, 2015 IL App (1st) 133788, ¶ 47. Credibility is the quality of a witness which renders his evidence worthy of belief. The Arbitrator, whose province it is to evaluate witness credibility, evaluates the demeanor of the witness and any external inconsistencies with his/her testimony. Where a claimant's testimony is inconsistent with his actual behavior and conduct, the Commission has held that an award cannot stand. *McDonald v. Industrial Commission,* 39 Ill. 2d 396 (1968); *Swift v. Industrial Commission,* 52 Ill. 2d 490 (1972). It is the function of the Commission to judge the credibility of the witnesses and to resolve conflicts in the medical evidence and assign weight to witness testimony. *O'Dette v. Industrial Commission,* 79 Ill.2d 249, 253 (1980); *Hosteny v. Workers' Compensation Commission,* 397 Ill. App. 3d 665, 674 (2009). Internal inconsistencies in a claimant's testimony, as well as conflicts between the claimant's testimony and medical records, may be taken to indicate unreliability. *Gilbert v. Martin & Bayley/Hucks,* 08 ILWC 004187 (2010).

In the case at hand, the Arbitrator observed Petitioner during the hearing and finds him to be a credible witness. The Arbitrator compared Petitioner's testimony with the totality of the

evidence submitted and did not find any material contradictions that would deem the witness unreliable. The Arbitrator finds Petitioner's testimony to be straight forward, truthful, and consistent with the record as a whole.

TTD

Respondent shall pay to Petitioner the sum of $1,231.41 per week for 406 6/7 weeks, that is, from September 18, 2010 through July 3, 2018, as Petitioner was totally and temporarily disabled during this period.

In so finding, the Arbitrator notes as follows:

1. The Arbitrator notes and relies upon the Section 12 report of Dr. Michael Lewis of July 3, 2018 (RX 5), which finds that Petitioner had reached MMI as of that date. It is further noted that Petitioner underwent no further surgical interventions after this date (see record of Suburban Orthopaedics, PX 6; dates of services 8/16/18 through 4/14/22).

2. During the above noted period, September 18, 2010 through July 3, 2018, Petitioner was noted to be totally incapacitated from work as a laborer by all physicians. Though there are some intermittent periods where Petitioner may have been able to perform light duty, there has been no evidence that any light duty position was available to him during this period.

3. Finally, regarding the determination of MMI, the Arbitrator has considered the opinion of Dr. Freedberg, who has prescribed further surgery for the Petitioner as opposed to the opinion of Dr. Lewis, who does not believe further surgery would be helpful to Petitioner. Petitioner's testimony, that he wishes to avoid further surgery, is therefore controlling. Petitioner is therefore at MMI as of July 3, 2018.

Nature and Extent

As a result of this undisputed accident, the Arbitrator finds that the Petitioner has suffered serious and permanent injuries to the extent that he is permanently and totally disabled as set forth within Section 8(f) of the Act. Based on this finding, there is no need to analyze this case with regard to the five factors as set for in Section 8.1b pf the Act. As stated in Section 8.1b, the Section is applicable to the determination of permanent partial disability, not permanent total disability. In this case, Section 8(f) of the Act is applicable.

The Arbitrator finds that Respondent shall pay to Petitioner the sum of $1,231.41 per week for a period of 202 3/7 weeks; that is from July 4, 2018 to May 19, 2022, the date of trial, and continuing for life, pursuant to Section 8(f) of the Act, as the Petitioner falls into the category of "odd lot" permanent total disability. In so finding, the Arbitrator notes as follows:

Section 8(f) of the Workers' Compensation Act provides in part:

> In case of complete disability, which renders the employee wholly and permanently incapable of work, or in the specific case of total permanent disability as provided in subparagraph 18 of paragraph (e) of this Section, compensation shall be payable at the rate provided in paragraph 2 of paragraph (b) of this Section for life. (820 ILCS 305/8(f))

Per this section of the Act, permanent and total disability, other than statutory, under Section 8(e) 18 of the Act are based upon medical disability or "odd lot" disability.

Medical Permanent and Total Disability

A Petitioner is entitled to permanent and total disability payments if, as a result of an injury, there is proof to establish that he cannot work.

> … a Petitioner is entitled to permanent total disability benefits if evidence of his injury and condition show that he is "obviously unemployable" (Courier v. Industrial Commission, 282 Ill.App.3d 1 (5th Dist. 1996)). Under these circumstances a disability finding will depend on strictly

> medical evidence. Opinions or testimony from treating physicians or competent evidence that the Petitioner is medically disabled from employment is sufficient to establish PTD.

In this case, Dr. Freedberg's records consistently state that Petitioner should be off work altogether (See PX 6, 11/14/18, 1/3/19, 2/4/19, 3/28/19, 5/30/19, 7/11/19, 8/22/19, 10/3/19, 11/14/19, 1/9/20, 2/20/20, 1/7/21, 2/25/21, 4/22/21, 6/3/21, 8/9/21, 10/21/21, 12/2/21, 12/16/21, 1/22/22, 4/14/22).

On each of these visits, Dr. Freedberg clearly states that Petitioner should be off work. However, Dr. Lewis in his report of July 3, 2018 (see RX 6) has stated that Petitioner should not undergo further surgery and is MMI and is able to work with significant restrictions.

Because Dr. Lewis' opinion in this regard appears to have been based upon the FCE, and because Dr. Freedberg's notes seem to reference a pending surgery which Petitioner testified that he did not wish to undergo, the Arbitrator finds that Petitioner is not medically disabled pursuant to Section 8(f).

"Odd Lot" Permanent and Total Disability

> If, as in this case, a claimant's disability is not so limited in nature that he is not obviously unemployable, or if there is no medical evidence to support a claim of total disability, to be entitled to PTD benefits under the Act, the claimant has the burden of establishing the unavailability of employment to a person in his circumstances; that is to say he falls into the 'odd-lot' category. Valley Mould & Iron Company v. Industrial Commission, 84 Ill.2d 538 (1981); AMTC of Illinois, Inc. v. Industrial Commission, 77 Ill.2d 482, 490 (1979). The claimant can satisfy his burden of proving that he falls into the odd lot category by showing diligent but unsuccessful attempts to find work or by showing that he will not be regularly employed in a well-known branch of the labor market. (Westin Hotel v. Industrial Commission, 272 Ill.App.3d 325 (2007).

In finding that Petitioner falls into the "odd lot" category, the Arbitrator notes as follows:

Report of Health Connection of Illinois (PX 14) 12/6/2019

This report, authored by Edward Pagella, considers both the opinion of Dr. Freedberg as well as the opinion of Dr. Lewis as follows:

> "According to the July 3, 2018 report from Dr. Lewis, he reports that Mr. Naimoli had an FCE performed which demonstrated he can stand for 10 minutes, then sit for up to 20 minutes and no stooping or bending. He reports he is unable to return back to his work as a laborer and is limited to sedentary activities. On 11/14/19, Dr. Freedberg reports that Mr. Naimoli is medically unable to work. Thus, based up [sic] the opinions of Dr. Freedberg, it is obvious that Mr. Naimoli is unemployable and totally disabled as he would be unable to perform work to earn an income. However, based upon the restrictions as outlined by Dr. Lewis, it would be my professional opinion as a Certified Rehabilitation Counselor and Vocation Expert with over 30 years' experience in determining an individual's employability for the Federal Government, that Mr. Naimoli is an "Odd Lot" permanent and total disabled individual. My reasoning is based upon the following factors:
>
> - Mr. Naimoli has a limited education with only a GED and no other certifications or degrees.
> - Mr. Naimoli does not have any transferable skills to any other occupations.
> - Mr. Naimoli is limited to the sedentary level of physical tolerance with a sit/stand option through the day with no stooping or bending. According to the United States Department of Labor, the lowest level of work that exists is at the sedentary level, however, sedentary work according to the United States Department of labor requires that an individual have the ability to at least sit 6 out of 8 hours a day and bend and stoop occasionally. Mr. Naimoli is unable to bend or stoop or even sit up to 6 hours a day. Thus, ruling out all unskilled sedentary work as defined by the United States Department of Labor. Thus, all occupations at each physical tolerance would be ruled out. Mr. Naimoli cannot perform light work, lifting up to 20 pounds, he cannot perform medium work, lifting up to 50 pounds and he cannot perform his past relevant work, lifting up to 100 pounds.
> - Even if he attempts to look for alternative work, it would have to be with an accommodating employer, however, all employers will ask why he has not worked in over 9 years and when they find out about his physical limitations and surgeries, employers will consider him to be a liability.

- Mr. Naimoli will also have to inform any potential employer that he is taking narcotic medication and will not pass any drug screening. This will also have an effect on employers wanting to hire him.

Thus, based upon the physical limitations as outlined by Dr. Lewis and his limited vocational profile, it is my professional opinion as a Certified Rehabilitation Counselor and Vocational Expert that no employer would hire Mr. Naimoli. *Thus, in my opinion, he is unemployable*." (Emphasis added) (PX 14, pp 2-3)

The Arbitrator therefore notes that:

"A person is permanently and totally disabled when he cannot perform any services except those for which no reasonably stable labor market exists. A.M.T.C. of Illinois, Inc. v. Industrial Comm'n, 77 Ill.2d 482, 487 (1979). The claimant need not, however, show that he has been reduced to total physical incapacity before being entitled to a permanent and total disability award. Interlake, Inc. v. Industrial Comm'n, 86 Ill. 2d 168, 176 (1981). Where an employee's disability is limited in nature so that he is not obviously unemployable, or if there is no medical evidence to support a claim of permanent total disability, the burden is on the employee to establish by a preponderance of the evidence that he falls into the "odd lot" category, "that is, one who although not altogether incapacitated to work, is so handicapped that he will not be employed regularly in any well-known brand of the labor market." Westin Hotel v. Illinois Workers' Compensation Comm'n, 372 Ill. App. 3d 527, 544 (2007). A claimant may establish he is permanently and totally disabled under the odd lot theory by showing that: (1) considering his age, education skills, training, physical limitations and work history he would not be regularly employable in any well-known branch of the labor market…When a claimant proves by a preponderance of the evidence that he falls into the odd lot category, the burden shifts to the employer to show that a reasonable stable job market nevertheless exists for that employee. City of Chicago v. Illinois Workers' Compensation Comm'n, 373 Ill. App. 3d 1080, 1091 (2007)." Cicero Sch. Dist. #99 v. Ill. Workers' Comp. Comm'n, 2016 IL App. (1st) 153307WC-U

In reliance upon Cicero, the Arbitrator finds that Petitioner has met his burden of proof that he is permanently and totally disabled under the "Odd Lot" theory, per the report of Health Connection. (PX 14, cited above)

Therefore, the burden of proof shifts to Respondent to show that a "reasonably stable job market nevertheless exists for *that* (emphasis added) employee." The Arbitrator finds that

Respondent has not met its burden of proof in that regard. In so finding, the Arbitrator notes as follows:

- **Report of Creative Case Management (RX 8, 10/7/2020)**

This report notes (in agreement with the report of Health Connection) that the Petitioner's physical restrictions preclude him from even sedentary jobs, noting that he would need accommodations within the sedentary level of employment. It further notes significant impediment to return to work:

"**Impediments to Mr. Naimoli's return to work:**

1. Mr. Naimoli has a 10-year gap in his work history.
2. Mr. Naimoli has very limited computer skills.
3. Mr. Naimoli has a singular work history.
4. Mr. Naimolia has physical restrictions that allow him to work at the sedentary demand level (full definition of demand levels found at the end of this report).
5. Mr. Naomoli [sic] has a prior felony conviction.
6. Mr. Naomoli's [sic] doctor currently has him "off work".
7. Mr. Naomoli [sic] is seeking continued medical treatment.
8. Mr. Naomoli [sic] does not have a computer or laptop at home.
9. He has no further training, certification or education beyond a GED." (RX 8, p. 3)

The Arbitrator further notes that this report does not take into account the prescription narcotic medication that Petitioner is currently taking. Additionally, under the heading of **Recommendations**, the report does not recommend job placement or training (in accordance with Petitioner's testimony wherein he stated he has not been asked to participate in any vocational program or job search), but merely indicates that the findings are to be discussed with the account. (RX 8, p. 3) Under the heading Opinion, the report concludes:

"**OPINION**

It is this vocational case manager's opinion with a reasonable degree of vocational certainty that the prognosis for him to find a job in his current labor market that is within his skills, abilities and restrictions is guarded (emphasis added). Mr. Naimoli has limited transferable skills from

> previous employment and has been out of the workforce for 10 years. He is considered a high wage earner and has very limited computer skills. He also has a previous felony conviction which may limit the types of positions he can apply to." (RX 8, p. 3)

Therefore, Respondent has not met its burden of proof to show that a reasonable stable job market exists for this Petitioner. There has been no showing that there is a job market available to this claimant. This is consistent with the opinions contained in Ameritech Services, Inc. v. Illinois Workers' Compensation Commission, 389 Ill.App.3d 191 (1st Dist. 2009) as follows:

> In Ameritech Services, Inc. v. Illinois Workers' Compensation Commission, 389 Ill.App.3d 191 (1st Dist. 2009), the treating physician opined that the Petitioner could no longer perform his previous job as a result of restrictions. The Petitioner introduced evidence from a vocational rehabilitation expert who opined that because of the medical restrictions placed upon the claimant, the constant pain that the claimant experienced, and the increase in his pain level when he performed activities, the claimant would not be a candidate for any of the jobs which were identified in a labor market survey. The vocation expert testified that it was unlikely that an employer would hire the claimant over an able-bodied candidate, and if he was hired the claimant would not be able to continue working. In this case, the Petitioner offered both medical evidence and labor market evidence.
>
> > "Taking into account the Claimant's injury, his age, education, work history, and the opinions of the treating physician, we believe that there is sufficient evidence in the record to support a conclusion that the claimant is incapable of performing any services for which a stable labor market exists. Further, (Respondent) failed to introduce any evidence to show that the claimant was capable of engaging in some type of regular and continuous employment." (348 Ill.App.3d at 409).

In the present case, the Arbitrator notes that Petitioner's injury, age, education, training, experience, criminal history and treating physician findings, as well as Respondent's Section 12 examiner's imposition of sedentary work and limitations on standing and sitting, support a conclusion that the Petitioner is incapable of performing any services for which a stable labor market exists. Additionally, the vocational reports admitted into evidence support that conclusion.

Credit

The parties have agreed and stipulated that during the pendency of this matter, Petitioner had been paid the sum of $732,369.45 in TTD/Maintenance benefits. They further agreed that they could not distinguish which benefits had been paid as maintenance and which benefits had been paid as TTD.

Therefore, Respondent shall have credit for all benefits paid in the total amount of $732,369.45. This credit shall be applied to TTD and PTD benefits which have been awarded per this decision.

Medical Bills

The Arbitrator has reviewed the medical bills in the amount of $30,346.67 as contained in Petitioner's Exhibit No. 12 and finds that all of the medication and medical services represented therein are directly related to Petitioner's work-related accident of September 16, 2010. Respondent shall therefore pay to Petitioner the sum of $30,346.67 for reasonable and related medical bills and services pursuant to Section 8(a) and 8.2 of the Act. Respondent shall make this payment directly to Petitioner's attorney in accordance with Section 9080.20 of the Rules Governing Practice before the Illinois Workers' Compensation Commission. It is further noted that Petitioner's Exhibit No. 12 does not contain the fee schedule for the bills. Therefore, Respondent is entitled to any and all discounts as contained in the Illinois Fee Schedule.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC009415
Case Name	Cindy McAllister v. State of Illinois - Elgin Mental Health Center
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0331
Number of Pages of Decision	16
Decision Issued By	Amylee Simonovich, Commissioner

Petitioner Attorney	Stephanie Seibold
Respondent Attorney	Dan Kallio

DATE FILED: 8/2/2023

/s/ Amylee Simonovich, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF WINNEBAGO)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CINDY MC ALLISTER,

Petitioner,

vs. NO: 15 WC 09415

STATE OF ILLINOIS – ELGIN MENTAL HEALTH CENTER,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 18, 2022 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.

Pursuant to §19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review. Therefore, no appeal bond is set in this case.

August 2, 2023

o072523
AHS/ldm
051

/s/*Amylee H. Simonovich*
Amylee H. Simonovich

/s/*Maria E. Portela*
Maria E. Portela

/s/*Kathryn A. Doerries*
Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC009415
Case Name	MCALLISTER, CINDY v. ST OF IL - ELGIN MENTAL HEALTH CENTER
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	13
Decision Issued By	Paul Seal, Arbitrator

Petitioner Attorney	Stephanie Seibold
Respondent Attorney	Dan Kallio

DATE FILED: 1/18/2022

THE INTEREST RATE FOR THE WEEK OF JANUARY 11, 2022 0.27%

/s/ Paul Seal, Arbitrator
Signature

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

January 18, 2022

/s/ Michele Kowalski

Michele Kowalski, Secretary

Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF WINNEBAGO)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Cynthia McAllister
Employee/Petitioner

v.

State of IL – Elgin Mental Health Center
Employer/Respondent

Case # **15** WC **9415**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Paul Seal**, Arbitrator of the Commission, in the city of **Rockford, Illinois**, on **December 17, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **1/19/2015**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**52,823.50**; the average weekly wage was $**1056.47**.

On the date of accident, Petitioner was **59** years of age, ***single*** with **0** dependent child.

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

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

Respondent shall be given a credit of $**0.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**0.00**. Respondent is entitled to a credit of $**0.00** under Section 8(j) of the Act.

ORDER:

THE ARBITRATOR FINDS THAT PETITIONER FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT SHE SUSTAINED AN INJURY ARISING OUT OF AND IN THE COURSE OF HER EMPLOYMENT. AS SUCH, ALL BENEFITS ARE DENIED. ALL OTHER ISSUES ARE MOOT.

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.

JANUARY 18, 2022

Signature of Arbitrator

I. Findings of Facts

This action was pursued under the Illinois Workers' Compensation Act (the "Act") by the Petitioner-Employee, Cynthia McAllister ("Petitioner"), and sought relief from Respondent, the State of Illinois – Elgin Mental Health Center ("Respondent").

On December 17, 2021, a hearing was held before Arbitrator Seal in Rockford, Illinois. Attorney Stephanie Seibold of Black & Jones represented the Petitioner. AAG Daniel Kallio of The Illinois Attorney General's Office represented Respondent. At issue was accident, notice, causation, medical bills, TTD, and nature and extent.

A. Testimony

Testimony of Petitioner

On January 19, 2015 Petitioner was 59 years old and employed by Respondent as a Storekeeper. Petitioner worked in the warehouse and processed supplies for the facility. This included moving supplies such as toilet paper, pens, food and other items needed in the day-to-day operating of the facility. Petitioner testified that the weight of the products varied greatly, from a pack of pens to 70-pound boxes.

Petitioner testified that prior to working in the warehouse, she had worked office jobs for 14 years. Petitioner testified that following her transfer, Petitioner began to notice pain in her shoulders and sought medical treatment.

Petitioner testified that she first sought treatment with Dr. Hess on January 9, 2015. Petitioner then underwent an MRI of the right and left shoulders on January 31, 2015. (See RX2). The MRI of her left shoulder revealed tendinopathy of the supraspinatus and infraspinatus and a possible tear in the labrum. *Id*. The MRI of the right shoulder was unremarkable. *Id*.

Following her initial treatment with Dr. Hess, Petitioner submitted an Employee's Notice of Injury report on February 4, 2015. (See RX1). On this form, Petitioner reported an injury occurring one day prior, on February 3, 2015. Petitioner claimed she injured her shoulders while "pulling very heavy skids / supervisor not in." (RX2). Petitioner testified that she reported it that day because that is when she "knew [she] had an injury."

Petitioner continued to work at her position until March 2015. At that time, according to her testimony, Respondent could not provide accommodation. Petitioner testified that she took sick days during this period and did not receive TTD benefits. Petitioner was released to work full duty and returned to work on June 27, 2015.

Petitioner testified that her shoulders hurt for more than three years and that she still has residual shoulder pain.

On cross-examination, Petitioner admitted that, despite reporting an injury pulling a skid on February 3, there was no specific incident that caused her shoulder pain. She then testified that her injury occurred gradually over time.

Testimony of Keith McTyer

Mr. Keith McTyer ("McTyer") was called to testify by Respondent. McTyer testified that at the time of the injury, he was the Workers' Compensation coordinator for the Elgin facility. McTyer has worked in this position intermittently for approximately twenty years.

McTyer's primary job duties at the Elgin facility were to coordinate the reporting of workers' compensation claims that were generated at the Elgin facility. McTyer became familiar with Petitioner through this process.

McTyer testified that Respondent's Exhibit 3 is a copy of an email sent by him on February 5, 2015 to the workers' compensation adjuster in this case. In the email, McTyer communicated concerns he had with Petitioner's claim. Consistent with the February 5, 2015 email, Petitioner called him prior to filing her February 3, 2015 claim and stated to him that she had injured herself sometime in September 2014, but could not state exactly when or exactly how she injured herself and that she had not reported it to anyone. She also stated to him that she had been treating for the injury. At that time, McTyer advised her that since a significant amount of time had passed, he wasn't sure if the injury would be compensable but that he wouldn't tell her not to file a claim. When McTyer saw that Petitioner then filed a report of injury for a February 2015 rather than a September 2014 date, he drafted and sent Respondent's Exhibit 3.

B. Medical Treatment

Petitioner's Exhibit #1 is a set of records from Dr. Hess. These records also contradict Petitioner's testimony that she first sought treatment for pain in her shoulders in January 2015. Petitioner's Exhibit 1 shows that Petitioner sought treatment for her shoulders from Dr. Hess at least as early as 2014. Due to the handwritten nature of the notes it is difficult to discern specific dates of treatment but on page 12 of Petitioner's Exhibit 1, it clearly states that Petitioner was suffering from left shoulder pain at that time in 2014. (See PX1, p. 12.).

In January 2015, Petitioner returned to Dr. Hess with continuing complaints of left shoulder pain and noting an injury 15 months, over a year, prior. (PX1, P. 11).

On January 19, 2015, Petitioner returned to Dr. Hess and indicated that Prednisone had helped her shoulder. Petitioner then underwent two MRI examinations of her left and right shoulder on January 31, 2015. The right shoulder was unremarkable while the left shoulder was suspected to have a possible tear in the superior labrum. (See RX2).

On February 4, 2015, Petitioner presented to Cadence Occupational Health. (PX3, P. 53). At this time, Petitioner presented with an injury to her right shoulder noted to be from a lifting injury the previous day. *Id*. There is no mention of the left shoulder or any prior treatment. She was told to return in one week. *Id*.

On February 12, 2015, Petitioner presented to Dr. Nyquist. (See PX2, P. 39, RX2). On that date, Petitioner presented with "pain and discomfort in both her shoulders for a year and a half." *Id (emphasis added)*. Dr. Nyquist opined that Petitioner was suffering from left shoulder impingement tendinitis and was told to follow up in one month. *Id*. She was given work restrictions of 10 pounds. *Id*.

Petitioner returned to Cadence on February 9, 2015, with continuing complaints of pain. (PX3, P. 57). Again, there is no mention of the left shoulder. She was given light duty restrictions and told to follow-up in four weeks. Petitioner did not return to this provider.

On March 12, 2015, Petitioner returned to Dr. Hess with complaints of shoulder pain in her right shoulder and claimed she pulled a heavy pallet at work. (PX1, P. 7). She also reported seeing Dr. Nyquist for her left shoulder and that she had been doing physical therapy for the past 10 weeks.

On March 13, 2015, Petitioner returned to Dr. Nyquist with continued complaints of pain in her left shoulder. (PX2, P. 35-36). She was told to continue home exercises and told to return in two months. *Id*.

On March 31, 2015, Petitioner indicated that she had not started physical therapy and was referred to Dr. Milos instead of Dr. Nyquist. (PX1, P.5). This is the last office note from Dr. Hess.

On May 27, 2015, Petitioner returned to Dr. Nyquist with continued pain complaints. (PX2, P. 31-32). She also reported going to Belvidere Hospital for treatment but did not like that office so she came back to Dr. Nyquist. *Id*. Dr. Nyquist discussed options such as surgery and told her to return when she made a decision. *Id*. This is the last office visit with Dr. Nyquist in the records.

On June 24, 2015, Petitioner presented to Dr. Mary Simmons with complaints of pain in both her shoulders. (PX4, P. 130). Petitioner indicated to Dr. Simmons that she injured herself at work because she was having to do duties beyond her normal 70 pound lifting. *Id*. She requested a return to work note and sought no further treatment.

II. Conclusions of Law.

A. Accident

To obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of the evidence, that he has suffered a disabling injury which arose out of and in the course of his employment. *Baggett v. Industrial Comm'n*, 201 Ill. 2d 187, 194, 775 N.E.2d 908, 912 (2002).

In a repetitive trauma case, issues of accident and causation are intertwined. See, e.g., *Boettcher v. Spectrum Property Group and First Merit Venture*, Ill. Workers' Comp. Comm'n, 97 WC 44539, 99 IIC 0961. Nevertheless, the employee must allege and prove a single, definable accident. *White v. Workers' Compensation Comm'n*, 374 Ill. App. 3d 907, 911 (2007). The date of an accidental injury in a repetitive-trauma compensation case is the date on which the injury "manifests itself." *Peoria County Belwood Nursing Home v. Industrial Comm'n*, 115 Ill. 2d 524, 531 (1987). The phrase "manifests itself" signifies "the date on which both the fact of the injury

and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person." Id.

The Commission is allowed to consider evidence, or the lack thereof, of the repetitive "manner and method" of a claimant's job duties. *Williams v. Industrial Comm'n*, 244 Ill. App. 3d 204, 211 (1993) (citing *Perkins Product Co. v. Industrial Comm'n*, 379 Ill. 115, 120, 39 N.E.2d 372 (1942)). The question of whether a claimant's work activities are sufficiently repetitive in nature as to establish a compensable accident under a repetitive trauma theory will be decided based upon the particular facts in each case, and it is the province of the Commission to resolve this factual issue. *Williams*, 244 Ill. App. 3d at 210-11. However, an employee alleging an injury based upon repetitive trauma must "show that the injury is work-related and not the result of a normal degenerative aging process." *Peoria County Bellwood Nursing Home v. Industrial Comm'n*, 115 Ill. 2d 524, 530 (1987); *Glister Mary Lee Corp. v. Industrial Comm'n*, 326 Ill. App. 3d 177, 182 (2001).

The Arbitrator finds that Petitioner failed to present sufficient, credible evidence that Petitioner's injury arose out of and in the course of work performed for Respondent.

In the instant case, Petitioner alleges an injury date of January 19, 2015. (See Arbitrator's Exhibit #1, Request for Hearing Form). This is inconsistent with Petitioner's "Notice of Injury" form in which she reported to her employer that an accident occurred on February 3, 2015 when she was pulling heavy skids and is inconsistent with her medical records and her statements to and testimony by McTyer.

Petitioner clearly suffered from shoulder pain prior to her alleged injury. According the records of Dr. Hess, Petitioner sought treatment for her shoulders from Dr. Hess at least as far

back as 2014. Dr. Hess also noted, in January 2015, that Petitioner reported that her complaints of left shoulder pain had been present for over a year, specifically 15 months. (PX1, P. 11).

In addition to the records of Dr. Hess, the records of Dr. Nyquist also clearly demonstrate that Petitioner had been suffering from chronic shoulder pain for a significant amount of time prior to her alleged accident. On February 12, 2015, Petitioner presented to Dr. Nyquist with "pain and discomfort in both her shoulders for a year and a half." (PX2, P. 39, RX2).

Furthermore, According to McTyer's testimony and Respondent's Exhibit 3, Petitioner had called him prior to filing her February 3, 2015 claim and indicated that she injured herself in September 2014, but could not state when or how she injured herself and that it had not been reported to anyone. Moreover, Petitioner told him that she was already treating with her medical provider. After McTyer advised her that since a significant amount of time had passed, he was not sure if the injury would be compensable, she then filed a report of injury claiming an injury date in February 2015, rather than September 2014. Once a claim was filed, McTyer noticed that the date of injury was reported as February 3, 2015 and documented his concerns in an email to Respondent's workers' compensation administrator.

As set forth above, the date of an accidental injury in a repetitive-trauma compensation case is the date on which the injury "manifests itself" which is "the date on which both the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person." *Peoria County Belwood Nursing Home v. Industrial Comm'n*, 115 Ill. 2d 524, 531 (1987). The Arbitrator finds that this occurred at the latest in September 2014. Petitioner told Keith McTyer that she had injured herself at that time and that she had already been treating with Dr. Hess with complaints of left shoulder pain at that time which she had reported pain in her shoulders for approximately 1 year prior. (PX1, P. 11).

Petitioner was 59 years old at the time of injury. There were substantial discrepancies regarding an injury date between the "Request for Hearing Form," her "Notice of Injury" form and the medical records. There were discrepancies in the Petitioner's statements to different physicians regarding the cause, length and starting point of her shoulder pain. McTyer's testimony was credible and supported by documentation. Petitioner's testimony was inconsistent and was not supported by the documentary evidence. Based on the foregoing, the Arbitrator finds that Petitioner failed to establish a single, definable accident, a credible manifestation date, or that the injury is work-related and not the result of a normal degenerative aging process.

After reviewing all of the evidence and considering the totality of the circumstances surrounding Petitioner's claim, the Arbitrator finds that Petitioner has failed to prove by a preponderance of the evidence that she sustained an injury arising out of and in the course of her employment. As such, all benefits are denied. All other issues are moot.

B. Causation

The Arbitrator finds that Petitioner did not prove an accident arising out of her employment. As such, the Arbitrator finds Petitioner's current condition of ill-being is not causally related to Petitioner's alleged accident on January 19, 2015.

C. Notice

The Arbitrator finds that Petitioner failed to present sufficient, credible evidence that notice of the accident was timely provided to the Respondent-Employer.

Pursuant to Illinois law, notice of a workplace accident shall be given to the employer as soon as practicable, but not later than 45 days after the accident. 820 ILCS 305/6 (C).

In the instant case, Petitioner submitted a "Notice of Injury" form to her employer on February 4, 2015. However, McTyer testified that prior to submitting the aforementioned notice, Petitioner had called him and indicated that she injured herself in September 2014, but could not state when or how she injured herself and admitted that she had not reported the injury to anyone. McTyer advised her that since a significant amount of time had passed, he wasn't sure if the injury would be compensable. Thereafter Petitioner reported a claim for an alleged injury in February 2015. Once a claim was filed, McTyer noticed that the date of injury was reported as February 3, 2015 and emailed his concerns to Respondent's workers' compensation administrator.

The Arbitrator finds that Petitioner failed to provide notice within the 45-day period required under Illinois law. It is clear from the record that Petitioner had been treating for shoulder pain for well over a year at the time that the notice of injury form had been completed and submitted to her employer on February 4, 2015. Petitioner also stated that she had already been treating with a doctor who could verify this when she spoke to McTyer prior to filing her claim. This delay in reporting any injury substantially prejudiced the Respondent as they could not take remedial actions to limit or mitigate any further injury nor could they timely investigate the claims made. By the time Petitioner decided to report the injury, even the Petitioner herself could not state exactly when or exactly how she was injured thus preventing any sort of investigation of the September injury. Petitioner then presented a February date of injury in an attempt to make the claim timely.

The Arbitrator finds that any injury sustained by Petitioner would have occurred in September 2014, at the latest. However, by the time this was reported in February 2015, the 45-day period had already lapsed.

Accordingly, the Arbitrator finds that Petitioner failed to present sufficient, credible evidence that notice of the accident was timely provided to the Respondent-Employer.

D. Medical Bills

The Arbitrator finds that Petitioner did not sustain an accident arising out of her employment. As such, the Arbitrator awards no medical benefits.

E. TTD / Maintenance

The Arbitrator finds that Petitioner did not sustain an accident arising out of her employment. As such, the Arbitrator awards no TTD benefits.

F. Nature and Extent

The Arbitrator finds that Petitioner did not sustain an accident arising out of her employment. As such, the Arbitrator does not award any permanency.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC034819
Case Name	Tonya Johnson v. The Home Depot
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	23IWCC0332
Number of Pages of Decision	12
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	James McHargue
Respondent Attorney	John McAndrews

DATE FILED: 8/2/2023

/s/ Deborah Baker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TONYA JOHNSON,

Petitioner,

vs. NO: 21 WC 34819

THE HOME DEPOT,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issue of whether there was an employer-employee relationship between Respondent and Petitioner 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 November 9, 2022 is hereby affirmed and adopted.

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner failed to prove an employer-employee relationship existed between Petitioner and Respondent on December 17, 2021.

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

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

The bond requirement in Section 19(f)(2) is applicable only when "the Commission shall have entered an award for the payment of money." *820 ILCS 305/19(f)(2)*. Based upon the denial of compensation herein, no bond is set by the Commission. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

August 2, 2023

/s/ *Deborah J. Baker*

DJB/lyc

O: 7/12/23

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/s/ *Stephen J. Mathis*

/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC034819
Case Name	Tonya Johnson v. The Home Depot
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	9
Decision Issued By	Rachael Sinnen, Arbitrator

Petitioner Attorney	James McHargue
Respondent Attorney	John McAndrews

DATE FILED: 11/9/2022

THE INTEREST RATE FOR THE WEEK OF NOVEMBER 9, 2022 4.49%

/s/ Rachael Sinnen, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
§19(b)

Tonya Johnson
Employee/Petitioner

Case # **21** WC **034819**

v.

Consolidated cases: _____

The Home Depot
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Rachael Sinnen**, Arbitrator of the Commission, in the city of **Chicago**, on **July 22 and August 15, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **12/17/2021**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did not*** exist between Petitioner and Respondent.

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

Timely notice of this accident **N/A** given to Respondent.

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

In the year preceding the injury, Petitioner earned $**N/A**; the average weekly wage was $**N/A.**

On the date of accident, Petitioner was **N/A** years of age, **N/A** with **N/A** dependent children.

Respondent **N/A** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **N/A** for TTD, **N/A** for TPD, **N/A** for maintenance, and **N/A** for other benefits, for a total credit of **N/A**.

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

ORDER

The Arbitrator finds that Petitioner has failed to meet her burden in proving by a preponderance of the evidence that an employee- employer relationship between Petitioner and Respondent existed on December 17, 2021.

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.

NOVEMBER 9, 2022

Signature of Arbitrator

ICArbDec19(b)

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

Tonya Johnson,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	Case No. 21WC 34819
Home Depot	)	
	)	
	)	
Respondent.	)	

FINDINGS OF FACT

This matter proceeded to hearing on 7.22.22 (see Transcript "Tx" 1) in Chicago, Illinois before Arbitrator Rachael Sinnen on Petitioner's Request for Hearing and proofs were closed on 8.24.22 (see Tx 2). The sole issue in dispute is employee - employer relationship. The parties agreed reserve all other issues and to proceed solely on the issue of whether an employee-employer relationship existed at the time of accident. Arbitrator's Exhibit "Ax" 1.

Testimony of Petitioner

Petitioner, Tonya Johnson, testified that she applied online for a sales associate position with Respondent, Home Depot, where she would help customers on the sales floor with merchandise and use the cash register and computer to check out customers. Tx 1 at 11-12.

Petitioner testified that after she applied online for Respondent, she received a phone call and email to schedule an interview. Id. at 13. Petitioner testified that she attended three interviews in total, with the first interview being at the end of October [2021]. Id. at 13. Petitioner testified that she went onsite to Respondent for the first interview and spoke with a person in management about her availability, hours, and the reason she was leaving her previous employment. Id. at 14. Petitioner testified that she filled out paperwork including a time sheet, an I-9, and other documents. Id. at 15.

Petitioner received an email from Respondent dated November 1, 2021 with the subject reading, "Finalize Your Job Offer With The Home Depot – Sales Associate." Petitioner's Exhibit "Px" 1.

The email read, in part,

> You have been scheduled to come onsite to complete your post offer activities. Please print this email and bring with you when coming onsite.
>
> Position: SALES ASSOCIATE
> Job Location: 140 COUNTRYSIDE PLAZA, COUNTRYSIDE, IL 60525
> Job Location Phone Number: 708-352-1550
> Scheduled Date: 11/04/2021
> Scheduled Time: 11:30 AM
>
> Additional information:
> - Business casual attire
> - Please plan to be onsite for 1-2 hours
>
> To reschedule your activities, or decline your offer, please log into Candidate Self Service.

Px 1.

Petitioner testified that she went onsite on November 4, 2021, spoke with a male manager regarding paperwork, and walked around the store. Tx 1 at 22. Petitioner testified that she was contacted by Respondent to come onsite for a third time to finalize the job offer that she had accepted and to undergo orientation. Id. at 23. Petitioner testified that the orientation was scheduled for December 17, 2021. Id. at 26. Petitioner stated that she was told she would be paid for orientation. Id. at 41.

Petitioner testified that on December 17, 2021, she arrived onsite, met with a female manager, finished additional paperwork, walked around the store with a supervisor, was introduced to other employees as the new sales associate, met the store manager and eventually ended up at the cashier. Id. at 26-27. Petitioner testified that the female manager stepped away but first told the cashier "…I need you to train her on cashiering, and I need you to train her on the computer." Id. at 28. Petitioner testified that she watched the cashiering but "we didn't get much because she had a customer." Id. at 29. Petitioner stated, "So the other associate took it upon herself to start training me and start telling me things that I needed to know about what to put in the computer…" Id. at 29. Petitioner testified that after the training, she was going to finish paperwork in another room when she reached for her purse and water bottle underneath the cash register and struck her head on the COVID shield as she was coming up. Id. at 30-32.

Petitioner testified that she felt pain in her head but went to finish the paperwork on the computer in another room. Id. at 36. Petitioner testified that she was unable to finish the paperwork on the computer because she was locked out of her account. Id. at 37-38. Petitioner testified that she was sent home and tried finishing the paperwork at home but was still locked out of her account. Id. at 38-39. Petitioner testified that she never completed the online paperwork for Respondent. Id. at 42. Petitioner testified that she tried contacting Respondent after December 17, 2021 but was never able to get into contact with them. Id. at 39-40.

On cross-examination, Petitioner was shown her online application to The Home Depot. Respondent's Exhibit "Rx" 1b[1]. The application read, in part,

> Should I become an employee of The Home Depot, I understand that my employment will be "at will" and for no definite term, and that I will have the right to terminate my employment at any time, at my convenience, with or without cause or reason. I further understand that The Home Depot will have the same right.
>
> * * *
>
> I further understand that the completion of an application with The Home Depot is a preliminary step to employment. It does not obligate The Home Depot to offer employment to me, or for me to accept employment. I understand that any offer of employment is a conditional offer of employment pending pre-employment requirements …and submitting to, and passing, a drug screen. The drug screen will be conducted on site or at a Company-selected facility at the Company's expense. If I do not successfully pass all of the pre-employment requirements, I understand that I will not be permitted to commence work for the Company, or I will be terminated if I have already commenced work.

Rx 1b, p. 2.

Petitioner testified that she did not punch in on an employee time clock, nor did she wear a badge or uniform on December 17, 2021. Id. at 44. Petitioner testified that she was at the store for around forty-five minutes on December 17, 2021. Id. at 45. Petitioner testified that she thought she was an employee at the time but knew that she still had to complete paperwork including a background check. Id. at 45. Petitioner testified that she did not receive any compensation for her time at the store and was not provided with a work schedule about future shifts Id. at 46-47.

Testimony of Manuela Faidy

Manuela Faidy testified that she was currently employed by Respondent and has been a district administrative assistant as of August 15, 2022. Tx 2 at 5. Ms. Faidy testified that prior to August 15, 2022, she was employed with Respondent as an associate support department supervisor at the Countryside store for seven and a half years. Id. at 5-6. As an associate support department supervisor, Ms. Faidy testified that she ensured the store was properly staffed, set up interview calendars, conditional job offers, and assist associates. Id. at 6.

Ms. Faidy testified that the hiring process involves: (1) job posting; (2) applicant takes assessment online; (3) scheduled for an initial conditional job offer; and (4) meet and greet the candidate. Id. at 7-9. Ms. Faidy testified that the applicant completes the application online, then is brought in for a tour of the store and explanation of the position. Id. at 10. Ms. Faidy testified that once a person applies for a job opening, she receives and email and the store manager to schedule an interview for a conditional job offer. Id. at 38. Ms. Faidy testified that the initial visit is a

[1] Respondent's Exhibit 1b is a more legible copy of Respondent's Exhibit 1a.

"conditional job offer." Id. at 11. Ms. Faidy testified that after the tour, the applicant is asked to fill out personal data online including a background check. Id. at 11-12. Ms. Faidy testified that once the background check is verified, the person can be hired. Id. at 13.

Ms. Faidy testified that Petitioner was considered for the order fulfillment associate. Id. at 31. Ms. Faidy testified that an order fulfillment associate and sales associate require knowing how to use the computer and completing order forms on the computer. Id. at 32-34. Ms. Faidy testified that knowing how to use these computer programs is for the benefit of Respondent. Id. at 35.

Ms. Faidy testified that she met with Petitioner on December 17, 2021. Id. at 14. Ms. Faidy testified that Petitioner had not finished the background check for Respondent. Id. Ms. Faidy testified that on December 17, 2021, she greeted Petitioner and walked her to the supervisor (Maribel) who showed Petitioner around the store. Id. at 15. Ms. Faidy testified that the purpose of this visit was to finish the conditional job offer and was not for orientation. Id. at 15-16. Ms. Faidy testified that Petitioner was not promised to receive compensation as she had not completed the background check. Id. at 16-17. Ms. Faidy testified that Petitioner was at the store for forty-five minutes when Petitioner hit her head. Id. at 18.

Ms. Faidy testified that she met Petitioner at the customer service desk where there is a computer and cash register. Id. at 47. Ms. Faidy testified that she was talking to another associate at the customer service desk when Petitioner was there. Id. at 47. Ms. Faidy testified that Petitioner had her purse underneath the customer service desk and that Petitioner was "with the supervisor who was explaining… the department details to her." Id. at 18. Ms. Faidy testified she took Petitioner to another room to finish the paperwork and background check, but Petitioner was locked out of her account. Id. at 19. Ms. Faidy testified that the last step before being hired was the background check. Id. at 20-22.

Ms. Faidy testified that training does not occur until a person has been hired into Respondent's system as an employee. Id. at 57. Ms. Faidy testified that Respondent pays for training services, and if Petitioner was being trained, Petitioner would be paid. Id. at 50. Ms. Faidy initially testified that if another employee taught Petitioner how to use the computer, she would not consider that training. Id. at 51. However, Ms. Faidy later testified that if Petitioner was taught how to use a computer, she would consider that training. Id. at 53. Ms. Faidy did clarify that an associate does not have access to a computer until after they're being hired because that's when a user ID and a password is established for that associate. Id. at 51.

CONCLUSIONS OF LAW

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

Issue B, whether there was an employee-employer relationship, the Arbitrator finds as follows:

Under the Illinois Workers' Compensation Act, the term "employee" includes "every person in the service of another under any contract of hire, express or implied, oral or written…" 820 ILCS 305/1(b)(2). The term "employee," for purposes of the Act, should be broadly construed. Ware

v. Industrial Comm'n, 318 Ill. App. 3d 1117, 1122, 743 N.E.2d 579, 583 (1st Dist. 2000) citing Chicago Housing Authority v. Industrial Comm'n, 240 Ill. App. 3d 820, 822, 181 Ill. Dec. 312, 608 N.E.2d 385 (1992). Service is defined as the action of helping or doing work for someone. (Marriam-Webster, 2022).

While Petitioner referred to December 17, 2021 as orientation day, little foundation was laid as to who told Petitioner she would be attending orientation on December 17, 2021 and who said she would be paid for her time at the store on December 17, 2021. Petitioner was not paid for her time at the store on December 17, 2021 and never completed her online paperwork, thus preventing her from completing a background check and drug test. Petitioner stated that she never heard back from Respondent and was unable to contact them (although she did not clarify who she tried to contact). Ms. Faidy testified that employees are paid for orientation/training, but Petitioner was not at the store for orientation/training on December 17, 2021. Instead, Petitioner was there to complete the last steps of Respondent's hiring process (the background check and drug test).

Petitioner testified that she toured the store with a female manager and ended up at cashiering. Petitioner stated that the manager stepped away but told the cashier to train Petitioner on the computer. Petitioner testified that she watched the cashiering but "we didn't get much because she had a customer." Tx1 at 29. Petitioner stated, "So the other associate took it upon herself to start training me and start telling me things that I needed to know about what to put in the computer…" Id. at 29. Ms. Faidy provided conflicting testimony as to whether she would consider that training. See Tx2 at 51, 53.

Petitioner did not specify whether she was using the computer herself or merely watching the cashier as the cashier showed her the process of entering merchandise into the computer. Ms. Faidy stated that an "associate does not have access to a computer until after they're being hired because that's when a user ID and a password is established for that associate." Id. at 51. Although watching the cashier as she showed Petitioner the computer process is a benefit to Respondent, the Arbitrator does not find that Petitioner was helping or doing work for someone, thus, was not in service of another.

Respondent's offer of employment was conditional on Petitioner passing a background test and drug screen. Petitioner's online application stated, "I understand that any offer of employment is a conditional offer of employment pending pre-employment requirements …and submitting to, and passing, a drug screen." Rx 1b. Petitioner was aware that she had not yet completed the background check and drug screen. Petitioner knew she had not finished the final online documents as she was locked out of her account and had to try again at home, although unsuccessful. Petitioner was on the verge of completing all the required steps needed to begin her employment but did not "cross the finish line" so to speak.

Taking the entire record into consideration, the Arbitrator finds that Petitioner has failed to meet her burden in proving by a preponderance of the evidence that an employee-employer relationship between Petitioner and Respondent existed on December 17, 2021.

It is so ordered:

Arbitrator Rachael Sinnen

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC025057
Case Name	Bryant Diggs v. Aerotek
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0333
Number of Pages of Decision	10
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	John Winterscheidt
Respondent Attorney	Steven J. Costello

DATE FILED: 8/2/2023

/s/ Deborah Baker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF)
JEFFERSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

BRYANT DIGGS,

Petitioner,

vs. NO: 21 WC 25057

AEROTEK,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, Petitioner's entitlement to incurred medical expenses, and Petitioner's entitlement to prospective medical care, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill. 2d 327, 399 N.E.2d 1322 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 6, 2022 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the reasonable and necessary medical expenses detailed in Petitioner's Exhibit 8, as provided in §8(a), subject to §8.2 of the Act. Respondent shall be given a credit for medical benefits that have been paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall provide and pay for the prospective medical treatment including, but not limited to, the left elbow surgery as recommended by Dr. Robert Bell, as provided in §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall receive credit for TTD benefits paid in the amount of $3,484.76.

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.

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $21,100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

August 2, 2023

/s/ *Deborah J. Baker*

DJB/lyc

O: 7/26/23

43

/s/ *Stephen J. Mathis*

/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC025057
Case Name	Bryant Diggs v. Aerotek
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	7
Decision Issued By	William Gallagher, Arbitrator

Petitioner Attorney	John Winterscheidt
Respondent Attorney	Steven J. Costello

DATE FILED: 9/6/2022

/s/William Gallagher, Arbitrator
Signature

INTEREST RATE WEEK OF AUGUST 30, 2022 3.23%

STATE OF ILLINOIS)
)SS.
COUNTY OF JEFFERSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Bryant Diggs
Employee/Petitioner

Case # 21 WC 25057

v.

Consolidated cases: n/a

Aerotek
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Mt. Vernon, on July 27, 2022. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, June 3, 2020, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $31,192.02; the average weekly wage was $599.85.

On the date of accident, Petitioner was 27 years of age, single with 0 dependent child(ren).

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

Respondent shall be given a credit of $3,484.76 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $3,484.76.

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

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 8, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

Respondent shall authorize and pay for prospective medical treatment including, but not limited to, the left elbow surgery as recommended by Dr. Robert Bell.

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

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

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

William R. Gallagher, Arbitrator **September 6, 2022**

ICArbDec19(b)

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained an accidental injury arising out of and in the course of his employment by Respondent on June 3, 2020. The Application alleged Petitioner sustained an injury to his "Left elbow and arm and body as a whole" when he was "Injured while using pallet jack" (Arbitrator's Exhibit 2). This case was tried in a 19(b) proceeding and Petitioner sought an order for payment of medical bills as well as prospective medical treatment. The prospective medical treatment sought by Petitioner was left elbow surgery as recommended by Dr. Robert Bell, an orthopedic surgeon. Respondent disputed liability on the basis of causal relationship (Arbitrator's Exhibit 1).

Petitioner became employed by Respondent in November, 2019, and worked as a warehouse associate. Petitioner moved inventory in a warehouse with a pallet jack, which he described as a manually operated hydraulic forklift which was operated by pushing down on its handle with both arms.

On June 3, 2020, Petitioner was operating a pallet jack when he experienced a "pop" and immediate onset of pain in his left elbow. The accident was reported to Respondent the same day it occurred. Petitioner testified he never previously sustained an injury to his left elbow or received medical treatment for any left elbow/arm symptoms.

Respondent directed Petitioner to go to Gateway Occupational Health where he was evaluated by Mitra Schulzt, a Physician Assistant, on June 5, 2020. Petitioner informed PA Schultz of the accident and complained of pain in the left elbow. PA Schultz diagnosed Petitioner with medial epicondylitis and gave Petitioner an elbow strap, directed him to take over-the-counter pain medication and advised Petitioner to limit the use of his left arm (Petitioner's Exhibit 1).

When Petitioner was subsequently seen by PA Schultz on July 1, 2020, Petitioner continued to complain of left elbow pain. PA Schultz ordered an MRI scan of Petitioner's left elbow (Petitioner's Exhibit 1).

The MRI scan was performed on July 18, 2020. According to the radiologist, the MRI revealed distal triceps insertional tendinopathy without discrete tendon tear and olecranon-humeral osteoarthritis. The report did not make any reference to the lateral collateral ligament (Petitioner's Exhibit 2).

PA Schultz saw Petitioner on July 21, 2020, and reviewed the MRI scan. She referred Petitioner to Dr. Lyndon Gross, an orthopedic surgeon (Petitioner's Exhibit 1).

Petitioner was evaluated by Dr. Gross on July 23, 2020. At that time, Petitioner informed Dr. Gross of the accident and complained of pain in the lateral aspect of the left elbow. Dr. Gross diagnosed lateral epicondylitis, administered an injection into the elbow and authorized Petitioner to return to work with a 10 pound lifting restriction (Petitioner's Exhibit 3).

Petitioner testified the injection did not help and his left elbow symptoms worsened. Dr. Gross ordered physical therapy. When he saw Petitioner on August 10, 2020, Petitioner continued to

complain of left elbow pain as well as a burning sensation in his upper/lower arm. Dr. Gross referred Petitioner to Dr. Daniel Phillips for EMG/nerve conduction studies (Petitioner's Exhibit 3).

The EMG/nerve conduction studies were performed by Dr. Phillips on August 24, 2020. Dr. Phillips opined the diagnostic studies were normal (Petitioner's Exhibit 4).

Dr. Gross evaluated Petitioner on August 24, 2020, and reviewed the EMG/nerve conduction studies. He opined Petitioner did not need any further treatment and released Petitioner to return to work without restrictions (Petitioner's Exhibit 3).

Petitioner returned to work for Respondent, but his job duties consisted primarily of driving a forklift. Petitioner subsequently obtained employment with Worldwide Technology. Petitioner continued to experience left elbow symptoms; however, Petitioner deferred seeking any medical treatment until his medical insurance at Worldwide Technology became effective.

On June 7, 2021, Petitioner sought treatment at Med Express because of his left elbow pain. He was diagnosed with lateral epicondylitis and referred to Dr. Robert Bell, an orthopedic surgeon (Petitioner's Exhibit 5).

Dr. Bell evaluated Petitioner on June 15, 2021. He diagnosed Petitioner with lateral epicondylitis and ordered an MRI scan of Petitioner's left elbow (Petitioner's Exhibit 6).

The MRI scan was performed on July 1, 2021. According to the radiologist, the MRI did not identify the lateral collateral ligament, but noted that it showed "correlate for physical examination consistent with a lateral collateral ligament injury." The MRI also revealed evidence of residuals of extensor tendinitis tendinopathy (Petitioner's Exhibit 7).

Dr. Bell saw Petitioner on July 6, 2021. He reviewed the MRI and opined it showed what might be a tear of the lateral collateral ligament. He also noted Petitioner's complaints and findings on examination were consistent with a tear of the lateral collateral ligament. Dr. Bell recommended Petitioner undergo surgery consisting of either a repair or reconstruction of the lateral collateral ligament (Petitioner's Exhibit 6).

At the direction of Respondent, Petitioner was examined by Dr. Timothy Farley, an orthopedic surgeon, on September 24, 2021. In connection with his examination of Petitioner, Dr. Farley reviewed medical records and diagnostic studies provided to him by Respondent. Dr. Farley opined there were no positive objective findings indicative of pathology in Petitioner's left elbow. He also opined the MRI scan did not reveal any evidence of ligamentous or tendinous pathology. He opined no further treatment was indicated and Petitioner could work without restrictions (Respondent's Exhibit 1; Deposition Exhibit 2).

Dr. Bell was deposed on May 17, 2022, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Bell's testimony was consistent with his medical records and he reaffirmed the opinions contained therein. Specifically, Dr. Bell testified Petitioner had sustained an injury to the lateral collateral ligament as a result of the work-related accident. In

regard to the MRI scan he ordered, Dr. Bell testified the scan appeared to reveal a tear in the midsubstance of the lateral collateral ligament. He also noted the insertion looked a little thickened (Petitioner's Exhibit 9; pp 7-9).

On cross-examination, Dr. Bell was interrogated about the MRI of July 1, 2021, and he reaffirmed his opinion it revealed a tear of the lateral collateral ligament. In explaining his opinion, Dr. Bell testified he discussed the MRI film with the radiologist and the radiologist agreed that the MRI revealed findings suggestive of a tear. Further, Dr. Bell testified that lateral collateral ligaments are difficult to see and MRIs are only 50% sensitive and specific for visualizing the lateral collateral ligament, as opposed to being 90% sensitive and specific for viewing the ulnar collateral ligament (Petitioner's Exhibit 9; pp 18-21).

Dr. Farley was deposed on June 28, 2022, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Farley's testimony was consistent with his medical report and he reaffirmed the opinions contained therein. Specifically, Dr. Farley testified he did not find any objective signs of pathology in his examination of Petitioner's left elbow. He also noted there was nothing acute observed in the MRI scan that was performed a few weeks after the accident. He stated there was no need for any further treatment (Respondent's Exhibit 1; pp 26-30).

On cross-examination, Dr. Farley agreed that sometimes, the lateral collateral ligament is not well visualized in an MRI scan. He testified the lateral collateral ligament can be seen, but it is necessary to go through different planes through different visions (Respondent's Exhibit 1; pp 37-38).

At trial, Petitioner testified he still has ongoing complaints and would like to proceed with the surgery recommended by Dr. Bell.

Conclusions of Law

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

The Arbitrator concludes Petitioner's current condition of ill-being is causally related to the accident of June 3, 2020.

In support of this conclusion the Arbitrator notes the following:

There was no dispute Petitioner sustained a work-related injury to his left elbow on June 3, 2020.

Petitioner's testimony that he had no injuries or medical treatment to his left elbow prior to the accident of June 3, 2020, was credible and unrebutted.

Petitioner's testimony that he has had ongoing left elbow symptoms since the accident of June 3, 2020, was credible.

Dr. Bell, Petitioner's primary treating physician, diagnosed Petitioner with lateral epicondylitis and a tear of the lateral collateral ligament. Dr. Bell's opinion was based upon his findings on clinical examination and his review of the MRI of July 1, 2021. Further, Dr. Bell discussed the MRI

findings with the radiologist who performed the MRI who agreed with Dr. Bell that there was a tear of the lateral collateral ligament.

Dr. Bell testified a tear of the lateral collateral ligament can be difficult to visualize in an MRI scan because MRIs are 50% sensitive and specific for visualizing the lateral collateral ligament.

Respondent's Section 12 examiner, Dr. Farley, testified there was no objective evidence of an injury to the left elbow and that there was no pathology of the lateral collateral ligament. However, Dr. Farley agreed that it can be difficult to visualize the lateral collateral ligament in an MRI scan.

Based on the preceding, the Arbitrator finds the opinion of Dr. Bell be more persuasive than that of Dr. Farley in regard to medical causality.

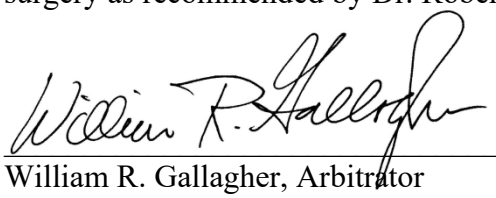
In regard to disputed issue (J) the Arbitrator makes the following conclusion of law:

Based upon the Arbitrator's conclusion of law in disputed issue (F) the Arbitrator concludes that all of the medical treatment provided to Petitioner was reasonable and necessary and Respondent is liable for payment of the medical bills incurred therewith.

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 8, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

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

Based upon the Arbitrator's conclusion of law in disputed issue (F), the Arbitrator concludes Petitioner is entitled to prospective medical treatment including, but not limited to, the left elbow surgery as recommended by Dr. Robert Bell.



William R. Gallagher, Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC010792
Case Name	Oknam Kwon v. United Airlines Inc
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0334
Number of Pages of Decision	17
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Brian McManus, Jr.
Respondent Attorney	Karen Coon

DATE FILED: 8/3/2023

/s/Maria Portela, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

OKNAM KWON,

Petitioner,

vs. NO: 21WC 10792

UNITED AIRLINES, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 11, 2022, 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 $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

August 3, 2023
O061323
MEP/yp
051

/s/ *Maria E. Portela*
Maria E. Portela

/s/ *Amylee H. Simonovich*
Amylee H. Simonovich

/s/ *Christopher A. Harris*
Christopher A. Harris

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC010792
Case Name	KWON, OKNAM v. UNITED AIRLINES, INC.
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	14
Decision Issued By	Steven Fruth, Arbitrator

Petitioner Attorney	Brian McManus, Jr.
Respondent Attorney	Karen Coon

DATE FILED: 5/11/2022

THE INTEREST RATE FOR THE WEEK OF MAY 10, 2022 1.38%

/s/Steven Fruth, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Oknam Kwon
Employee/Petitioner

Case # **21 WC 10792**

v.

Consolidated cases:

United Airlines, Inc.
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Steven Fruth**, Arbitrator of the Commission, in the city of **Chicago**, on **November 30, 2021.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other

FINDINGS

On the date of accident, **July15, 2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**71,397.59**; the average weekly wage was **$1,373.03**.

On the date of accident, Petitioner was **59** years of age, ***single*** with **0** dependent children.

Per the parties' agreement, medical benefits are not at issue.

ORDER

Because the Arbitrator finds the accident did not arise out of and in the course of the employment, all benefits are denied.

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

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

_____ **MAY 11, 2022**

Signature of Arbitrator

Oknam Kwon v. United Airlines
21 WC 10792

INTRODUCTION

This matter proceeded to hearing before Arbitrator Steven Fruth. The disputed issues were: ***C:*** Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?; ***F:*** Is Petitioner's current condition of ill-being causally related to the accident?; ***G:*** What were Petitioner's earnings?; ***K:*** What temporary benefits are in dispute? TTD; ***M:*** Should penalties be imposed upon Respondent?

Petitioner claims an AWW of $1,667.55, which Respondent disputes. Respondent claims an AWW of $1,373.03.

FINDINGS OF FACT

Jeffrey Heisey testified on behalf of Petitioner. He is currently a flight attendant for Respondent United Airlines ("United") and is also a national elected officer for the United Airlines Flight Attendants Union serving as MEC Secretary-Treasurer. Mr. Heisey engages with United Airlines on behalf of the union in terms of contract enforcement issues that arise. Prior to being Secretary-Treasurer of the union Mr. Heisey worked on the Schedule Committee which would interface with United in all facets of flight attendant schedules.

Mr. Heisey is very familiar with the reserve provision of the collective bargaining agreement. On July 15, 2018 United flight attendants were working under the collective bargaining agreement that covered 2012-2016.

On July 14, 2018 Ms. Kwon was working as a "call-in reserve". Mr. Heisey testified that reserves are very important to Respondent as they cover for flight attendants that are sick or on vacation. Reserves are divided into two categories: call-in and ready. A call-on reserve, which Ms. Kwon was on July 14, 2018, has a responsibility to call United the night before their assignment. They would call a recording, and would get an assignment that said one of three things: "You are released for the day", which means they had no obligation but to call again for assignment the next night if they were on reserve; "You are assigned a specific pairing", which is a trip sequence of segments that says you will fly these places with these layovers and you'll be back by a certain time; or the third, assigned "ready reserve", which meant that they would be available on call.

Mr. Heisey testified Petitioner was a "ready reserve", meaning that she is converted to be available for working status between 12:00 a.m. through 12:00 p.m. on July 15, 2018. The term "converted" means the flight attendant needs to be ready, available, and

reachable during the particular 24-hour period. When converted the flight attendant needs to be able to get to the airport within 4 hours of being called in.

There is a section of the collective bargaining agreement entitled "reserve minimum guarantee." The "reserve minimum guarantee" speaks to how a reserve is compensated for the work they do for the corporation for the month they are on reserve". Mr. Heisy testified a reserve flight attendant for the month is guaranteed to receive 78 hours of pay during the reserve month, or the greater of what hours they actually fly. For example, if Ms. Kwon only flew 23 hours in the month of July 2018, she would be paid an additional 55 hours even though she did not actually fly those 55 hours due to her reserve status and the terms of the "reserve minimum guarantee." "If they're released every day by the company, the company says we don't need you any of those days, they are paid 78 hours."

Mr. Heisey testified a reserve a flight attendant has the additional responsibility to be available to the company to be called anytime or anywhere and to be able to be at the airport in 4 hours. A flight attendant would get paid by the company if not called into work while on reserve, the reserve minimum.

The collective bargaining agreement recognized that reserve flight attendants have to be available in unusual hours. As such it was negotiated that when a flight attendant needs to get to an airport in the early morning hours for the safety of the flight attendant, there is a provision that provides reimbursement for travel expenses.

Mr. Heisey explained page 40 of Respondent's Exhibit #2 (RX #2), which explains the transportation aspects for flight attendants on reserve. §5D 2(a) specifically says a flight attendant will be allowed $10 dollars for cab or limousine between the airport or co-terminal or place of lodging at domicile points whenever departure time of her/his flight assignment is between 10:00 p.m. and 8:00 p.m. and 6:00 a.m. In Ms. Kwon's instance, based upon the fact that she had a 6:30 a.m. show up time, she was eligible for the transportation reimbursement because the check-in time was between 10:00 p.m. and 8:00 a.m.

Mr. Heisey continued, in a section that admittedly does not apply to Petitioner, namely §5 D (3) states, "A flight attendant shall be reimbursed for actual expenses for cab transportation to the airport when the reserve flight attendant determines transportation is necessary in order to respond to a call of less than 3 hours before report."

Mr. Heisey further testified that reserve override pay is a compensation United provides to reserve flight attendants ($2 dollars extra per hour) when the flight attendant is on reserve.

Mr. Heisey also testified that "converted" reserves are very important to United Airlines because it makes sure that flight attendants are available in an expedited fashion. In a lot of instances there is an FAA minimum crew requirement, and the airplanes cannot depart without the requisite amount of crew; reserve flight attendants are critically important to United for crew staffing. The provision of the collective bargaining agreement ($10 dollar reimbursement) contemplates a flight attendant needs to get to an airport quickly and at odd hours, just like Ms. Kwon's situation.

Mr. Heisey testified when a flight attendant is on ready reserve they are not able drink during the 24 hours of that day. There is also an expectation of the flight attendant that he or she can come to the airport on a short notice and complete any assignment given during the time period, be it domestic or international.

Mr. Heisey testified §5 D of RX #2 provides a twofold provision that benefits both United and the employee. This section was put into place to ensure that flight attendants arriving in the very late evening hours or early morning hours have necessary support to safely get to and from work and also an ability to expedite their transportation to work to help the company, both the Flight Attendant Union and United had an interest in both.

Mr. Heisey added that in July 2018 if you are a reserve flight attendant and you flew 0 hours for the month you are paid the 78-hour reserve minimum plus the $2 dollar per hour override. The flight attendant will receive full pay for flight time if they actually fly more than 78 hours during the month on reserve. This is because as a reserve, part of the work is being available when the company needs you.

Petitioner Oknam Kwon testified she has been employed by United Airlines as a flight attendant for the last 24 years. She had never injured her left leg until July 15, 2018. On July 15 Petitioner was a full-time flight attendant, based in Chicago, and was at that time on "ready reserve" status. On July 15 Petitioner called United and was converted to ready reserve status, meaning she had to be available to be at the airport within 4 hours between 12:00 p.m. on July 15 through 12:00 a.m. on July 15.

Petitioner testified United Crew Scheduling called her around 1:30 a.m. on July 15, 2018 and informed her to be at O'Hare by 6:55 a.m. for a two-day trip. She tried to sleep and was awake by 4:30 a.m. She then packed her bag and went outside her Chicago

condominium by 5:30 a.m. Petitioner was in uniform with all her duty items and United required baggage.

Petitioner asked the doorman to call a cab, but the cab did not show up. When a cab did not show up she called for an Uber. She testified that she did not remember falling but guessed she fell down.

Petitioner was taken to the emergency room at Northwestern Memorial Hospital and was admitted for surgery. On July 16, 2018, she underwent an open reduction and internal fixation of left intra-articular distal femur fracture and retrograde intramedullary nailing of the left femoral shaft fracture performed by Dr. Bradley Merk (PX #1).

Dr. Merk saw Petitioner in follow up on July 31, 2018. New X-rays of the left femur showed stable alignment without evidence hardware failure. Staples were removed and steri-strips were applied. The plan was to continue inpatient therapy at Shirley Ryan Ability Lab ("Shirley Ryan") and a follow-up in 4 weeks (PX #4).

Petitioner saw Dr. Merk again on August 14, 2018 for post-surgery status. It was noted that after being discharged from Shirley Ryan on August 11, 2018, she was injured when a friend was pushing her in a wheelchair and while exiting an elevator her foot became stuck on the side of the elevator (PX #4). She complained of significant pain and increased soft tissue swelling at the left knee. Petitioner had previously discontinued the knee immobilizer but was wearing it again after this recent injury. X-rays showed the hardware in stable position and the alignment was excellent. The examination was noted as benign after the increased pain after the elevator incident, with no evidence of acute injury. The plan was to continue physical therapy and return in 2-3 weeks.

On August 29, 2018, Petitioner returned to Dr. Merk and reported she continued to attend outpatient physical therapy at Shirley Ryan and was using a wheelchair to move around due to the walker causing pain in her hands. X-rays showed the hardware in position, alignment well maintained and evidence of progressive healing of the femoral shaft component.

Petitioner followed up with Dr. Merk on October 9, 2018. X-rays showed the hardware in stable position and appropriate progression of healing. Petitioner continued to attend therapy and use a walker and, at times, a wheelchair at home. She was to continue therapy with aqua therapy and remain off work.

By November 6, 2018, Petitioner reported her pain was improved and that she was walking better but was still using a walker in public although not at home. X-rays showed interval healing at the fracture site and hardware in position. On December 4, 2018, Dr. Merk noted she was doing well and progressing in therapy, with minimal pain reported.

Petitioner was now using a cane for ambulation. The hardware remained in good position.

Dr. Merk noted on January 9, 2019 that Petitioner denied any pain and had returned to all of her activities. X-rays showed the fracture healed with the hardware in stable position. Petitioner was to continue weight bearing and activities as tolerated and to return in 2-3 months. On January 9, 2019, Petitioner was released to return to work at full duty by Dr. Merk.

Petitioner followed up with Dr. Merk on April 9, 2019 and reported she had been doing well overall apart from some stiffness in the morning. X-rays showed excellent healing of the distal femoral fracture without displacement of the articular segment or hardware. When she returned to Dr. Merk on July 16, 2019, she reported she was doing well but was not back to all activities she would like, as the knee was still a little stiff. X-rays showed stable positioning of the hardware and no radiolucencies. Examination showed nearly full range of motion on the left compared to the right side but with subjective stiffness and Petitioner was not quite happy with the results. She was advised to continue pursuing activities including running and to return as needed.

Petitioner returned to Dr. Merk on July 14, 2020 and reported some local discomfort at the lateral iliotibial band with flexion and extension, which the doctor noted appeared to be caused by a screw. Petitioner had otherwise recovered well and had resumed her activities. X-rays showed the fracture healed without any arthritic degeneration and the implant in stable position. The option of screw removal was discussed Petitioner and she was advised to return as needed.

Petitioner called Dr. Merk's office on July 28, 2020 to go over the X-rays from the last visit and to ask about removal of hardware. The doctor's office informed Petitioner the decision on removal would be based on how she feels.

Petitioner presented to Dr. Merk again on May 5, 2021 and reported some crepitation and discomfort in the area of her iliotibial band, particularly when using a stationary bike but also problematic with other exercises, although she had not changed her activities and was working. The examination showed an area of presumed screw prominence and some reproducible crepitation rubbing the iliotibial band. X-rays showed the fracture well healed with the hardware in stable position. The impression was potentially symptomatic hardware and some local bursitis or tendinitis in the area of the iliotibial band. Petitioner opted for a steroid injection, which was administered at the left knee. Physical therapy or removal of the screw pending symptoms were considered.

On July 14, 2021, Petitioner returned to Dr. Merk and reported she had been having some medial left knee pain worse with knee flexion and extension. X-rays showed

transverse screws outside of the nail fixating the intra-articular fracture. The plan was to schedule removal of the hardware.

On August 3, 2021, Petitioner followed up with Dr. Merk status-post removal of two distal interlocking screws from the left knee which were causing some local mechanical irritation, with petitioner now reporting some increased pain, stiffness and swelling about the knee since the surgery. Petitioner requested additional physical therapy. X-rays showed interval removal of the two distal interlocking screws and no evidence of any new bony abnormality or hardware failure. The plan was to start outpatient physical therapy, to remain off work until August 23, and to return in four weeks. Petitioner was released to full duty work on September 13, 2021 (PX #4).

Robert Krabbe, Director of Labor Relations, Flight for United Airlines, testified on behalf of the respondent. Mr. Krabbe clarified the provision of the union contract which provide for partial reimbursement up to $10 for any flight attendant (reserve or lineholder) who needs to get to work for flights during certain time periods.

CONCLUSIONS OF LAW

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

On July 15, 2018 Petitioner was working as a reserve flight attendant, which is similar to being on call. At 1:30 a.m. she received notification from the employer that she would need to report to O'Hare at 6:55 a.m. for a flight. When she left her home, she was initially unable to get a cab and called an Uber. As she was waiting for the Uber, she fell.

The Arbitrator finds that Petitioner failed to prove that she was injured in an accident that arose out of or in the course of her employment. Petitioner was outside her home and was simply commuting or "coming and going" to her job as a flight attendant at the time of the injury. She had not yet reached her domicile airport and was not traveling for work at the time of the occurrence. The general rule is that an injury incurred by an employee in going to or returning from his place of employment does not arise out of or in the course of the employment. C*ommonwealth Edison Co. v. Industrial Comm'n*, 86 Ill. 2d 534 (1981). Although Petitioner is a traveling employee, there is no exception available to Petitioner which brings the regular commute within the scope of the Act.

A traveling employee is one who is required to travel away from the employer's premises in the performance of his or her job duties. Traveling employees are afforded increased protection under the Act to account for the hazards encountered while traveling. While in general an employee is not in the course of their employment while going to and coming home from work, a traveling employee may be covered from door to

door. In *Urban v. Industrial Comm'n*, 34 Ill.2d 159 (1966), the Court held that a traveling salesperson was in the course of his employment from the time he left his home until he returned, on the basis that the going to and coming from work could not be separated from actually calling on a customer. The petitioner in that case did not have an office he worked out of but would travel directly from his home to sales calls. This does not apply, however, when a traveling employee is simply on the regular commute to a fixed place of employment.

A traveling employee is one who is engaged in "work travel" rather than one who is commuting or traveling "to and from" their employment. An injury suffered by a traveling employee is compensable if the injury occurs while the employee is traveling for work, i.e., during a work-related trip. However, the work-related trip at issue must be more than a regular commute from the employee's home to the employer's premises.

Employers are not insurers for circumstances which are purely in the control of the employee. Employees have freedom over where they live and how they get to work. The impact of an employee's freedom of choice and the employer's corresponding lack of control over such issues as where an employee lives and how they get to work were discussed at length in The *Venture-Newberg-Perini, Stone & Webster v. IWCC (Ronald Daughtery),* 2013 IL 115728. In that case, the petitioner, Ronald Daugherty, was a pipefitter who accepted a temporary position 200 miles from his home in Springfield. To facilitate this work, the claimant obtained a motel room 30 miles from the job site. He was injured while driving with another employee to the jobsite from the hotel. The Supreme Court found the petitioner was not a 'traveling employee' at the time of the injury and denied petitioner benefits. The Court explained that the reason behind this is that "the employee's trip to and from work is the product of his own decision as to where he wants to live, a matter in which his employer ordinarily has no interest."

The issue of commuting for traveling employees with reference to flight attendants was addressed in *United Airlines, Inc. v. IWCC (Kristine Isern)*, 2016 IL App (1st) 151693WC. Ms. Isern was a flight attendant who lived in Denver but was domiciled for work in New York (LGA). Ms. Isern was injured while on a flight from her home in Denver to New York. The petitioner was scheduled to work a flight out of New York the following morning. The Appellate Court held that a flight attendant traveling to her work domicile is commuting and was not in the course of her employment and covered under the Act until she reaches her domicile. The Court held that even for a traveling employee, the regular commute to the employment premises is not covered under the Act. Ms. Isern was not a traveling employee at the time of the accident as her time and method of travel was a matter of choice made for her own personal benefit and the employer derived no benefit from her choices. The fact Ms. Isern was on a fee-waived United Airlines flight at the time of the accident did not bring the commute within the scope of the employment.

The Appellate Court in *United Airlines, Inc.* (*Isern)* specifically addressed the issue presented of a flight attendant being injured while driving to work at an airport in the same city when looking at compensability. They pointed out that, "[A] United flight attendant with JFK airport as his or her base airport and who permanently resides in the New York City area would not be entitled to benefits as a traveling employee if he or she is injured during his or her regular commute to the airport. Likewise, a United flight attendant based out of the same airport should not qualify as a traveling employee if she is injured in her regular commute to JFK airport merely because she chose to live in Colorado instead of New York City and had a longer commute.

The general rule is that an injury incurred by an employee in going to or returning from his place of employment does not arise out of or in the course of the employment. C*ommonwealth Edison Co. v. Industrial Comm'n (Patricia Aulich)*, 86 Ill. 2d 534 (1981). An exception to this general rule exists where the employer, for its own benefit, provides the employee with the means of transportation to and from work. *Beattie v. Industrial Comm'n*, 276 Ill. App. 3d 446 (1995). Petitioner argues that her eligibility for partial reimbursement of up to $10 for her Uber to the airport brings the commute within the protections of the Workers' Compensation Act. The reimbursement of partial travel expenses also does not make Petitioner a traveling employee at the time of the occurrence, notwithstanding the acknowledged relative safety of that means of transport. Nor does the fact that there was a guaranteed minimum for reserve flight attendants create liability for anything which occurs while flight attendants are on reserve.

Reimbursement for travel expenses was once considered by the courts to be an exception to the "coming and going rule." However, the Supreme Court in *Commonwealth Edison Co. (Aulich)* distinguished between compensation for travel expenses, and compensation for travel time, holding that only the latter arrangement may suggest that the employee was traveling in the course of employment. The rationale for this exception is that the making of this journey is a service for which the employee is being compensated. In this case, the petitioner was not compensated for her time spent traveling to and from work. Flight attendants are only paid for "duty time", the time that they are working flights, and not while they are commuting to work. Per the union contract, the petitioner would have been reimbursed up to $10 under the union contract for transportation to the airport. Petitioner here may have been allowed reimbursement for her cab, but this does not bring the commute within the scope of the employment.

Neither does the minimum guarantee for reserve flight attendants bring the commute to work within the scope of the employment. A similar claim was asserted in *Martinez v. Industrial Comm'n,* 242 Ill. App. 3d 981 (4th Dist. 1994). In that matter the petitioner was a physician who was injured in an automobile accident while driving to the emergency room to cover a shift for another physician. Because of extra driving required in travel to one of the hospitals, the doctor's wage was inflated to account for the travel.

The Appellate Court denied compensation because the petitioner was paid only for the time that he was actually in the hospital. The Court noted that, "The rationale underlying the rule is that the employee's trip to and from work is the result of the employee's decision about where to live, which is a matter of no concern to the employer. Here, Petitioner was similarly not under the direction or control of her employer at the time of injury.

The Arbitrator finds the Supreme Court Rule 23 order in *Brustin v. IWCC*, 2021 IL App (1st) 200502WC-U (Rule 23) helpful, although not precedential. The petitioner, an attorney, fell at a bus stop waiting for a bus to go into work. The petitioner was rushing to his business office from his home to consult with a client. The Court found the case was not compensable. The petitioner argued that he was "on call" and described the suddenness and urgency resulting in his being called in to work. The Court pointed out that "on call" employees are not categorically exempt from the coming and going rule and that they would be compensated while doing their job and not while simply going to their job. The Court also distinguished the petitioner's claim from claims of police officers who are on call because the officers were already performing a service for their employer while traveling, they already were doing their job. The Court also examined whether the petitioner was on a special mission and found he was not because he was simply going to his office, which was hardly unusual. He took this same journey 6 days a week normally. Nor was there anything particularly onerous about the journey. Similarly, Petitioner here was just on her regular commute to her domicile airport at the time of the occurrence.

The Arbitrator finds that the facts of this case do not fall within any exception which would bring the injury occurring on Ms. Kwon's regular commute to the airport within the coverage of the Act. Compensation is therefore denied, and all other issues are moot.

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

Based on the Arbitrator's finding that Petitioner failed to prove that she was injured in an accident that arose out of and in the course of her employment, this issue is moot.

G: What were Petitioner's earnings?

Based on the Arbitrator's finding that Petitioner failed to prove that she was injured in an accident that arose out of and in the course of her employment, this issue is moot.

K: What temporary benefits are in dispute? TTD

Based on the Arbitrator's finding that Petitioner failed to prove that she was injured in an accident that arose out of and in the course of her employment, this issue is moot.

M: Should penalties be imposed upon Respondent?

Based on the Arbitrator's finding that Petitioner failed to prove that she was injured in an accident that arose out of and in the course of her employment, this issue is moot.

Respondent disputed Petitioner's claim based on an assessment that Petitioner was not injured in an accident that arose out of and in the course of her employment. Even if Petitioner had sustained a compensable injury, based on the facts Respondent had a good faith basis for disputing Petitioner's claim. Both parties' arguments illustrated the fact-dependent nature of a travelling employee claim. There was evidence to support each argument despite the Arbitrator's finding there was insufficient evidence to support Petitioner's claim. Respondent's defense was neither frivolous nor vexatious nor intended to delay paying a compensable claim.

Steven J. Fruth, Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC011327
Case Name	Krista Seierup v, Baymont by Wyndham Peoria
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0335
Number of Pages of Decision	14
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Damon Young
Respondent Attorney	Charles Knell

DATE FILED: 8/3/2023

/s/Maria Portela, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KRISTA SEIERUP,

Petitioner,

vs. NO: 21WC 11327

BAYMONT BY WYNDHAM PEORIA,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, temporary total disability, permanent partial disability, Respondent's request to affirm the decision of the arbitrator, 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 August 3, 2022, 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 $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

August 3, 2023
O071123
MEP/yp

/s/ *Maria E. Portela*
Maria E. Portela

/s/ *Amylee H. Simonovich*
Amylee H. Simonovich

/s/ *Kathryn A. Doerries*
Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC011327
Case Name	Krista Seierup v. Baymont by Wyndham Peoria
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	11
Decision Issued By	Bradley Gillespie, Arbitrator

Petitioner Attorney	Damon Young
Respondent Attorney	Charles Knell

DATE FILED: 8/3/2022

THE INTEREST RATE FOR THE WEEK OF AUGUST 2, 2022 2.85%

/s/ Bradley Gillespie, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF **PEORIA**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

KRISTA SEIERUP
Employee/Petitioner

v.

BAYMONT BY WYNDHAM PEORIA
Employer/Respondent

Case # **21** WC **011327**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Arbitrator Bradley Gillespie**, Arbitrator of the Commission, in the city of **Peoria**, on **01/24/2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **March 4, 2021**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**23,288.72**; the average weekly wage was $**447.86**.

On the date of accident, Petitioner was **43** years of age, ***single*** with **3** children under 18.

Petitioner ***has not*** received all reasonable and necessary medical services.

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

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

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

ORDER

C. **Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?**

The Arbitrator finds and concludes that Petitioner failed to prove that she sustained an accident that arose out of and in the course of the Petitioner's employment by the Respondent on March 4, 2021.

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.

Bradley D. Gillespie **AUGUST 3, 2022**

Signature of Arbitrator

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KRISTA SEIERUP,	)	
Petitioner,	)	
	)	
Vs.	)	**Case No.: 21WC011327**
	)	
BAYMONT BY WYNDHAM PEORIA,	)	
Respondent.	)	

DECISION OF THE ARBITRATOR

FINDINGS OF FACT

On or about April 29, 2021, Krista Seierup [hereinafter "Petitioner"] filed an Application for Adjustment of Claim alleging injuries to her back while employed by Baymont by Wyndham Peoria [hereinafter "Respondent"] on March 4, 2021. (PX #1) The question, " How did the accident occur?" on the Application for Adjustment of Claim was answered: "Cleaning Lobby." *Id.*

This claim proceeded to hearing on January 24, 2022, in Peoria, Illinois. (Arb. Ex. 1) The following issues were in dispute at arbitration:

- Accident;
- Causal Connection;
- Medical Expenses;
- TTD; and
- Nature and Extent of Injuries.

In March of 2021, Petitioner was employed by Respondent as a night desk auditor/night desk clerk. (Tr. p. 12) Her duties included cleaning the lobby, returning refunds, checking people in, checking rooms to give back refunds and making breakfast in the morning. *Id.* Petitioner testified that she had worked there approximately 8 months. *Id.* Petitioner testified that on March 4, 2021, she was about two hours into her shift, and she was cleaning the bathroom and collapsed to the floor when she stood up. (Tr. p. 13) She stated that she experienced a "shock of pain in my back and I couldn't move." *Id.* She testified she was mopping the floor at the time.

Petitioner's counsel asked Petitioner whether mopping the floor caused her to have low back pain. She replied that she dropped something, went to pick it up, and had sharp pain in her back making her fall to the floor. (Tr. p. 13) Petitioner testified that she called her manager, Sean to report the incident. (Tr. p. 14) She indicated that he came back to the hotel to relieve her so that she could go to the hospital. *Id.* Petitioner testified that she went to Proctor Hospital/UnityPoint. (Tr. p. 14; PX #2)

When asked about what history she provided to the hospital, Petitioner testified that she told them she had fallen down at work. (Tr. p. 14) She stated that she told them about her previous accident to make sure that everybody knew about it. (Tr. pp. 14-15) Petitioner testified that five years before, she was in a car accident that left her pretty much completely disabled and it took her three years and lots of physical therapy to get back to where she was. (Tr. p. 15)

Petitioner testified that she had been wrestling with her daughter several days before the incident. *Id.* She explained that she has three daughters, and they were wrestling around, and her back was sore all week at work. *Id.* Petitioner indicated that she had been wrestling with her daughters three days prior to March 4, 2021. (Tr. p. 16) Petitioner claimed that she was sore the first day back to work but that it was getting better all week. *Id.* Petitioner testified that her symptoms around the time of the bathroom cleaning incident on March 4, 2021, were like she had been to the gym and overworked herself the day before. *Id.*

Petitioner testified that she received medications and she underwent an x-ray. (Tr. p. 17, (PX #2) She stated that the emergency room made an appointment for her to see a spine specialist. (Tr. p. 17) Emergency room records provide a history of her prior back injury from an automobile accident, wrestling with her daughter on Tuesday and her pain being exacerbated by bending over and standing up after cleaning a toilet. (PX #2, p. 3) She reported symptoms in her lumbar spine, along with pain into her left posterior upper leg. *Id.*

On March 8, 2021, she returned to the emergency room at Proctor Hospital/UnityPoint. (PX #2, p. 71) When asked if she was still complaining of low back pain, she denied that was the reason for her follow up appointment. (Tr. p. 17) Petitioner testified that the reason she went back to the emergency room the second time was for tests and the primary reason was because one of the prescriptions they gave her, she was unable to fill. (Tr. pp. 17-18) Records show that she was still reporting sharp pain over her lower back, made worse with movement, bearing down, and certain positions. (PX #2, p. 71) The history shows that she had a positive pregnancy test and confirmation was needed before more medicines could be prescribed. *Id.*

Petitioner testified that she saw an orthopedist on April 5, 2021. (Tr. p. 18) Her medical records show that she was evaluated by Van Allen, M.D. at Perry Memorial Hospital Orthopedic Clinic. (PX #3 p. 1) Petitioner stated that she gave a history to the doctor about what happened prior to what happened at work and what happened at work. (Tr. p. 19) However, the history states that she does not recall any onset traumatic event. (PX #3, p. 1) Dr. Allen recommended against any further work up since she appeared to be improving. (PX #3, p. 2) Petitioner testified that after that visit she was feeling fine. (Tr. p. 19) She stated that her back was fine on the day of the trial. *Id.*

Petitioner testified that, "My only main problem is something that I've had since the accident, I can only sit for so long and then I have to stand, and I can only stand for so long and I have to sit…" This testimony was in reference to her accident five years before. (Tr. p. 20) When asked whether she had any issues regarding the matter before the tribunal, she said, " No. I can function completely normal, I go about my daily life with no problems." (Tr. p. 20)

On cross-examination, Petitioner testified that her shift for Respondent was from 10:00 p.m. to 8:00 a.m. each day. (Tr. p. 20) She stated that she rarely got off at 8:00 a.m. and that it was usually closer to 9:00 a.m. (Tr. pp. 20-21) Petitioner said that she was in charge of the desk, checking people in, the lobby, the breakfast area and if there are any problems with the rooms or complaints. (Tr. p. 21) She testified that cleaning the lobby, the counters, and the front area was part of her responsibilities. *Id.* Her job duties did not include any cleaning of the hotel rooms. *Id.* She stated that she was responsible for cleaning the bathroom in the lobby and the employee bathroom behind the desk. (Tr. p. 22)

Petitioner testified that she came into work on the evening of March 4th at approximately ten o'clock. (Tr. p. 25) She said that the person she relieved was Sean Smith. *Id.* Petitioner stated that she had had a conversation earlier in the week with Sean about the fact she hurt her back wrestling with her children. *Id.* She denied that Sean offered to take her shift on the evening of March 4th. (Tr. pp. 25-26)

Petitioner testified that she was cleaning the employee bathroom and there was nobody else there because she is the only one that works that shift. (Tr. p. 27) She testified that she hurt her back when she was cleaning the bathroom and physically mopping the floor. *Id.* She stated she reached down to put the mop into the bucket and squeeze it, and that is when she felt pain. (Tr. p. 28) Then, she called Sean. *Id.* Sean came in to relieve her. *Id.* Petitioner testified that she waited there until he came in. *Id.* Sean told her that if she needed to go to the emergency room but don't go to OSF, go to Proctor. (Tr. p. 29) Petitioner testified that she went to Proctor Emergency Room and arrived a little before midnight. *Id.* She was discharged around five o'clock in the morning. (Tr. p. 30)

When asked whether she was supposed to go to Proctor First Care on War Memorial for follow up on March 8, 2021, Petitioner said she did not remember them telling her that. (Tr. p. 30) She never went to Proctor First Care on War Memorial for care related to her back. *Id.* She went back to Proctor emergency room on Monday, March 8th at 6:00 p.m. and she stayed until about 9:00 p.m. (Tr. pp. 30-31) She recalled that they did blood work and examined her. (Tr. p 31) She admitted that she did not have any restrictions placed on her. *Id.*

Petitioner testified that she never went back to Baymont after March 4, 2021. (Tr. p. 31) Petitioner claims that she sent a text message along with a photocopy picture of the letter that she received from the hospital advising her to take one day to rest and that she could return back to work after that. (Tr. p. 32) Petitioner testified that the March 5th note from the emergency room stated that she could return to work on the 9th which would have been Monday after her weekend. (Tr. p. 34) Petitioner testified that she never returned to work for Baymont after March 5, 2021. (Tr. pp. 34-35) Petitioner claimed that she tried multiple times with text messages and phone calls to return to work. (Tr. p. 35)

Petitioner testified that she contacted Dr. Jeff Akerson and he referred her to Perry Memorial-Ortho Clinic in Princeton, Illinois. (Tr. p. 37) She could not recall the name of the doctor at Perry Memorial. (Tr. p. 39) Petitioner testified that she spent about 15 minutes with the doctor at Perry Memorial-Ortho Clinic. *Id.*

Petitioner testified that she does not have any physical problems from the incident that she alleges took place on March 4, 2021. (Tr. p. 39) She admitted that the problems she was having at that time were as a result of her automobile accident years before. (Tr. p. 40)

Petitioner testified that the medical bills were paid by Medicaid. (Tr. p. 40) The medical bills are contained in Petitioner's Exhibit #4. Petitioner is not claiming any lost time from work. (Tr. p. 42)

On re-direct, Petitioner testified she hurt herself when she was mopping/cleaning around the bottom of the toilet by the floor. (Tr. p. 43) She acknowledged that she testified earlier that

she was squeezing the mop when she felt pain. *Id.* Petitioner then said that when she reached up to squeeze the mop, that is when she started to feel the pain. *Id.*

Her attorney asked her, at page 43 of the transcript:

> Q. Okay. I'm just trying to clarify how you hurt yourself.
> A. I don't know how I hurt myself. (Tr. p. 44)

Petitioner testified to that she had a text conversation with her manager on March 8th. (Tr. p. 44) She claimed that her manager was making the schedule and inquired about her availability. (Tr. pp. 44-45) Petitioner told him that she could come back on Thursday. (Tr. p. 45) Petitioner testified that her manager requested the doctor's release note and she said that it was the one she had previously given to him. *Id.* She then stated that she re-sent the picture of the note to him. *Id.* Petitioner asserted that she had given the note to her manager the next day. *Id.* Upon further questioning, Petitioner testified that she sent him the text with the letter on March 10th. (Tr. p. 46) various different occasions when she notified Sean Smith about medical treatment.

On re-cross, Petitioner testified that she provided Sean with information about her condition when she spoke to him from the hospital. (Tr. p. 50) However, Petitioner admitted that she did not provide her manager with any written information from March 4th until March 10th. (Tr. p. 51)

SEAN SMITH TESIMONY

Sean Smith was subpoenaed to testify by Respondent. (Tr. p. 51) He testified that he worked for Baymont Suites in Peoria in March 2021. *Id.* He stated that he was the front desk manager and had held that position approximately six months. (Tr. p. 52) Mr. Smith testified that he was familiar with Petitioner and that she had been a night auditor for third shift. *Id.*

Mr. Smith testified that Petitioner's primary responsibilities were to check in guests over the evening, set up breakfast in the morning and then also to clean. (Tr. p. 52) She was responsible for cleaning the lobby area and the area where hotel staff work. (Tr. pp. 52-53) Petitioner was not responsible for cleaning any of the rooms. (Tr. p. 53) On March 4, 2021, Mr. Smith worked the second shift from 3:00 p.m. to 10:00 p.m. *Id.* He worked his shift and left about 10:15 p.m. *Id.* Petitioner relieved him at approximately 10:00 p.m. that evening. (Tr. p. 54) She was scheduled to work until 8:00 a.m. the next morning. *Id.*

Mr. Smith testified that he noticed Petitioner was limping when she came through the door on the evening of March 4, 2021. (Tr. p. 54) Mr. Smith testified that he saw Petitioner come through the door of the hotel and her walk did not appear normal. (Tr. pp. 54-55) Mr. Smith stated that he asked Petitioner about her about her physical condition. (Tr. p. 55) He asked if she was okay and she said that she had been roughhousing with her daughter the day before. *Id.* Mr. Smith suggested that she probably pulled a muscle because he roughhouses with his daughter a lot and usually wakes up sore the next day. *Id.*

Mr. Smith testified that he asked Petitioner if she could work. (Tr. p. 55) He said that Petitioner responded that she would try to get through it, and he told her not to clean anything,

don't touch anything, just sit down and check people in. *Id.* Mr. Smith testified that he prepared all the breakfast items for the morning so she wouldn't have to do that and took care of any manual labor. (Tr. pp. 55-56) Thereafter, he left. (Tr. p. 56) Mr. Smith testified that he received a phone call from Petitioner before midnight. *Id.* He stated that "she said she was using the restroom and got off the toilet seat and ended up popping and pulling something in her back and it was hard to move." *Id.* He affirmed that Petitioner did not say she was cleaning anything when she hurt her back. (Tr. pp. 56-57) Mr. Smith had a conversation with her about seeking medical care. (Tr. p. 57) He told her that, if she was going to go to the ER, to go to Proctor rather than OSF as it was easier to get in and out of quicker. *Id.* Mr. Smith had come back to the facility before the foregoing conversation. (Tr. p. 58)

Petitioner did not go to Proctor Hospital emergency room until Mr. Smith was back at the hotel. (Tr. p. 58) On Friday March 5th , he had a conversation with her. (Tr. pp. 58-59) He asked her if she was going to be able to work the following evening. (Tr. p. 59) She said no, she had to go to a specialist. *Id.* He asked her for medical documentation concerning her ability to work. *Id.* He said that Petitioner did not provide him any documentation about her ability to work on that date. *Id.*

Mr. Smith testified that, approximately 3 days later, Petitioner provided him information about her coming back to work. (Tr. p. 60) He said that he received the information via text and letter. *Id.* Mr. Smith testified that she never returned to work for Baymont. *Id.* He claimed that she never filled out an accident report. *Id.* Mr. Smith testified that Petitioner was aware he was the individual to whom she needed to report regarding filling out an accident report. (Tr. pp. 61-62)

On cross examination, Sean Smith was asked whether he went over the process for completing the workers' compensation paperwork. Mr. Smith said that he did not personally hire Petitioner so another employee would have done it. (Tr. p. 63) He admitted that he did not have any personal knowledge about Petitioner's understanding of the process to complete the workers' compensation reporting. (Tr. pp. 63-64)

Mr. Smith testified that Petitioner called him between 10:15 and 10:30 on the evening in question. (Tr. p. 64) Petitioner's counsel asked him what she told him at that time and he indicated:

> "She told me she was in physical pain from getting off the toilet, that she pulled something and it was very hard to move." (Tr. pp. 64-65)

Mr. Smith testified that he offered to come in and cover the rest of the shift for her since she was in pain. (Tr. p. 65) He came in at approximately 10:45 p.m. *Id.* Mr. Smith did not fill out an accident report when he took over for Petitioner. *Id.* He admitted that it was part of his responsibility to do so. *Id*.

The hotel has a policy that if someone calls off work due to a medical reason, they request a doctor's note stating a return date for any dates for which the employee has bee excused. (Tr. p. 68) He did receive a work note from her. *Id.* Mr. Smith said that he received the work note on approximately March 9th. *Id.* Mr. Smith claimed that he attempted to contact

Petitioner to return her to the schedule and he was told that she was waiting on the specialist. (Tr. p. 70). He further indicated that he provided Petitioner with a schedule to return to work and she did not return to work. (Tr. pp. 71-72) Mr. Smith indicated that Petitioner was asked to come back to discuss her work status. (Tr. p. 73) She did not come back to meet with him. *Id.* She was not to be terminated, but just never showed back up for work. *Id.*

CONCLUSIONS OF LAW

C. **Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?**

The Arbitrator incorporates by reference the findings of fact as set forth in the paragraphs above. Petitioner provided various histories, or accounts, of her alleged accident. Petitioner's Application for Adjustment of Claim alleges that the accident occurred by "Cleaning lobby." (PX #1) Petitioner testified that on March 4, 2021, she was about two hours into her shift, and she was cleaning the bathroom and collapsed to the floor when she stood up. (Tr. p. 13) She stated that she experienced a "shock of pain in my back and I couldn't move." *Id.* She testified she was mopping the floor at the time. *Id.* Immediately thereafter, Petitioner testified that, "I dropped something and I just went to pick it up is all I know. When I stood up I got this sharp pain in my back and it just made me fall to the floor." *Id.*

Petitioner then testified that she notified her manager, Sean, and that he turned around and came straight back to the hotel to relieve her to go to the hospital. (Tr. p. 14) Petitioner testified that she went straight to Proctor Hospital UnityPointy. (Tr. p. 14) When asked what history she provided at the hospital, Petitioner stated that, "Basically I just told them exactly what had happened, that I had fallen down at work." *Id.* She said she provided a history of a prior accident. (Tr. pp. 14-15) Petitioner testified that she had been in a car accident five years before that left her "pretty much completely disabled." (Tr. p. 15) She stated that it took her three years and a lot of physical therapy to get back to her present state. *Id.* She also described an incident where she had been wrestling with her daughters and her back was sore all week at work. *Id.*

Medical records from Proctor Hospital Emergency Room provide the following history: "Krista Seierup is a 43-year-old female with history of migraines, thyroid disease and prior back injury who presents today complaining of low back pain after wrestling with her daughter on Tuesday; she reports the pain worsened over time and was exacerbated at work tonight. Today, Krista went to work, and developed more pain when she bent over and stood back up after cleaning a toilet; she then developed right posterior leg sciatica symptoms." (PX #2 p. 3) Petitioner denied that she was having back problems or soreness at the time of her alleged accident. (Tr. p. 15) She testified that the wrestling incident had been three days prior to the mopping incident. (Tr. p. 16) Petitioner claimed that her back had been getting better all week and it was just the first day when she came to work that she was sore. *Id.* She described her complaints prior to the cleaning the bathroom as "Like I had been to the gym and overworked myself the day before." *Id.* There appeared to be some concern as to whether Petitioner was pregnant, and she was advised that they could not tell whether she was pregnant or not for another 48 to 72 hours. (PX #2 p. 6) Petitioner was provided a return to work note stating that she could return to work on March 9, 2021. (PX #2 p. 46)

Petitioner returned to the emergency room on March 8, 2021. (PX #2 p. 71) She returned for evaluation of back pain and for a repeat HCG. *Id.* She provided a history that she had strained her back at work on 3/5/21 and that she has been having sharp pain over her low back. *Id.* Her history reports that Petitioner had been told to follow up for pregnancy confirmation before more medicines could be prescribed. *Id.* She told emergency room personnel that she attempted to follow up at Proctor First Care that day for repeat labs but was told that she should return to the emergency department because she would have to wait for three weeks for labs. (PX #2 p. 71) Petitioner testified that she did not return to the emergency room due to low back pain and that she returned just for lab tests. (Tr. p. 17) Petitioner said that she was not directed back to the emergency room. (Tr. p. 18) She testified that the main reason she went back was because she could not fill one of the prescriptions. *Id.* She received a referral to Dr. Jeffrey W. Akeson, an orthopedic doctor. (PX #2 p. 110)

Petitioner testified that she followed up with an orthopedic on April 5, 2021. (Tr. p. 18) She asserted that she, "told him about what happened prior to what happened at work and what happened at work." (Tr. p. 19) Her history to Dr. Allen Van reveals a history back pain that had been stabilized "until recently over the last couple weeks she noted increasing discomfort in the lower back does not recall any onset traumatic event." (PX #3 p. 1) Her physical examination showed a negative straight leg raise, hip and knee range of motion is intact. (PX #3 p. 2) Dr. Allen recommended aerobic exercise such as walking, biking, and swimming along with weigh reduction. *Id.* Petitioner testified that no treatment was rendered. (Tr. p. 19) When asked how she was feeling after the visit, she replied, "Fine." *Id.* She testified at the time of trial her low back felt, "Fine." *Id.* Finally, she stated that her "main problem is something that I've had since the accident, I can only sit for so long and then I have to stand, and I can only stand for so long and I have to sit…" (Tr. pp. 19-20)

Mr. Smith testified that he noticed Petitioner was limping when she came through the door on the evening of March 4, 2021. (Tr. p. 54) Mr. Smith testified that he saw Petitioner come through the door of the hotel and her walk did not appear normal. (Tr. pp. 54-55) Mr. Smith stated that he asked Petitioner about her about her physical condition. (Tr. p. 55) He asked if she was okay and she said that she had been roughhousing with her daughter the day before. *Id.* Mr. Smith suggested that she probably pulled a muscle because he roughhouses with his daughter a lot and usually wakes up sore the next day. *Id.*

Mr. Smith testified that he asked Petitioner if she could work. (Tr. p. 55) He said that Petitioner responded that she would try to get through it, and he told her not to clean anything, don't touch anything, just sit down and check people in. *Id.* Mr. Smith testified that he prepared all the breakfast items for the morning so she wouldn't have to do that and took care of any manual labor. (Tr. pp. 55-56) Thereafter, he left. (Tr. p. 56) Mr. Smith testified that he received a phone call from Petitioner before midnight. *Id.* He stated that "she said she was using the restroom and got off the toilet seat and ended up popping and pulling something in her back and it was hard to move." *Id.*

After observing the testimony of the witnesses, the varied and inconsistent histories contained in the medical records regarding the mechanism of injury, and the record as a whole, the Arbitrator finds the Petitioner's explanation of her injuries unconvincing. Petitioner was experiencing back pain when she reported for work on the date in question. Her manager, Sean Smith, testified credibly that Petitioner was limping upon arrival at work on March 4, 2021. She

admits that she had back pain from wrestling with her children prior to March 4, 2021. Petitioner did not refute or deny Sean Smith's testimony that she reported using the restroom and having pain after getting off the toilet. Furthermore, Petitioner had a note allowing her to return to her job on March 9, 2021, and did not return to her employment following the incident. The Arbitrator finds and concludes that Petitioner did not sustain an accidental injury arising out of an in the course of her employment with Respondent on March 4, 2021. All benefits are denied.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC027727
Case Name	Genaro Cabrera v. Butler Coring Inc
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0336
Number of Pages of Decision	13
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Peter Lorenz
Respondent Attorney	Michelle LaFayette

DATE FILED: 8/3/2023

/s/Maria Portela, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

GENARO CABRERA,

Petitioner,

vs. NO: 18 WC 27727

BUTLER CORING, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

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

We agree with the Arbitrator's finding that Petitioner's current cervical condition is causally related to his work accident but make a few clarifications and further expand upon the rationale.

Initially, we point out that Petitioner had cervical complaints since the time of his injury. The August 24, 2018 Concentra records (*Px1*) reflect that he complained of "bilateral posterior neck pain" that "radiates to the right neck" and trapezius. Petitioner had tenderness at the C5-6 level and right-sided muscle spasms. "Neck strain" was diagnosed along with the right shoulder injury/sprain and cervical x-rays were ordered. The Concentra records continue to reflect ongoing

cervical complaints until Petitioner was released on September 14, 2018 to see his own orthopedist for the right shoulder. Curiously, even though Petitioner still had documented painful cervical range of motion and tenderness at that last Concentra visit, the Assessment was inexplicably changed to reflect only the right shoulder and no longer listed the neck strain.

Regarding Petitioner's continued cervical symptoms, Respondent argues that the "cervical radiculopathy did not begin until almost two years after the accident." *R-brief at 10*. We disagree and point to the flaws in Dr. Butler's §12 report, upon which Respondent's argument is based. On January 18, 2021, he wrote, "The patient did not have complaints or symptoms consistent with a cervical radiculopathy back in 2018." *Rx3*. However, this is not true. Although Dr. Butler's report discusses the August 30, 2018 Athletico Physical Therapy Evaluation that mentions Petitioner's pain, weakness and limited mobility, Dr. Butler did not address the finding of "Decreased sensation in C6 and C7 dermatomes." *Px3, T.1586*. This notation of decreased sensation in the cervical dermatomes is repeated in subsequent physical therapy records as well (C6 and C7 on 9/13/18 and 10/2/18; C6 through C8 on 10/16/18) until Petitioner was discharged from therapy, on October 18, 2018, because he was to undergo an EMG (electromyography) test.

Similarly, on October 18, 2018, Dr. Cole noted that Petitioner "also is having pain radiating into his neck, which he believes started at the time of the injury." Dr. Cole found positive Spurling's and Lhermitte's tests on exam and referred Petitioner to Dr. Cheng "to rule out [a] cervical spine pathology given his numbness, tingling symptoms in his right shoulder radiating to his hand and also because of his neck pain since the day of the injury." Significantly, Dr. Butler's summary of that October 18, 2018 record does not mention that Petitioner had complained of numbness and tingling from the right shoulder radiating to the hand.

We find the medical records reflect Petitioner was having symptoms related to his cervical spine (including C7) from the time of his accident and do not find persuasive Dr. Butler's opinion that Petitioner did not have any cervical radiculopathy symptoms in 2018. Additionally, Dr. Butler opined that Petitioner's "current physical symptoms are not consistent with a C7 radiculopathy." *Rx3*. He identified Petitioner's symptoms as "global weakness of his deltoid, biceps, triceps, wrist extensors, and intrinsics. This is not consistent with a C7 radiculopathy." *Id.* However, he did not address Petitioner's complaints that day of "numbness, tingling and swelling of the arm and hand" (*T.1647*) and did not opine about whether those symptoms are consistent with a C7 radiculopathy.

Further, Dr. Butler never opined that Petitioner's symptoms were not related to a cervical condition *at other levels*. This is significant because, although he wrote Petitioner "did not sustain a cervical spine injury beyond a cervical strain with the work incident," he also wrote that he needed "to review the actual MRI of the cervical spine to confirm these opinions." *Rx3*. Since Dr. Butler admitted that he could not give a definitive answer about "correlation to the work injury" without seeing the MRI films, and since there is no evidence that Dr. Butler subsequently reviewed the films, we find that Dr. Butler's opinion is incomplete and unpersuasive.

Respondent also argues that Dr. Cole, Petitioner's shoulder surgeon, ruled out underlying cervical radiculopathy by ordering the 2018 EMG/NCV. *R-brief at 9*. However, Respondent admits that "at some point during the course of treatment for the shoulder, Petitioner and his therapist started to make mention of possible nerve involvement and a possible cervical radiculopathy. Dr. Cole, the treating orthopedic physician, did not join in their concerns." *Id. at 10*. Respondent argues, "Instead, Dr. Cole proceeded with multiple surgical procedures and recommended continued physical therapy for the shoulder." *Id.* Respondent argues that if Petitioner "truly had symptoms as he claimed," he would have sought a second opinion. *Id*.

Despite all of Respondent's arguments, it admits, "It was only after Petitioner plateaued with therapy and Dr. Cole concluded he could do nothing more in terms of treatment for the shoulder that Dr. Cole shifted his focus to the cervical spine in October of 2020, recommending another EMG/NCV study." *Id*. We agree that, when all of the shoulder procedures and surgeries did not resolve Petitioner's complaints, it was logical to consider other alternatives.

Since the 2020 EMG did show a mild C7 cervical radiculopathy, Respondent argues that Dr. Cole did not explain how such a change from the 2018 EMG could relate back to the work injury. Regarding the difference between the two EMG tests, Petitioner testified that "Dr. Singh performed a more thorough EMG or procedure" and "she looked up into the neck" whereas "Dr. Cheng had only tested from the elbow down." *T.30-31.* The question is whether Petitioner's testimony that Dr. Cheng's 2018 EMG "only tested from the elbow down" is supported by the records. The July 30, 2018 EMG report indicates that the following *seven* right-side muscles were tested (listed here as described in the report):

Muscle	Root
Biceps	C5-6
Triceps	C6-7-8
FlexCarRad	C6-7
FlexCarpiUln	C8-T1
Abd Poll Brev	C8-T1
1stDoring	C8-T1
Cervical Parasp Low	C7-8

Rx3, T.1652.

Neither physician testified in this case, but it appears that the biceps, triceps and cervical paraspinal muscles were tested, which are all above the elbow. So, the question remains why Petitioner would think that Dr. Singh's 2020 EMG was more extensive?

The November 3, 2020 EMG report indicates that the following *eight* right-side muscles were tested (listed here as described in the report):

Muscle	Root

AbdPollBrev	C8-T1
1stDorint	C8-T1
ExtIndicis	C7-8
Biceps	C5-6
Triceps	C6-7-8
PronatorTeres	C6-7
ExtCarUln	C7-8
Deltoid	C5-6

Dr. Singh found the "right Ext Indicis, the right biceps. the right triceps, and the right extensor carpi ulnaris muscles showed polyphasic potentials" which were consistent with a "mild right chronic C7 radiculopathy." *Px2, T.363.*

There are some minor differences when comparing the two tests. Dr. Singh's EMG tested eight muscles while the previous one only tested seven. Dr. Singh's test also included an additional test for the C5-6 nerve root (deltoid in addition to biceps). Although we do not believe Petitioner's testimony is accurate that the 2018 EMG only tested muscles below his elbow, it is not unreasonable for Petitioner to have considered the 2020 test "more thorough."

Therefore, we disagree with the Arbitrator's finding that the 2018 EMG was less valid because it was only taken from the elbow down, but we agree with the Arbitrator's finding of causation and note the following:

- Although no physician opined as to why the 2018 EMG did not show any cervical radiculopathy, Dr. Cole opined on November 19, 2020 that Petitioner "has likely suffered a nerve injury and the patient reports that his symptoms of weakness began at the time of injury. As such, this does appear to be an ongoing issue originating from his initial injury."

- Petitioner's complaints of weakness and decreased sensation in the C6 through C8 dermatomes at the time of his injury are supported by the records.

- The 2020 EMG indicates chronic C7 radiculopathy, which we find consistent with a long-standing problem.

- Despite Petitioner's initial and continuing cervical complaints in 2018, no cervical MRI was ordered at that time. *T.40, 48*. Only a right shoulder MRI was performed, so there is no objective evidence of Petitioner's immediate, post-accident cervical condition.

- On December 3, 2020, Petitioner's Dr. Singh opined that the November 19, 2020 MRI showed multilevel disc bulges most significant at C5-6 and neuroforaminal narrowing at C6-7. She wrote, "Based on his symptoms in a C7 distribution as well as the EMG, I am concerned about a C7 radiculopathy."

- The report of Respondent's §12 physician, Dr. Butler, omitted certain symptoms in his summary of the records that support Petitioner's complaints of radiculopathy in 2018.

- Dr. Butler's opinion is unpersuasive and incomplete because his report states that he cannot give a definitive answer about "correlation to the work injury" without seeing the MRI films. (T.1650).

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 4, 2022 is hereby affirmed and adopted with the clarifications noted above.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $10,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

August 3, 2023

/s/ *Maria E. Portela*

SE/
O: 6/13/23
49

/s/ *Amylee H. Simonovich*

/s/ *Kathryn A. Doerries*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC027727
Case Name	CABRERA, GENARO v. BUTLER CORING
Consolidated Cases	
Proceeding Type	19(b)/8(a) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	7
Decision Issued By	Elaine Llerena, Arbitrator

Petitioner Attorney	Peter Lorenz
Respondent Attorney	Michelle LaFayette

DATE FILED: 5/4/2022

THE INTEREST RATE FOR THE WEEK OF MAY 3, 2022 1.42%

/s/Elaine Llerena, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF **COOK**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)/8(a)

Genaro Cabrera
Employee/Petitioner

v.

Butler Coring
Employer/Respondent

Case # **18** WC **027727**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Elaine Llerena**, Arbitrator of the Commission, in the city of **Chicago**, on **August 25, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **August 24, 2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**78,981.76**; the average weekly wage was $**1,516.88**.

On the date of accident, Petitioner was **46** years of age, ***married*** with **0** dependent children.

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

Respondent shall be given a credit of $**131,529.28** for TTD, $**4,013.75** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**135,543.03**.

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

ORDER

Respondent shall authorize and pay for prospective medical care as recommended by Dr. Singh in the form of epidural steroid injections and Gabapentin, pursuant to Sections 8(a) and 8.2 of the Act.

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

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

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

Elaine Llerena
Signature of Arbitrator

MAY 4, 2022

ICArbDec19(b)

STATEMENT OF FACTS:

Petitioner worked as a Labor Union operator for Respondent. Petitioner testified his primary job function was demolition. Petitioner dismantled and demolished structures. Petitioner described himself as a concrete cutter, using diamond tools to perform those tasks. During the performance of his job duties, he would wear a respirator, dust masks, hardhat, and steel toe shoes.

On August 24, 2018, Petitioner was enlarging an elevator shaft at a property on Elston Avenue. Workers with multiple trade unions were on site. Petitioner was working in the basement of the building 4 to 5 feet below while brick workers were working above him in the same elevator shaft. Petitioner had been sawing for about 15 to 20 minutes when debris from the brick workers above him began to fall. Petitioner did not know exactly what struck him or where it struck him, but he recalled being hit by debris. Petitioner did not fall to ground, as the chainsaw mounted to the wall prevented him from doing so. When he came to, Petitioner reported a sharp pain in his chest. Petitioner stopped working, cleared the elevator shaft, and reported the incident to his employer.

Petitioner was initially evaluated by Dr. Kang at Concentra Medical Center. Petitioner had complaints of right shoulder and neck pain, but Petitioner's primary complaints were to the right shoulder. Dr. Kang referred Petitioner to Dr. Brian Cole at MidWest Orthopedics at Rush where Petitioner was examined on September 17, 2018. Dr. Cole noted significant complaints of pain and stiffness with range of motion, diagnosed right shoulder severe osteoarthritis of the glenohumeral joint and administered a steroid injection to the joint. Dr. Cole opined the debris falling onto Petitioner aggravated the condition of his shoulder.

Petitioner returned to Dr. Cole on October 18, 2018, reporting no lasting relief from the injection and worsening symptoms, which Petitioner attributed to physical therapy. Dr. Cole documented Petitioner had pain radiating into his neck, which Petitioner believed began at the time of the injury. Dr. Cole diagnosed a cervical strain and right shoulder glenohumeral arthritis. He recommended surgical intervention, but first wanted Petitioner evaluated by Dr. Cheng to rule out a cervical spine pathology, such as radiculopathy, before proceeding with surgical intervention.

Before the surgical procedure, Petitioner participated in physical therapy at Athletico. When seen on October 16, 2018, Petitioner reported complaints of pain located in the right neck, UT, lateral shoulder, biceps and mostly in the scapular border of the arm. He also reported no arm strength, wrist swelling when his arm was in a dependent position. The therapist indicated an EMG/NCV along with an MRI should be done to further treat the shoulder.

At Dr. Cole's request, Dr. Cheng performed an EMG and NCV study of the upper extremities on November 30, 2018. In the history portion of the note, Dr. Cheng included the following: "Dr. Cole is referring him for an electrodiagnostic tests to assess for cervical radiculopathy." Dr. Cheng indicated the study was abnormal, but it was abnormal for bilateral sensory motor median neuropathy at the wrist of a demyelinating type. Dr. Cheng indicated the findings were consistent with mild carpal tunnel syndrome. The study also demonstrated right ulnar neuropathy, axonal type. There was no electrophysiologic evidence of other focal neuropathy, peripheral neuropathy, polyneuropathy, or cervical radiculopathy on the right.

Petitioner testified that the 2018 EMG was administered from the elbow down, unlike a later EMG done in 2020.

Dr. Cole performed the first surgical procedure on December 5, 2018. The procedure consisted of a debridement of the capsule, labrum, osteoarthritic cartilage, synovium, and lysis of adhesions under

manipulation. Following surgery, Petitioner returned to Athletico for physical therapy. The focus of therapy from the end of 2018 into the first part of 2019 was Petitioner's right shoulder. During this time, Petitioner continued to complain of cervical pain, which was noted in the physical therapy records.

On March 25, 2019, Dr. Cole documented Petitioner's pain was "deep" in the shoulder, not lateral or posterior. He felt Petitioner plateaued with physical therapy. Petitioner therefore did not participate in physical therapy of any sort from March 28, 2019, through December 23, 2019.

During this period, Dr. Cole administered several PRP and Orthovisc injections to the right shoulder. When this did not resolve Petitioner's symptoms, Dr. Cole recommended additional surgery for the right shoulder, which was performed on December 10, 2019. The procedure was a total shoulder arthroplasty. Petitioner resumed physical therapy on December 24, 2019. During the post operative course of therapy from December 24, 2019, to February 6, 2019, the therapist noted Petitioner had symptoms of hand swelling, numbness and tingling to the fingers and symptoms along the ulnar distribution.

After February 6, 2020, the physical therapist continued to recommend a cervical MRI to rule out any radiculopathy into the rotator cuff and noted Petitioner's elbow remained very painful with ulnar nerve/C7 neural symptoms. In May of 2020, the therapist expressed concern for cervical radiculopathy at C5 affecting the supraspinatus or due to extensive damage and scar tissue formation strangulating the subscapularis nerve from the cinderblock hitting Petitioner. The therapist recommended further workup for the neck and nerve. Dr. Cole recommended a shoulder manipulation to deal with Petitioner's ongoing limited range of motion. The shoulder manipulation was performed on July 29, 2020.

After the shoulder manipulation, Petitioner again returned for physical therapy at Athletico. The therapist noted on October 28, 2020, that Petitioner felt a strong pull and stabbing pain up into the neck and going into the triceps when performing lifting maneuvers. The therapist indicated Petitioner exhibited myotomal weakness and atrophy along muscles in the C5 to C7 nerve distribution, consistent with extensive deficits in his elbow and an inability to abduct the arm.

On October 1, 2020, Dr. Cole noted Petitioner had concerns regarding possible nerve involvement with numbness and tingling into the fourth and fifth digits. Dr. Cole recommended Petitioner see a physiatrist due to persistent pain and weakness, suggesting an EMG and NCV study be obtained.

The EMG and NCV was performed by Dr. Singh on October 3, 2020. Before beginning the study, Dr. Singh noted Petitioner had pain, mostly in the shoulder, radiating down his right arm to the fingertips. Petitioner described constant numbness in the fingers, and Petitioner alleged he had had symptoms since the initial injury. The EMG and NCV study showed findings different from the study in 2018. The findings in 2020 were of mild right chronic C7 radiculopathy, mild right median neuropathy with entrapment at the wrist and the possibility of a brachial plexus injury could not be excluded. Petitioner returned to Dr. Cole on November 19, 2020.

Dr. Cole opined Petitioner likely suffered a nerve injury. Dr. Cole concluded his condition appeared to be an ongoing issue originating with the work injury. He also concluded the 2020 EMG indicated Petitioner's right shoulder was not the source of his pain symptoms at the present time, noting that the 2020 study showed positive findings for cervical radiculopathy. An MRI study of the brachial plexus and cervical spine were recommended.

The MRI of the brachial plexus demonstrated normal findings. The MRI of the cervical spine demonstrated findings of multilevel mild degenerative changes with mild spinal canal stenosis between C3-C4 and C6-C7, moderate to severe left foraminal stenosis at C4-C5 and moderate bilateral foraminal stenosis at C5-

C6. Following the MRI studies, Dr. Singh recommended ESIs to the C6-7 and possibly the C5-6 levels and prescribed Gabapentin.

Petitioner reported he reported complaints of neck pain to Dr. Cole after the total shoulder replacement surgery, and he then reported neck pain to his physical therapist in May of 2020. Petitioner testified his pain symptoms remain, as does significant limitations to range of motion of the shoulder/arm. Petitioner described the home exercise program as helpful, but also testified the exercises aggravated his symptoms and made his neck/shoulder painful. Petitioner testified if he does not move his arm, his arm stiffens up and his hand goes numb. At the same time, moving the arm is aggravating. Petitioner testified he wanted to pursue the treatment recommended by Dr. Cole and Dr. Singh, including the cervical ESIs.

Dr. Guido Marra examined Petitioner several times at Respondent's request, concurring Petitioner had pathology in the right shoulder, his condition was related to the August 24, 2018, accident and the course of treatment for the shoulder was appropriate.

Respondent also had Petitioner examined by Dr. Jesse Butler on January 18, 2021, to assess the cervical spine and suspected brachial plexus injury. Dr. Butler opined the original injury in which Petitioner was struck by a piece of concrete was consistent with the initial diagnosis of a cervical strain. Dr. Butler also noted Petitioner did not manifest radicular complaints immediately following the injury and his complaints of severe shoulder discomfort and weakness of elevation were consistent with the rotator cuff and labral tears.

Dr. Butler also noted the different findings on the EMG/NCV study in 2018 when compared to the EMG/NCV study in 2020, opining the positive findings in 2020 were not consistent with the work injury. Petitioner did not have symptoms and complaints of radiculopathy in 2018. Additionally, Petitioner's current symptoms are not consistent with a C7 radiculopathy. Petitioner has global weakness of the deltoid, biceps, triceps, wrist extensors and intrinsics. Dr. Butler concluded the cervical radiculopathy and recommended treatment for the cervical spine was not causally related to the work injury.

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

The Arbitrator notes that Petitioner complained of right shoulder and neck pain following the accident. It is clear from the medical records that the primary focus was the right shoulder since it was the more painful and considered the source of all of Petitioner's pain. Following the treatment for the right shoulder, Petitioner continued to complain of neck pain and subsequent testing showed cervical radiculopathy. The Arbitrator further notes that the EMG taken in 2018 which failed to find cervical radiculopathy was, per Petitioner's credible testimony, taken from the elbow down. As such, the Arbitrator finds the EMG taken in 2020 showing cervical radiculopathy more persuasive. The Arbitrator also notes that Dr. Butler's opinion that Petitioner's cervical radiculopathy is not causally related to the work accident is based on a comparison of the 2018 EMG versus the 2020 EMG. As such, the Arbitrator finds the opinion of Dr. Cole, Petitioner's treating physician who has concluded that concluded Petitioner's cervical condition appears to be an ongoing issue originating with the work injury, more persuasive than the opinion of Dr. Butler.

Based on the above, the Arbitrator finds that Petitioner's current condition of ill-being regarding his right shoulder and neck is causally related to the August 24, 2018, work accident.

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

The Arbitrator notes that while Dr. Butler does not feel that Petitioner's current cervical issues are related to the work accident, he noted that the EMG showed Petitioner is suffering from cervical radiculopathy. The Arbitrator further notes that Dr. Singh has diagnosed Petitioner as having cervical radiculopathy and recommended epidural steroid injections and Gabapentin.

Based on the Arbitrator's finding as to causation and the medical records, the Arbitrator finds that Petitioner is entitled to prospective medical care in the form of epidural steroid injections and Gabapentin as recommended by Dr. Singh. Respondent shall authorize and pay for Petitioner's prospective medical care pursuant to Sections 8(a) and 8.2 of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC003508
Case Name	Julie Phelan v. American Freedom Insurance Company
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0337
Number of Pages of Decision	16
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Parag Bhosale
Respondent Attorney	Jim Roach

DATE FILED: 8/3/2023

/s/Carolyn Doherty, Commissioner

Signature

23IWCC0337

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JULIE PHELAN,
AS INDEPENDENT EXECUTOR
OF THE ESTATE OF
FRANCIS J. PHELAN, DECEASED,

Petitioner,

vs. NO: 20 WC 3508

AMERICAN FREEDOM INSURANCE
COMPANY,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causation, medical expenses and nature and extent, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Amended Decision of the Arbitrator, dated November 29, 2021, which is attached hereto and made a part hereof.

We affirm causal connection for the medical expenses awarded but modify the decision to order that these shall be paid subject to the fee schedule in §8.2 of the Act.

We modify the start date of Petitioner's permanent total disability benefits to reflect that they shall begin on August 26, 2021, the date of hearing. The parties stipulated, on the Request for Hearing form, that Petitioner was entitled to temporary total disability benefits from June 6, 2018 through August 26, 2021. Despite the ending date of this stipulation, we find that Petitioner's temporary total disability concluded on August 25, 2021 and that he is entitled to permanent total disability benefits commencing August 26, 2021.

In Section "(L)", on page 11, we strike everything in the last sentence after the word

"unpersuasive."

On page 12, we strike the duplicative Section "(L)."

Finally, we correct three clerical errors in the Findings of Fact section. On page 3, in the first paragraph, we correct the date of hearing to reflect it was held on August 26, 2021. In the second paragraph, we correct the date of accident to June 5, 2018. At the top of page 4, we clarify that Petitioner was released from the emergency room on June 6, 2018 (not 2021).

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $323,075.00 for medical expenses under §8(a) of the Act subject to the fee schedule in §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $1,463.80/week for life, commencing August 26, 2021, as provided in Section 8(f) of the Act, because the injury caused the permanent and total disability of Petitioner. Commencing on the second July 15th after the entry of this award, the petitioner may become eligible for cost-of-living adjustments, paid by the Rate Adjustment Fund, as provided in Section 8(g) of the Act.

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

August 3, 2023

/s/ *Carolyn M. Doherty*

CMD/se
O: 7/25/23
45

/s/ *Amylee H. Simonovich*

/s/ *Kathryn A. Doerries*

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
AMENDED ORDER

Francis J. Phelan
Employee/Petitioner

v.

American Freedom Insurance Company
Employer/Respondent

Case # 20 WC 003508

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William McLaughlin, Arbitrator of the Commission, in the city of Chicago, on August 26, 2021. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **June 5, 2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$1,500,000.00**; the average weekly wage was **$28,846.15**.

On the date of accident, Petitioner was **84** years of age, Married with **0** dependent children.

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

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

ORDER

Respondent shall pay reasonable and necessary medical services of **$323,075.00**, as provided in Section 8(a) of the Act. This amount SHALL NOT be reduced by the Illinois Medical Fee Schedule as these amounts were paid in full directly by the Petitioner.

Respondent shall pay Petitioner permanent and total disability benefits of **$1,463.80**/week for life, commencing **01/16/2020**, as provided in Section 8(f) of the Act. Respondent shall be given a credit for indemnity benefits paid under Section 8(f) from **01/05/2018** thru **01/15/2020.**

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.

NOVEMBER 29, 2021

FRANCIS PHELAN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**Case No.: 20 WC 003508**
	)	
AMERICAN HEARTLAND INSURANCE COMPANY,	)	
	)	
	)	
Respondent.	)	

FINDINGS OF FACT

On the date of the hearing, August 21, 2021, the Petitioner, Mr. Phelan, was 87 years old and was married but separated and living apart from his second wife. (Tr. 11-12.) Petitioner's daughter,
Dr. Julie Phelan, testified that Mr. Phelan lives with 24-hour nursing assistance in his condominium.

The testimony was that after finishing law school, Petitioner worked at various law firms as a licensed attorney. In 1998, Mr. Phelan founded the Respondent, American Freedom Insurance Company (hereinafter "American Freedom"). Mr. Phelan sold American Freedom in 2012 but continued working for the company as the managing officer until his accident on August 26, 2021. His duties included workplace management, employee oversight, and financial decision-making. (Tr. 14-15.)

Dr. Julie Phelan testified that Mr. Phelan's work injury occurred June 5, 2018, at the Respondent's office. Mr. Phelan was walking when he tripped and fell head-first into a wall. Immediately after the accident, Mr. Phelan called her. Dr. Phelan testified she arrived at the office shortly thereafter and drove him to the emergency room at Northwestern Memorial Hospital.

Mr. Phelan was released from the emergency room on June 6, 2021. Two days later, Mr. Phelan was readmitted for further examination due to abnormalities in the results of the scans that were performed during his initial visit to the emergency room. On June 8, 2018, an MRI of Mr. Phelan's cervical spine was performed and spine surgery was recommended.

Mr. Phelan was released from Northwestern Memorial on June 19, 2018. He was then treated at two 24-hour care facilities – Shirley Ryan and The Clare, respectively. Mr. Phelan began receiving 24-hour in-home care services from Elite Healthcare Management upon being discharged from The Clare. Elite Care Management specializes in spinal cord injury patients and patients with a high fall risk.

Mr. Phelan has been paying out-of-pocket for Elite Healthcare's 24-hour care since January 15, 2020, when the Respondent declined to further fund 24-hour at-home care. From January 15, 2020 to the present, Mr. Phelan has paid $323,075.00 for Elite's home healthcare services.

Mr. Phelan has not been able to return to work as an executive vice president at American Freedom or an attorney since the date of the accident. It is undisputed that Mr. Phelan needs 24-hour care. He is confined to a wheelchair and requires assistance with walking, preparing and eating meals, cleaning his home, bathing himself, and going to the bathroom. Prior to the subject accident, Mr. Phelan lived alone, worked 40-hour weeks as an attorney, and was completely independent. Dr. Julie Phelan specifically testified that prior to June 5, 2018, Mr. Phelan was not in a wheelchair, had no issues with falling or tripping, did not require assistance walking, drove a car, worked 40-hour weeks without issue, lived alone, cooked and prepared his own meals, did not have a housekeeper, went to the bathroom and bathed by himself, paid his own bills, did not have hand tremors or weakness in his arms, had the ability to hold onto things, and was otherwise completely independent. (Tr. 16-20.) Mr. Phelan was able to walk 2 miles in 20-30 minutes without any issues. (Tr. 33.)

Dr. Julie Phelan testified that, after the accident, her father is completely dependent on others to provide him with everything. Petitioner has to have help with all daily activities of living, including: brushing his teeth, bathing, applying soap to his body, putting shampoo in his hair, drying himself off, shaving, preparing his meals, holding utensils, cutting up his food, using a toilet, wiping himself, pulling up his undergarments, getting dressed, and buttoning his shirts. (Tr. 26-27.)

Dr. Julie Phelan testified that Mr. Phelan fell and hit his face on December 9, 2019, while she was with him. Dr. Julie Phelan took him to the hospital and he was released the same day. His only injury was a cut on his forehead that required stitches. Other than the cut, his conditions remained the same after this minor 12/09/2019 incident. (Tr. 29-30.)

During his testimony, Mr. Phelan exhibited visible arm tremors that caused him to shake. He is not able to write anything with a pen since the 6/05/18 work accident. He's not able to type on a computer. He can only move around with assistance. When asked to come out of his wheelchair and take a few steps, he testified that he wouldn't be able to do it without his attorney holding him up. When asked to lift his arms up as high as he could, Mr. Phelan was only able to lift his left arm to his third shirt button and his right arm to his bellybutton. Mr. Phelan visibly shook while he attempted to raise each arm. (Tr. 41-46.) At the time of his accident, he had no plans of retiring. (Tr. 52.)

Mr. Phelan's last medical record prior to the 6/05/2018 accident was a meeting with his primary-care physician, Dr. Gregory Kaczmarek, on October 25, 2017. *Px. 1, p. 22-24*. He went there for pre-operative testing for a inguinal hernia repair. He was cleared for the procedure without any issues, and there is nothing in the record stating that he was having any neurological, orthopaedic, or cognitive issues.

On June 5, 2018, Mr. Phelan was admitted to Northwestern Memorial Hospital. The intake nurse noted, "[patient] present to [ER] with [complaints of] mechanical fall at work; [patient] statues that he tripped over something at work and broke his fall into the wall; [patient] did not lose consciousness; is a/ox3; speaking in clear/complete sentences…[patient] has hematoma over right eye/swelling to right side of face…[patient] is occasionally unsteady on feet." *Px. 2, page 1328*. An x-ray of Mr. Phelan's right shoulder showed a fracture of his right shoulder. *See Px. 2, page 1369-70*. X-rays of Mr. Phelan's thoracic spine, chest, and cervical spine were also performed. *See Px. 2, page 1364-68*. A CT scan of Mr. Phelan's cervical spine revealed a right supraorbital hematoma, chronic right frontal parasagittal subdural hematoma or cystic hygroma, moderate to severe global parenchymal volume loss, multilevel degenerative disc disease, most advanced at the C4-C5 and C5-C6 levels. *See Px. 2, page 1363-64*. Dr. Ali Habib noted, "cortical irregularity associated with the lesser tuberosity/surgical neck which may represent and acute, nondisplaced fracture." *Px. 2, page 1294-95*. Nonetheless, Mr. Phelan was discharged from on June 6, 2018.

On June 8, 2018, Mr. Phelan was re-admitted to Northwestern because a CT angiogram was "suggestive of traumatic injury with facet joint widening at C6-7" and "subtle hyper densities in the ventral epidural space, which could reflect a small epidural hematoma." *Px. 2, page 754*. An MRI was performed which revealed a traumatic injury with disruption of the anterior longitudinal ligament at C6-7 and a fracture through the C6-7 disc with associated increased signal in the C6 inferior plate and C7 superior endplate. A CT angiogram carotid was also performed, which suggested traumatic injury

with facet joint widening at C6-7 and subtle hyper densities in the ventral epidural space, which "may reflect small epidural hematomas." *See Px. 2, page 774*.

On June 11, 2018, a C4-T2 spinal fusion and multilevel decompression surgery was performed to stabilize Mr. Phelan's spine by Dr. Nader Dahdaleh. *See Px. 2, page 828-30*. After the surgery, an ECG was ordered because Mr. Phelan was experiencing shortness of breath. *Px. 2, page 759*. Mr. Phelan exhibited "swallow impairment" with "reduced airway closure and pharyngeal inefficiency." *Px. 2, page 416-18*. He had to intubated and sent to the ICU due to the low-level of oxygen in his blood. *Rx. 4, page 39-40*. He didn't get discharged until June 19, 2018, and Respondent's Section 12 physician, Dr. Arthur Itkin, characterized this post-operative stay as "stormy." *Rx. 4, page 40*.

On June 18, 2018, Dr. Steven Nussbaum noted Mr. Phelan would benefit from an acute rehabilitation stay to improve post-operative mobility and ambulation and that such rehabilitation was medically necessary because of Mr. Phelan's cervical spine injury and spinal fusion. *See Px. 2, page 506*.

On June 15, 2018, a psychological evaluation was done of Mr. Phelan and he was evaluated as "agitated, anxious, confused, forgetful, and paranoid." *Px. 2, page 1018*. On June 18, 2018, Mr. Phelan was evaluated with a fall risk score of 18. *Px. 2, page 1200*. On June 18, 2018, Mr. Phelan's occupational therapist, Todd Jarzenski, noted Mr. Phelan requires "assistance or supervision for mobility," has an "unsteady gate," and requires a lot of assistance eating meals, brushing his teeth, putting on and taking off his clothes, and bathing. *Px. 2, page 436-37*. He further stated Mr. Phelan is unable to take off regular lower body clothing or toilet himself. *Px. 2, page 436-37*.

On September 14, 2018, Dr. Sharon Song performed a neuropsychological evaluation. She concluded that he appeared to have suffered hypoxic ischemic brain damage due to his post-op hospital stay. He would require supervision, future assistance, and could not drive a vehicle. *Px. 5, page 83-86*.

At his deposition, Dr. Bega testified that the traumatic injury to Mr. Phelan's cervical spine could explain his hyperreflexia and physical weakness Mr. Phelan exhibited after 6/5/2018. *See Px. 10, page 20-21*.

On October 19, 2018, an MRI of the cervical spine was performed that indicated "postsurgical changes from posterior spinal fusion from C4 through T2 . . . A partially visualized non-enhancing fluid collection posterior to and bilaterally along the spinous processes from the C5-6 level and extending below the field-of-view is likely postsurgical. Ill-defined patchy enhancement in the soft tissues surrounding the posterior elements and bilateral facets likely represents postsurgical granulation tissue. . . . At C6-7, there is no significant spinal canal narrowing status post spinal fusion, previously moderate to severe secondary to the previously described posttraumatic findings. There ls unchanged degenerative severe right and moderate left neural foraminal narrowing at this level. Degenerative severe bilateral neural foraminal narrowing is noted at C5-6, where there is also improved mild spinal canal narrowing that was previously moderate." *See Px. 2, page 136*.

On October 24, 2018, Dr. Bega conducted a follow-up physical examination of Mr. Phelan. Dr. Bega diagnosed "cervical myelopathy," or weakness in the arms. At his deposition, Dr. Bega attributed this condition to Mr. Phelan's cervical injury. *See Px. 10, page 27*.

Mr. Phelan was released from Northwestern Memorial on June 19, 2018 and was immediately admitted to Shirley Ryan Ability Lab, a 24-hour surgical aftercare facility. While at Shirley Ryan, Mr. Phelan was seen three times per day for physical therapy, which improved his functional mobility overall.

On July 23, 2018, Mr. Phelan was admitted to the Clare, a 24-hour care facility, but he continued treatments at Shirley Ryan through June 30, 2018. Upon admission to The Clare, Mr. Phelan was diagnosed with an unspecified displaced fracture of the sixth cervical vertebra, an unspecified displaced fracture of the seventh cervical vertebra, a sprain of the ligaments of the cervical spine, lack of coordination, and muscle weakness. *See Px. 3*, *page 1*. While at The Clare, Mr. Phelan underwent significant occupation, physical, and speech therapy. Mr. Phelan was discharged on November 3, 2018. *See Px. 3*, *page 362*. A discharge note stated Mr. Phelan demonstrated increased mobility and improved functional dynamic standing balance after his treatment at The Clare, but that he would need further outpatient therapy to address his remaining deficits. *See Px. 3*, *page 362*.

Upon discharge to his residence in Chicago, Elite Management Services immediately began providing Mr. Phelan 24-hour home care services. *See generally Px. 8*. Mr. Phelan continues to require these services to-date and for the foreseeable future. Elite Management's daily services include, but are not limited to: assisting Mr. Phelan shower, dress, undress, prepare and set up meals, shave, brush his teeth, trim his nails, ambulate, take his medications, brush his hair, do his laundry, clean his apartment, and assist with his skin care. *See generally Px. 8*.

On or about October 30, 2018, Respondent's nurse case manager, Laura Freeland, wrote a letter to Dr. Dahdaleh seeking answers to several causation questions. *Px. 5, page 81-82*. There are handwritten answers that would appear to be from Dr. Dahdaleh, but there is no signature or certification to verify this. Regardless, when asked whether a 24/7 caregiver is needed from the work injury versus the natural aging process, the handwritten answer is "unable to determine; [patient] has [right upper extremity] weakness dlt injury." With regard to whether Mr. Phelan had reached MMI, the answer states "unable to determine. Possibly within 1-2 years."

On March 12, 2019, Mr. Phelan underwent an EMG study. *Px. 2, page 115-116*. An EMG is an objective test that tests specifically for radiculopathy. *Rx. 4, page 67*. This EMG was positive for chronic bilateral C7-T11 radiculopathy that is

mild to moderate on the left and mild on the right. There was also mild right-sided C6 radiculopathy. *Px. 2, page 116*. Radiculopathy is pinching of a nerve coming out from the spinal canal. *Rx. 4, page 66*.

On November 19, 2019, Dr. Bega wrote a letter stating Mr. Phelan's "significant weakness in his limbs . . . is not attributable to his underlying degenerative disease. His range of motion is limited in his shoulders with his right being worse than the left. . . . Parkinsonism would not explain this weakness. This apparently began after his spinal cord injury and these exam findings and limitations would go along with that. He requires around the clock care and assistance." *See Px. 5, page 122, 126*.

Mr. Phelan was admitted to Northwestern Memorial's Emergency Room on December 9, 2019 after tripping and falling and hitting his right knee. He was treated for a laceration on his head which required stitches. An X-ray of Mr. Phelan's right knee revealed no fracture or dislocation and a CT of his cervical spine revealed no acute fracture, nor any evidence of hardware fracture or loosening. He was released from the emergency room the same day.

As far as ongoing therapy, a discharge note dated January 14, 2020 states Mr. Phelan lacks progress toward functional therapy goals due to decreased safety awareness and fall risk. The author of the note, Derrick Stables, PT, recommended discharging Mr. Phelan from occupational therapy with continued 24-hour caregiver supervision. *See Px. 5, page 139*.

Notably, Mr. Phelan's treatment with The Clare, Shirley Ryan, and Elite Management were all arranged by the Worker's Compensation case management nurse assigned to Mr. Phelan's claim.

Mr. Phelan has received continuous 24/7 home-health care through the date of the hearing from Elite Management. *Px. 8, p. 1119*.

Dr. Bega testified that it was his conclusion that Mr. Phelan would never be returning to work. *Px. 10, page 37*.

Respondent's section 12 examiner Dr. Itkin testified in his evidence deposition that Mr. Phelan developed hypoxia while in the hospital after the 6/11/2018 surgery. *Rx. 4, page 40*. Hypoxemia is a lack of oxygen in the blood, and that can have a negative effect on the brain. Dr. Itkin testified that nobody anticipated that intubation would have been necessary due to the hypoxemia. *Rx. 4, page 41*. Despite this, he curiously had "no opinion" as to whether the hospital stay in this case resulted in the hypoxemia. He did not have an opinion as to whether Mr. Phelan's long-standing neurological conditions caused his hypemia. *Rx. 4, page 42*.

Dr. Itkin testified that he had no opinion as to whether Mr. Phelan's neck fracture required the 24-hour home health care that he was currently receiving. *Rx. 4, page 53-54*. Despite a positive EMG test, Dr. Itkin did not believe that Mr. Phelan had radiculopathy when he examined him. *Rx. 4, page 65*.

CONCLUSIONS OF LAW

The aforementioned Statement of Facts is hereby incorporated into each section of these Conclusions of Law.

Section l(b)3(d) of the Act provides that, in order to obtain compensation under the Act, the employee bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment. 820 ILCS 305/1(b)3(d). To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of her claim (O'Dette v. Industrial Commission, 79 Ill. 2d 249, 253 (1980)), including that there is some causal relationship between her employment and her injury. *Caterpillar Tractor Co. v. Industrial Commission*, 129 Ill. 2d 52, 63 (1989).

Decisions of an arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e). The burden of proof is on a claimant to establish the elements of her right to compensation, and unless the evidence considered in its entirety supports a finding that the injury resulted from a cause connected with the employment, there is no right to recover. *Board of Trustees v. Industrial Commission*, 44 Ill. 2d 214 (1969).

(F) WHETHER PETITIONER'S CURRENT CONDITION OF ILL-BEING IS CAUSALLY CONNECTED TO THE INJURY?

The Arbitrator finds that the injury suffered by Mr. Phelan and his current condition is causally related to his work accident.

In reaching this conclusion, the Arbitrator is relied on the testimony of Dr. Daniel Bega at his evidence deposition and the medical records of Northwestern Center for Comprehensive Orthopedic & Spine Care, Shirley Ryan Ability Lab, The Clare, and Elite Care Management that the Petitioner's current conditions of ill-being are causally related to the 6/5/2018 work accident. Dr. Bega opined at his evidence deposition that there was a causal relationship between the accident and the Petitioner's shoulder and spine pathology. *See Px. 10, page 33*. Respondent's Section 12 physician, Dr. Itkin, refused to opine as to whether a causal relation between the accident and spine pathology exists. *Rx. 4, page 53-54*. Since Dr. Itkin provides no contrary evidence, the Arbitrator is compelled to follow the opinion of Dr. Bega. The arbitrator finds Dr.

Bega's conclusion to be credible. Dr. Bega, gave the opinion that Mr. Phelan's hand weakness was from his spinal cord injury, and to the extent that the hand weakness necessitated the 24-hour home healthcare, that would make it related to the 6/05/2018 work accident. *Px. 7, page 2; Px. 10, page 35.*

It is uncontroverted that the Petitioner suffered a traumatic injury with disruption of the anterior longitudinal ligament at C6-7 and a fracture through the C6-7 disc with associated increased signal in the C6 inferior plate and C7 superior endplate that required a C4-T2 neck fusion surgery with Dr. Dahdaleh on June 11, 2018. None of the doctors, including Respondent's section 12 examiner, dispute this.

Petitioner and his daughter, Dr. Julie Phelan, testified at trial that none of his issues with mobility, ambulation, and balance predated the June 5, 2018 accident. Their testimony was corroborated by the pre-accident records of NorthShore University Healthsystem, which establish Mr. Phelan did not experience any mobility, ambulation, or balance-related symptoms prior to June 5, 2018. *See Px. 1, page 22-24.* The Arbitrator believes that if his current level of helplessness predated the 6/05/2018 accident, he likely would have exhibit at least some symptoms at his visit with Dr. Kaczmarek on 10/25/2017. Since there is no evidence of any of these symptoms or deficits prior to his accident, the Arbitrator finds it more probably true than not that these conditions were caused by Petitioner's June 5, 2018 work accident.

Despite section 12 examiner's (Dr. Itkin) two reports whereby he cannot make a definitive determination of Petitioner's connected condition, the Arbitrator gives little weight to Dr. Itkin's conclusions and notes his review of the Petitioner's condition were based merely on medical records only. Furthermore, Dr. Itkin's testimony did not speak to Mr. Phelan's orthopedic injuries. In addition, Dr. Itkin *does not have an opinion* on whether Mr. Phelan's neck fracture necessitated 24-hour home health care from an orthopedic standpoint. *See Rx. 4, page 54.*

(J) WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY? HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES?

The Arbitrator finds the Petitioner's 24-hour in-home treatment with Elite Care Management is medically necessary as a result of the subject accident notwithstanding Petitioner's cognitive conditions. His orthopedic conditions, which are related, necessitated the services of Elite Care Management from January 15, 2020 to the present. January 15, 2020 represents the date on which Respondent arbitrarily ceased covering Mr. Phelan's treatment with Elite. Respondent shall

thus pay for Elite Care Management's reasonable and necessary medical services, as recommended by Dr. Bega and as provided in Sections 8(a) and 8.2 of the Act.

The Arbitrator is persuaded by and adopts Dr. Bega's unequivocal finding that the "significant weakness in [Mr. Phelan's] limbs . . . is not attributable to his underlying degenerative disease. His range of motion is limited in his shoulders with his right being worse than the left. . . . Parkinsonism would not explain this weakness. This apparently began after his spinal cord injury and these exam findings and limitations would go along with that. He requires around the clock care and assistance." *See Px. 7.*

The Arbitrator adopts this finding because Dr. Bega has significant experience evaluating and treating orthopedic injuries, while Respondent's Section 12 examiner refused to opine on any of Mr. Phelan's orthopedic injuries and the treatment such injuries necessitated. Given the absence of compelling evidence to the contrary, the Arbitrator finds Mr. Phelan's cervical injury necessitated 24- hour care.

(L) THE NATURE AND EXTENT OF PETITIONER'S INJURY?

The Arbitrator is persuaded by the testimony of Dr. Bega and the medical records of Northwestern Center for Comprehensive Ortho & Spine Care that Petitioner's injury is a cervical fracture at C6-7 that necessitated a cervical fusion surgery and ultimately caused Mr. Phelan to be incapable of engaging in everyday activities or taking care of himself. The Arbitrator is further persuaded by the testimony presented at trial which establishes Mr. Phelan's mobility, ambulation, balance, and muscular issues commenced immediately after the subject accident on June 5, 2018.

Based on the foregoing, the Arbitrator adopts Dr. Daniel Bega's opinions as to the nature and extent of Petitioner's injuries and finds the findings of Respondent's Section 12 physician, Dr. Itkin, to be unpersuasive and irrelevant as to the nature and extent of Petitioner's injuries because Dr. Itkin has not provided any contradictory evidence to rebut the *prima facie* evidence.

(K) WHETHER PETITIONER IS ENTITLED TO PERMANENT TOTAL DISABILITY BENEFITS?

The Arbitrator finds the Petitioner is permanently and totally disabled and thus entitled the permanent total disability benefits pursuant to Section 8(f) of the Act, retroactive to the date of the accident (6/05/2018).

An employee is totally and permanently disabled when he is unable to make some contribution to the work force sufficient to justify the payment of wages. *Ceco Corp. v. Industrial Comm'n*, 95 Ill. 2d 278, 286, 447 N.E.2d 842 (1983). An employee,

however, need not be reduced to total physical incapacity before a permanent total disability award may be granted. *Ceco Corp.*, 95 Ill. 2d at 286. Instead, the employee must show that he is unable to perform services except those that are so limited in quantity, dependability, or quality that there is no reasonably stable market for them. *A.M.T.C. of Illinois, Inc., Aero Mayflower Transit Co. v. Industrial Comm'n,* 77 Ill. 2d 482, 487, 397 N.E.2d 804 (1979).

The Arbitrator finds Dr. Bega's testimony conclusive in his opinion that the Petitioner would never be able to return to work. *Px. 10, page 37*. Petitioner's neck fracture, subsequent surgery, and "stormy" 11-day post operative hospital stay began a chain of events that rendered him completely unemployable for the rest of his life. Additionally, given the reliable testimony of the Petitioner's daughter, Dr. Julie Phelan, a licensed physician in good standing, and the testimony of Petitioner himself, who is a licensed attorney who is subject to the Illinois Rules of Professional Conduct, the Arbitrator is convinced that there is no quantity, dependability, or quality of a labor that the Petitioner could provide any employer. Furthermore, not being able to stand, walk, drive, or care for himself without assistance would make any vocational rehabilitation attempt pointless, a waste of time, and an unnecessary disposal of Respondent's resources.

Respondent shall pay Petitioner permanent and total disability benefits of $1,463.80/week for life, commencing June 5, 2018, as provided in Section 8(f) of the Act.

(L) THE NATURE AND EXTENT OF PETITIONER'S INJURY?

Because the Arbitrator grants PTD, he relies on the above analysis for the reward given. testimony of Dr. Bega and the medical records of Northwestern Center for Comprehensive Ortho & Spine Care that Petitioner's injury is a cervical fracture at C6-7 that necessitated a cervical fusion surgery and ultimately caused Mr. Phelan to be incapable of engaging in everyday activities or taking care of himself. The Arbitrator is further persuaded by the testimony presented at trial which establishes Mr. Phelan's mobility, ambulation, balance, and muscular issues commenced immediately after the subject accident on June 5, 2018.

Based on the foregoing, the Arbitrator adopts Dr. Daniel Bega's opinions as to the nature and extent of Petitioner's injuries and finds the findings of Respondent's Section 12 physician, Dr. Itkin, to be unpersuasive and irrelevant as to the nature and extent of Petitioner's injuries because Dr. Itkin has not provided any contradictory evidence to rebut the *prima facie* evidence.

(M) WHETHER PENALTIES OR FEES SHOULD BE IMPOSED PURSUANT TO SECTIONS 19(K), 19(L), AND 16?

The Arbitrator notes that the Petitioner, in his proposal indicates that he is not seeking fees or penalties therefore, Arbitrator awards none.

Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC022535
Case Name	Steve Fielding v. Kelly's Restaurant
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0338
Number of Pages of Decision	8
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Matthew Brewer
Respondent Attorney	Daniel Simmons

DATE FILED: 8/4/2023

/s/Stephen Mathis, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF ADAMS)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Steve Fielding,

Petitioner,

vs. NO. 20WC 22535

Kelly's Restaurant,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 9, 2022, is hereby affirmed and adopted.

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.

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

August 4, 2023

SJM/sj
o-6/14/2023
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/s/ *Stephen J. Mathis*
Stephen J. Mathis

/s/ *Deborah J. Baker*
Deborah J. Baker

/s/ *Deborah L. Simpson*
Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC022535
Case Name	FIELDING, STEVE v. KELLY'S RESTAURANT
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	5
Decision Issued By	Edward Lee, Arbitrator

Petitioner Attorney	Matthew Brewer
Respondent Attorney	Daniel Simmons

DATE FILED: 5/9/2022

THE INTEREST RATE FOR THE WEEK OF MAY 3, 2022 1.42%

/s/Edward Lee, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF **Adams**)

☐ 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

STEVE FIELDING
Employee/Petitioner

v.

KELLY'S RESTAURANT
Employer/Respondent

Case # **20** WC **022535**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Quincy**, on **April 6, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **May 12, 2019**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

ORDER

The Petitioner did not sustain an accident that arose out of and in the course of Petitioner's employment by Respondent on May 12, 2019 based on the Petitioner's theory that he sustained a specific incident at work on that date. Accordingly, the Petitioner's claim for compensation is denied. Given the Arbitrator's ruling on accident, there is no need for ruling on the remaining disputed issues in the case.

Claim for compensation is denied.

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

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

Edward Lee_____ **MAY 9, 2022**
Signature of Arbitrator

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

The Petitioner alleges that he sustained a specific work related injury to his right hand and elbow on May 12, 2019 while cutting a block of cheese with a piano wire cutter. Petitioner's Exhibit 1 at 7. The Petitioner testified that he worked for Kelly's Restaurant on May 12, 2019 (T7-8). He was a cook and had been employed by Kelly's Restaurant for about 20 years (T-8). He had worked in a food prep position at Kelly's for about a year and a half before May 12, 2019. (T-15).

On May 12, 2019, the Petitioner testified that he was using the piano wire with 2 handles on it to cut into a 40 pound block of cheese (T-15). About the third slice down he testified that he felt a snap in his right hand and burning of his right arm (T15-16). He was using the cheese cutter pulling the wire toward himself to cut into the 40 pound block of cheese. (T-16).

The Petitioner sought medical care at Quincy Medical Group on May 16, 2019 (T17-18). The Petitioner agreed that he had been experiencing slight discomfort in his right hand for about one month before his first visit at Quincy Medical Group (T-18). He had not noticed popping, burning or pain before the May 12, 2019 incident (T18-19).

The Quincy Medical Group records are in evidence as Petitioner's Exhibit 2. The Petitioner's first visit on May 16, 2019 contains a history of the Petitioner reporting getting numbness and tingling in fingers in his right hand for about one month before the visit. Petitioner's Exhibit 2 at 2. The progress note by Dr. Arndt shows that the Petitioner was very atrophied in the interdigital space between the thumb and first digit of the right hand that the Petitioner said was a new finding. *Id*. Dr. Arndt recommended a nerve conduction study and indicated that he suspected that this was not an acute injury. *Id*. at 3

The Petitioner was referred to Dr. Fynn-Thompson at Quincy Medical Group for evaluation. The Petitioner was first seen by Dr. Fynn-Thompson on July 10, 2019. Dr. Fynn-Thompson's note indicates that the degree of atrophy in the Petitioner's right hand usually takes a period of about 12 to 18 months and sometimes more like 18 to 24 months to develop after constant nerve compression. *Id*. at 29. It is not something that develops over 2 to 6 months. *Id*. Dr. Fynn-Thompson concluded that the Petitioner had ulnar compression of the elbow for quite some time that had progressively gotten worse. *Id*. Dr. Fynn-Thompson thought that the May 12, 2019 incident may have just brought attention to some of his evolving muscle atrophy. *Id*.

Dr. Fynn-Thompson was deposed, and his evidence deposition transcript is in evidence as Petitioner's Exhibit 5. Dr. Fynn-Thompson testified that at the time of his first visit with the Petitioner, he concluded that the petitioner likely had a combination of ulnar nerve compression of the elbow and superimposed carpal tunnel, even though the ulnar nerve problem was probably the more significant issue. Petitioner's Exhibit 5 at 18. He recommended that the Petitioner undergo an ulnar nerve release at the elbow as well as a carpal tunnel release of the right hand. *Id*. at 19. Dr. Fynn-Thompson testified that it was difficult to say for sure whether the May 12, 2019 incident had any causal relation with the conditions that he diagnosed. *Id*. at 19. It is possible that any injury in the hand and swelling could potentially have aggravated a hand based problem, but it would have been unlikely to generate any additional issue or an aggravation of an elbow based issue. *Id. at 20*.

On cross-examination, Dr. Fynn-Thompson acknowledged and agreed with his July 10, 2019 office note that it was his opinion that the May 12, 2019 incident may have just brought attention to some of the evolving muscle

atrophy (T26). He also agreed that the level of atrophy seen in the right hand would have taken at least one year to develop. *Id*.

The medical records and testimony of Dr. Fynn-Thompson are instructive on the issue of whether the Petitioner sustained a specific incident involving the right hand and right elbow on May 12, 2019. Dr. Fynn-Thompson's records and testimony, taken together, confirm his opinion that the Petitioner had a longstanding issue with his right elbow primarily and coincidentally his right hand. Although Dr. Fynn-Thompson did not dispute the May 12, 2019 incident, his opinion is that the incident did not cause any problem in the right hand or right elbow and more likely just alerted the petitioner to an evolving condition for which he should seek medical treatment. The Petitioner's claim for compensation in this case is based on the theory that he sustained a specific incident on May 12, 2019 that caused injuries to his right elbow and right hand that ultimately required surgery with Dr. Fynn-Thompson. It is Dr. Fynn-Thompson's clear opinion that the May 12, 2019 incident cutting cheese did not cause injury either to the Petitioner's right elbow or right hand. As a result, the Petitioner has not established that he sustained a specific injury to his right elbow and right hand on May 12, 2019. Accordingly, the Petitioner's claim for compensation is denied.

Claim for compensation is denied.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC010784
Case Name	Steve Fielding v. Kelly's Restaurant
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0339
Number of Pages of Decision	10
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Matthew Brewer
Respondent Attorney	Daniel Simmons

DATE FILED: 8/4/2023

/s/Stephen Mathis, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF ADAMS)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Steve Fielding,

Petitioner,

vs. NO. 21WC010784

Kelly's Restaurant,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 9, 2022, is hereby affirmed and adopted.

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.

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

August 4, 2023

SJM/sj
o-6/14/2023
44

/s/ *Stephen J. Mathis*
Stephen J. Mathis

/s/ *Deborah J. Baker*
Deborah J. Baker

/s/ *Deborah L. Simpson*
Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC010784
Case Name	FIELDING, STEVE v. KELLY'S RESTAURANT
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	7
Decision Issued By	Edward Lee, Arbitrator

Petitioner Attorney	Matthew Brewer
Respondent Attorney	Daniel Simmons

DATE FILED: 5/9/2022

THE INTEREST RATE FOR THE WEEK OF MAY 9, 2022 1.42%

/s/Edward Lee, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF **Adams**)

☐ 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

STEVE FIELDING
Employee/Petitioner

v.

KELLY'S RESTAURANT
Employer/Respondent

Case # **21** WC **010784**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Quincy**, on **April 6, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **May 12, 2019**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

ORDER

The Petitioner did not sustain an accident that arose out of and in the course of Petitioner's employment by Respondent concerning the Petitioner's repetitive use theory of compensability. Accordingly, the Petitioner's claim for compensation is denied. Given the Arbitrator's ruling on accident, no ruling is necessary on the remaining disputed issues in the case.

Claim for compensation is denied.

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

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

Edward Lee
Signature of Arbitrator

MAY 9, 2022

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

The Petitioner alleges injuries to his right elbow and right hand as a result of repetitive use working for the Respondent. Petitioner's Exhibit 1 at 9. On October 1, 2019, the Petitioner underwent surgery with Dr. Fynn-Thompson at Blessing Hospital to address right carpal tunnel syndrome and right cubital tunnel ulnar nerve compression at the elbow. Petitioner's Exhibit 2 at 78. The Petitioner underwent a right mini open carpal tunnel release and a right ulnar nerve in situ decompression at the elbow. *Id.* The question presented is whether the Petitioner engaged in repetitive use of the right hand and elbow to the extent that the petitioner sustained an accident that arose out of and in the course of Petitioner's employment by Respondent.

Dr. Fynn-Thompson was deposed and his evidence deposition transcript is in evidence as Petitioner's Exhibit 5. During the course of the deposition, Dr. Fynn-Thompson testified as follows:

> Q. Doctor, do you have an opinion as to whether…Mr. Fielding had worked for the Respondent in this case, Kelly's Restaurant, for over 20 years as a cook, full-time working 40 hours a week, where he would do normal work as a cook or as a prep cook, lifting pots and pans, cutting, doing food prep, would you have an opinion as to whether or not those job duties over that period of time could have a causative or aggravating affect in the carpal and/or cubital tunnel condition which you diagnosed?
>
> A. Well, I cannot say for 100% for sure. But there is a possibility that anything that generates repeated flexion and extension of the elbow or flexion extension of the wrist in a repetitive fashion with some degree of force may potentially aggravate one or both of those conditions. Petitioner's Exhibit 5 at 20-21.

Dr. Fynn-Thompson was not asked a hypothetical question concerning the nature of the Petitioner's work for the respondent. Dr. Fynn-Thompson testified generally that anything that generates repeated flexion and extension of the elbow or flexion extension of the wrist in a repetitive fashion with some degree of force may possibly aggravate one or both of the conditions. Accordingly, the Petitioner's testimony must be analyzed to see if the nature of his work fits with the general discussion by Dr. Fynn-Thompson and whether there might exist other possible causes of the right elbow and right wrist injuries.

The Petitioner testified that, as of May 12, 2019, he had been employed as a cook for Kelly's Restaurant for about 20 years (T-8). For the previous year and a half, he was a prep cook. *Id.* The Petitioner filled the line with his hands. He filled the line with items needed for cooking, including providing plates, buns, and of various food items (T-9). While working as a cook, the Petitioner used a spatula, tongs, and his hands (T-10). He did not use anything else. *Id*. He did not use a blender or a mixer or anything of the sort. *Id*. He had to the cut and dice tomatoes and heads of lettuce. (T-11).

In the year and a half before May 12, 2019, the Petitioner worked as a prep cook. He did a variety of duties, including peeling potatoes and making sauces (T-13). While making sauces, the Petitioner would pour buckets of mayonnaise and other ingredients in a large commercial mixer that would mix the ingredients together (T-14).

The Petitioner testified that he had a previous injury involving his right arm. About a year before May 12, 2019, he slipped and fell on water on the floor that was dripping from a light fixture (T-24). The petitioner testified that he fell on his elbows and his back. *Id.* On direct examination, the following exchange took place:

> Q. Do you have any sort of, for lack of a better term, hand intensive hobbies that you participate in outside of work?
>
> A. Well yeah, I used to order bicycles and me my son would put them together. He would do most of the work, most of the heavy work. It's hard for me to put the bolts on and stuff with this hand because I'm not good with the left doing that stuff, so he would do most of the work.
>
> Q. When was that?
>
> A. That was like before and after (T-25).

On cross-examination, the Petitioner testified that ordering motors and fixing up bikes started about one year before May 12, 2019 (T31-32). The Petitioner testified that they would get gas motors to put on bicycles and then put them together (T-32).

The Petitioner testified that he was also a hunter and a fisherman (T-26). He has engaged in those activities all of his life (T30-31). The Petitioner testified that the space between his right thumb and right index figure was sunk in after May 12, 2019 (T-17). He did not notice it until he got home after working on May 12, 2019 (T-29). The space between the thumb and finger had never been like that before and always looked like his left hand. *Id.* The Petitioner followed up with Dr. Fynn-Thompson following his surgery on October 9, 2019. Petitioner's Exhibit 5 at 23. The Petitioner was doing well and his incisions were healing well. *Id.* The Petitioner reported that some of the numbness was somewhat improved in the right hand, including the right and small fingers. I*d.* Dr. Fynn-Thompson had the Petitioner on light-duty restrictions for 2 weeks and then was to follow-up as-needed afterwards. *Id.* Dr. Fynn-Thompson has not seen the Petitioner since the October 9, 2019 office visit.

On cross-examination, Dr. Fynn-Thompson testified that the atrophy in the Petitioner's right hand between the right thumb and right index finger usually takes a period of about 12 to 18 months and sometimes a longer to develop after a constant nerve compression. *Id.* at 25. Dr. Fynn-Thompson thought that the Petitioner had ulnar compression in his right elbow for quite some time that progressively got worse. *Id.* The atrophy occurs after an extended period of time of constant nerve compression. *Id.* at 26. Dr. Fynn-Thompson explained that constant nerve compression means dysfunction of the nerve to some degree that generates lack of normal nerve function. In other words, there is tightness in the tunnel that the nerve is passing through and that tightness is persisting for an extended period of time. *Id.*

There is nothing specific in the Petitioner's testimony to establish that his work as a cook or prep cook for the Respondent required repeated flexion and extension of the elbow or wrist with some degree of force. The Petitioner used his hands at work, however, for the most part he was moving or carrying food items. The Petitioner did not use any kind of vibratory tools and essentially was limited to using a spatula and tongs in his cooking work. The Petitioner used knives for cutting and dicing, however, there is no quantification of what portion of the Petitioner's work required him to use knives. The totality of the Petitioner's testimony suggests that using knives for cutting was an overall small part of the Petitioner's workday. The Petitioner's description of his job duties as a prep cook for a year and a half leading up to May 12, 2019 did not provide any concrete

examples of work requiring extension or flexion with either his right hand or elbow. Likewise, there is no indication that the Petitioner engaged in any kind of repetitive forceful work with his right hand and elbow.

The medical records are clear that at the time of the Petitioner's first medical visit and through his initial consultation with Dr. Fynn-Thompson that he had significant atrophy in the space between the right thumb and right index finger. Although the Petitioner testified that he never noticed the atrophy until after the incident on May 12, 2019, there is no question that the atrophy had to have preexisted that date based on the totality of the medical records in the case and Dr. Fynn-Thompson's explanation of the length of time it would take for significant atrophy to develop.

The petitioner testified to two events that occurred approximately one year before May 12, 2019 that have to be taken into consideration concerning the development of the Petitioner's right elbow and wrist conditions. First, the Petitioner testified to a specific accident approximately one year before May 12, 2019 when he slipped and fell and landed on his back and both elbows. The Petitioner said that his elbows were sore for a period of time after the fall, however, he thought that he generally was okay and continued working. Dr. Fynn-Thompson was not questioned about the fall and its potential impact on the development of the right wrist and elbow injuries. It is reasonable to infer from a chain of events analysis that the Petitioner could have acutely injured his right elbow to the point where he developed a constant compression in the right cubital tunnel so that, over the next year, the constant compression led to the atrophy in the space between the Petitioner's right thumb and index finger.

Second, the Petitioner was asked if he engaged in any hand intensive activities outside of work and discussed his hobby of putting gas powered engines on bicycles, apparently for resale. The Petitioner acknowledged in answering the question that the work on bicycles was hand intensive. He also indicated that he and his son started the activity about one year before May 12, 2019. The activity required of mounting gas powered engines on bicycles using nuts, bolts and screws is his hand intensive and would require flexion and extension and the use of force. The start of the Petitioner's hobby coincides with the length of time that the atrophy in the Petitioner's right hand would take to develop according to the testimony of Dr. Fynn-Thompson.

The Petitioner has not met his burden of proving that he engaged in repetitive activities at work sufficient to cause the injuries in the right wrist and elbow that required surgery with Dr. Fynn-Thompson. There is nothing in the Petitioner's description of his job duties for the Respondent that establishes that he engaged in activities that generated repeated flexion and extension of the elbow or wrist with some degree of force. Dr. Fynn-Thompson testified that those types of activities would be required to generate the right elbow and right wrist injuries for which he performed surgery. The Petitioner testified to a fall at work in which he landed on his back and both elbows. The acute force with which the Petitioner struck his right elbow could conceivably result in ongoing right elbow problems. The fall also took place about a year before May 12, 2019, which is consistent with the amount of time it would take for the development of the Petitioner's right hand atrophy. More compelling, however, is the Petitioner's testimony about his hobby of mounting gas powered motors on bicycles. The Petitioner acknowledged that the work was hand intensive and he and his son began the hobby about one year before May 12, 2019. The Petitioner's hobby necessarily involved extension and flexion of the right wrist and elbow and also would have required the use of force consistent with Dr. Fynn-Thompson's definition of what activity would have been necessary to cause the right wrist and elbow injuries. The Petitioner's start of the hobby about one year before May 12, 2019 also puts the hobby in the exact time frame for the development of atrophy in the right hand as described by Dr. Fynn-Thompson.

The evidence in this case does not establish that it is more likely than not that the Petitioner's work activities are causally related to the development of his right elbow and wrist injuries. The Petitioner's testimony about his job duties for the Respondent does not support a conclusion that he engaged in repetitive flexion and extension of the right elbow and wrist with force. In this case, the Petitioner had both the acute blow to the right elbow when he fell and he also began his bike hobby about one year before the development of symptoms and the discovery of the atrophy in the Petitioner's right hand. The motorized bike hobby was hand and arm intensive, required flexion and extension of the wrist and elbow with force and started about one year before the development of symptoms consistent with what Dr. Fynn-Thompson would have expected given that his observation of the atrophy in the Petitioner's right hand. The Petitioner has not established that he sustained an accident that arose out of and in the course of his employment with the Respondent. In this case, the Petitioner has provided substantial evidence of incidents outside of work that could have been the source of the injuries, particularly the motorized bike hobby. The Petitioner has not met his burden of proof to establish that he sustained a repetitive use injury while working for the Respondent. Accordingly, the Petitioner's claim for compensation is denied.

Claim for compensation is denied.

41064141_1

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC006662
Case Name	Howard Reynolds v. Mueller Co.
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0340
Number of Pages of Decision	16
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Todd Schroader, Mary Massa
Respondent Attorney	Peter Carlson, Lauren Kus

DATE FILED: 8/8/2023

/s/ Deborah Baker, Commissioner

Signature

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

HOWARD REYNOLDS,

Petitioner,

vs. NO: 21 WC 06662

MUELLER COMPANY,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of whether Petitioner sustained an accidental injury arising out of and occurring in the course of his employment, whether Petitioner's current left shoulder condition is causally related to the work injury, and entitlement to incurred medical expenses as well as prospective medical care, and being advised of the facts and law, amends the Decision of the Arbitrator as set forth below, but otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill. 2d 327 (1980).

The Commission observes Petitioner's personal identity information was unredacted from Petitioner's Exhibits 1 and 2. The Commission cautions Counsel to adhere to Supreme Court Rule 138. *Ill. S. Ct. R. 138* (eff. Jan. 1, 2018).

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 1, 2022, as amended above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $982.47 for medical expenses as provided in §8(a), subject to §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall provide and pay for left shoulder surgery as recommended by Dr. John Kefalas, including but not limited to any necessary pre-operative and post-operative rehabilitative treatment, as provided in §8(a) of the Act.

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.

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $44,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

August 8, 2023

DJB/mck

O: 7/26/23

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/s/ *Deborah J. Baker*

/s/ *Stephen J. Mathis*

/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC006662
Case Name	Howard Reynolds v. Mueller Co.
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	13
Decision Issued By	Edward Lee, Arbitrator

Petitioner Attorney	Todd Schroader
Respondent Attorney	Lauren Kus

DATE FILED: 11/1/2022

THE INTEREST RATE FOR THE WEEK OF NOVEMBER 1, 2022 4.44%

/s/Edward Lee, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF **Sangamon**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Howard Reynolds
Employee/Petitioner

v.

Mueller Co.
Employer/Respondent

Case # **21** WC **006662**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Springfield**, on **9/29/22**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **2/3/2021**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**51,043.20**; the average weekly wage was $**981.60**.

On the date of accident, Petitioner was **49** years of age, ***married*** with **0** dependent children.

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

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

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

ORDER

The Arbitrator finds that Petitioner's injury on February 3, 2021, occurred in the course of and arose out of his employment with Respondent.
The Arbitrator finds that Petitioner's current condition of ill being is causally related to his injury of February 3, 2021.
The Arbitrator finds Petitioner is entitled to prospective medical care as outlined by Dr. Kefalas. The Arbitrator orders Respondent to authorize and pay for the medical care outlined by Dr. Kefalas.
Respondent shall pay reasonable and necessary medical services of $982.47, as provided in Sections 8(a) and 8.2 of the Act.

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

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

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

NOVEMBER 1, 2022

Edward Lee
Signature of Arbitrator

Petitioner testified that he was employed as a setup man which entailed setting up machines, staging jobs and at the end of the day, cleaning the machines out. Petitioner testified the department he is in makes the cores for castings for water and gas valves and the innards of fire hydrants, anything that is brass. On February 3, 2021, it was at the end of the day and Petitioner was cleaning a Hopper out taking the head off and blowing the machine down. Petitioner testified the sand gets everywhere and in the cleanup process he was stretched out as far as he could go and felt a sharp pain in his left shoulder. Petitioner testified he was squatted down leaning on the table with his right hand and stretched out in like a swimming position, with his left arm extended out as far as it could go. He had an air wand attached to a hose in his left hand. Petitioner testified the sand was located underneath and behind the 4D machine. Petitioner injured himself on his left shoulder pointing to the top of the shoulder. Petitioner testified that when the accident happened, he immediately stopped what he was doing and had to wait for it to go away. He gathered himself and then he went and told Terry his supervisor.

Petitioner testified the original accident report noted pain in the top right shoulder and neck however the second report that was dated the same day indicated pain in the left shoulder and neck. Petitioner testified that his right neck and arm were not injured and that the pain was always in the left shoulder and neck. Petitioner testified that he was directed by Respondent to go to HSHS Occupational Health the next day. Petitioner testified he treated with occupational health until they gave him an injection in the shoulder and referred him to an orthopedic surgeon. He then began treatment with Dr. Kefalas who has recommended surgery a left shoulder arthroscopy, subacromial decompression and A.C. resection. Petitioner wishes to proceed forward with that surgery. Petitioner testified he still has problems of burning and tingling in his left shoulder. If he does anything where his hand is above his head for too long he gets fatigued really quick. Petitioner acknowledged he had prior treatment on his left shoulder; however, he returned to full duty and did not get any significant testing. Petitioner testified that prior to the accident he was not having problems.

Petitioner testified that a hose was attached to the air wand that was approximately 10 foot long and he would drag that along with him. Petitioner testified at the 4D machine there were surveillance cameras that were close to the 4d station. The security cameras were less than 15 feet away. Petitioner testified the individual that mixes the sand before he switched jobs made it to where petitioner had to move quite a bit of sand. Petitioner testified he would have to empty the sand in the tray weighing approximately 30 to 40 pounds. Petitioner testified that after he left the job that he was working in 2018 he was not having problems with his left shoulder. Petitioner testified the shoulder pain in his left arm went away when he was working in the set up job. Petitioner testified that a month after the accident he went to his machine with Jason Eberle to re-create the accident. Petitioner testified that when he was recreating the accident, he didn't fully extend his shoulder because it would have hurt him again. Petitioner testified that he never hurt his right arm; it was a simple mistake in the reporting. Petitioner testified his left arm was straight out when the accident happened similar to a swimming position.

Terry Hedding was the core room supervisor with Respondent. He was Petitioner's supervisor. Petitioner told him that he was finishing up the cleanup and he was bent over blowing the sand round from the floor away from the machine and felt pain in the back of his neck going to shoulder.

Jason Eberle was an EHS Specialist for Respondent. Mr. Eberle testified that Petitioner came to him on February 3, 2021, regarding a work accident. Mr. Eberle testified that Respondent's Exhibit 4 was the statement that petitioner gave to him on the date of the accident. Jason Eberle testified that a report was generated after the re-creation of the accident called the Fishbone which was not put into evidence. Additionally, Mr. Eberle testified that the plant has video surveillance which also was not put into evidence in this case. Mr. Eberle testified that he has pulled video before on prior accidents. He testified he chose not to pull video on Petitioner's accident. Thus, there was no video showing the accident admitted into evidence by Respondent. Mr. Eberle testified that Martin Dybas was the insurance adjuster

for Sedgwick who also had Petitioner's prior claim from 2018. Mr. Eberle assumed that Mr. Dybas had every opportunity to send information regarding the previous claim to their Section 12 physician Dr. Aribindi.

HSHS Occupational Health

On February 4, 2021, Respondent sent Petitioner to HSHS Occupational Health wherein he described an injury while cleaning the machine when he was bent over to blow with his left arm, he felt a sharp pain in his left shoulder and the back of his neck. (PX 1 at 2). Petitioner stated he was using an air hose to sweep sand (bent over an awkward position) when he noticed a sharp pain in the posterior aspect of the left shoulder. (PX 1 at 2). Petitioner was initially diagnosed with Cervicalgia and sprain of joints and ligaments of other parts of neck. (PX 1 at 3). Petitioner returned to HSHS on February 17, 2021, with a diagnosis of cervicalgia; a sprain of joints and ligaments of other parts of neck; and pain in left shoulder. (PX 1 at 5). Petitioner was continued on full duty. (Id.). Dr. Adillis Moosa provided a referral order for Petitioner to have ART therapy with the billing instructions to send to Sedgwick Worker's Compensation guarantor. (PX 1 at 6). On March 15, 2021, Petitioner had 7/10 pain prior to treatment with Dr. Zobrist. (PX 1 at 7). Petitioner was again seen by Dr. Moosa on April 5, 2021. (PX 1 at 12). Dr. Moosa continued his diagnosis of Cervicalgia; sprain of joints and ligaments of other parts of neck; and pain in left shoulder. (PX 1 at 13). Dr. Moosa arranged for physical therapy. (Id.). On April 26, 2021, Dr. Moosa noted Petitioner had been using capsaicin cream and ibuprofen which improved symptoms in his left shoulder. Dr. Moosa's diagnosis was Cervicalgia; sprain of joints and ligaments of other parts of neck; pain and left shoulder; radiculopathy, cervical region; and other spondylosis, cervical region. (PX 1 at 19). Dr. Moosa recommended an MRI of the cervical spine. (Id.). Petitioner was also given a Medrol Dosepak. (Id.). On May 10, 2021, Dr. Moosa noted Petitioner continuing to complain of a dual ache along the posterior aspect of the shoulder as well as tingling sensation in the lateral aspect of the left shoulder. (PX 1 at 23). Dr. Moosa noted the MRI had mild disc protrusion at C5–C6 foraminal encroachment on right C5–C6, and small central disc herniation at C7–T1.(PX1 at 24). Dr. Moosa ordered an MRI of the left shoulder with scapula for left shoulder and neck pain. (PX 1 at 26). Worker's Compensation guarantor Sedgwick with the adjuster Martin Dybas was listed on the referral form.(Id.). On May 27, 2021, Dr. Moosa noted the MRI report of the left shoulder appears to be conflicting wording which suggests that there is an articular surface tear of infraspinatus or supraspinatus. (PX 1 at 28). Dr. Moosa recommended a left shoulder subacromial injection. (PX 1 at 28). Martin Dybas, the insurance adjuster for Sedgwick approved the left shoulder subacromial injection as requested. (PX 1 at 30). On June 10, 2021, Dr. Moosa performed the injection on Petitioner's left shoulder. (PX 1 at 32). Dr. Moosa injected 2 cm below the posterior lateral border of the acromion with the tip of the needle targeted to the superior aspect of the acromion. (Id.). After the injection, manipulation of the left shoulder was performed. (Id.). On June 24, 2021, Petitioner returned to see Dr. Moosa wherein Petitioner was told he needed to establish care with his PCP to help address the radiating pain in the left upper extremity as it would not likely be work-related (MRI of c-spine was unremarkable). As for the persistent left shoulder pain, Dr. Moosa will refer to Ortho for further management of the left shoulder. (PX 1 at 34). Dr. Moosa then sent a referral form for Petitioner to see an orthopedic doctor to Martin Dybas, the adjuster for Sedgwick. (PX 1 at 36). Dr. Moosa noted a symptom history of left shoulder pain and MRI with findings of hypertrophic AC joint with impingement, supraspinatus tendinopathy, and partial tear of the infraspinatus. Subacromial injection provided approximately one week of relief. (PX 1 at 36). Adjuster Martin Dybas approved the referral to Orthopedic doctor for the left shoulder. (PX 1 at 37).

Dr. John Kefalas

On June 28, 2021, Dr. John Kefalas, Board Certified in Orthopedic Surgery, noted Petitioner had been treating through HSHS Occupational Medicine for left shoulder pain and left-sided neck pain. (PX 2 at 6). Petitioner indicated he had no prior left shoulder symptoms. (Id.). Dr. Kefalas noted tenderness in the subacromial space as well as positive impingement sign. (PX 2 at 7). Dr. Kefalas diagnosed left shoulder impingement syndrome. (Id.). Dr. Kefalas placed him on Meloxicam and asked him to return in a month at that time he would consider repeating the injection. (Id.) On July 26, 2021, Dr. Kefalas followed up with Petitioner who was reported his left arm still bothers him. (PX 2 at 9). Dr. Kefalas wanted Petitioner to continue physical therapy and placed Petitioner on Neurotin. (PX 2 at 9). Dr. Kefalas also wanted to obtain approval for a left shoulder arthroscopy possible decompression, AC resection and will proceed once authorization is provided. (PX 2 at 9). Dr. Kefalas diagnosed left shoulder impingement. (PX 2 at 11). Petitioner was seen by Dr. Kefalas on August 3, 2022. (PX 2 at 13). Petitioner was still having difficulty with left shoulder motion and mainly posterior pain. (Id.). Dr. Kefalas noted Petitioner was positive for impingement sign and provided a left lateral glenohumeral joint injection. (PX 2 at 13). On August 29, 2022, Dr. Kefalas noted Petitioner was not provided relief by the injection of the left shoulder. (PX 2 at 13). Dr. Kefalas again advised that Petitioner should consider left shoulder arthroscopy subacromial decompression and A.C. Resection. (PX 2 at 16).

Dr. Kefalas Deposition Testimony

Dr. John Kefalas testified he is a Board Certified Orthopedic Surgeon. On June 28, 2021, Petitioner presented with complaints of left shoulder pain. (PX 8 at 4, 5). On examination, Dr. Kefalas noted petitioner had fairly good motion of cervical spine. The left side was tender when Dr. Kefalas would push or palpate in the front part or subacromial space of the shoulder. (Id.). Petitioner also had pain when Dr. Kefalas raised his arm up and rotated the hand down which was an impingement sign indicative of inflammation in the shoulder. (PX 8 at 5, 6). Continuing in the exam, Dr. Kefalas found some restricted range of motion limited abduction to 160 degrees, normally Dr. Kefalas likes 175 degrees external rotation was limited to 35 degrees, and normally that's a bit more than that. (PX 8 at 6) Dr. Kefalas reviewed an MRI of the cervical spine which showed degenerative disc disease but nothing that Dr. Kefalas identified as being the source of the shoulder symptoms. (PX 8 at 6). Dr. Kefalas continued that his shoulder MRI showed some signal or fluid on the shoulder joint around his long head of the biceps tendon and in the area of his rotator cuff tendons in subacromial space. (Id.) Dr. Kefalas noted Dr. John Locke interpreted the MRI as being hypertrophic AC joint degenerative changes with impingement and supraspinatus tendinopathy and articular surface partial-thickness tearing of the supraspinatus. (PX 8 at 6, 7). Dr. Kefalas when comparing the MRI of the left shoulder to his clinical exam felt that Petitioner's symptoms were mainly secondary to inflammation in his shoulder. (PX 8 at 7) Dr. Kefalas placed him in physical therapy and on anti-inflammatory medication with an initial impression of left shoulder impingement syndrome. (Id.). On July 26, 2021, Dr. Kefalas noted petitioner was still having left arm pain with occasional numbness down the arm into his left hand. He was continuing to have pain in the front or anterior and superior aspect of the left shoulder with physical therapy keeping his mobility, but he was still noting symptoms and continued to perform his regular work. (PX 8 at 9). Dr. Kefalas noted Petitioner's tenderness with palpation was about the same however it was noting some symptoms on the upper part of the left shoulder where the collarbone attaches to the shoulder blade or the AC joint. (PX 8 at 9). Dr. Kefalas noted that Petitioner had slightly improved range of motion with his external rotation out 45°, which was improved, and he still had this positive impingement sign. (PX 8 at 9). Dr. Kefalas wanted Petitioner to continue physical therapy helping to keep and maintain his range of motion. He also placed Petitioner on neurotin which is a medicine utilize for your irritated nerves.The next step would be to consider left shoulder arthroscopy and that would allow Dr. Kefalas to visualize his rotator cuff biceps tendon as well as inspect his subacromial space in AC joint and treat them at the time of surgery. (PX 8 at 9). During Dr. Kefalas's deposition a hypothetical was posed to him to assume the HSHS notes described that on February 3 of 2021, Petitioner was cleaning the machine when he was bent over to blow debris with his left arm. He felt a sharp pain in his left shoulder and the back of his neck. When performing this

maneuver, petitioner had fully extended with his left arm, and he was bent over with his right hand bearing weight on an object. He was stretched out with his left arm trying to reach around the machine to try and blow debris out and had an air hose in his hand. It was an air hose with a trigger and wand, and then at the moment that he was fully outstretched with that left shoulder bent over he had sharp pain in the left shoulder and it started to burn. After that, he had treatment with HSH and then to you. (PX 8 at 11) Dr. Kefalas replied hypothetically assuming all of those facts, it's very reasonable that he might have sustained either a partial rotator cuff tear or biceps tendon injury, which is continuing to cause him discomfort, so I think that's very reasonable. Dr. Kefalas continued that within a reasonable degree of medical certainty, I think one could state that the type of injury has resulted in his continued left shoulder symptoms, yes. (PX 8 at 12). Dr. Kefalas noted he has treated individuals that have had injuries to their cervical spine as well as shoulders which oftentimes overlap. (PX 8 at 12, 13). Dr. Kefalas noted that if patients have injured their AC joint, which is where the collar bone attaches to the shoulder blade, that's often where the trapezius muscle attaches. The trapezius muscle is the big muscle that goes out of the side of your neck and those patients present with neck pain as well as shoulder pain. This complaint of numbness in his arm makes a concern that could the nerves in the neck have been irritated or become symptomatic and so the two regions overlap, so I tend to try and focus and eliminate one variable at a time, see if all symptoms deteriorate, and so commonly the shoulder is what we address first. (PX 8 at 13). Dr. Kefalas noted that the clinical exam findings and MRI imaging both support more shoulder issue than neck issue. (Id.) Dr. Kefalas testified that he wants to make sure that all the nerves are functioning motor -wise and sensory -wise, and they were. With regard to the shoulder, the pain when you push, that palpation pain in the front, it's indicative that there's some pathology there as well as his restricted shoulder motion. Those two facts combined with the fluid in his shoulder on the MRI and the signal near his rotator cuff and biceps tendon are kind of suspicious, and that's why I was thinking that maybe and oftentimes we do arthroscopy and we find biceps pathology not visible on the MRI or even full-thickness rotator cuff tears given that his MRI was not an arthrogram, it was a regular MRI. (PX 8 at 14).
Dr. Kefalas testified that within a reasonable degree of certainty, I believed he(Petitioner) has symptoms in his left shoulder. He could have symptoms in both areas. That's what I'm saying but I'm confident that his left shoulder symptomatic and that's why advise left shoulder arthroscopy. I wouldn't advise it if I didn't think there was pathology. (PX 8 at 23). Dr. Kefalas continued that he felt in high probability Petitioner's main symptoms are generating from his shoulder, and not his neck. (PX 8 at 23, 24).

Dr. Ram Aribindi Section 12 Exam

Petitioner was seen by Dr. Aribindi's for a section 12 examination on September 13, 2021. Dr. Aribindi noted mild tenderness over the anterior aspect of the left shoulder is consistent with a partial thickness tear/stenosis of the articular surface of the infraspinatus noted on MRI. However, he opined this is not the result of the work incident of February 3, 2021. The mechanism of injury as described by Mr. Reynolds does not cause tears/partial tears of the articular surface rotator cuff. (RX 7 at 8). Dr. Aribindi testified that all of the treatment rendered to Petitioner's left shoulder and cervical spine was reasonable and related to the accident up until the date of Dr. Aribindi's examination on September 13, 2021. (RX 8 at 55). Dr. Aribindi conceded that Dr. Moosa's injection was something that would address impingement and the surgery that Dr. Kefalas is proposing also addresses impingement. (RX 8 at 57, 58).

The Arbitrator finds the following:

B. Did an accident occur that arose out of and in the course of Petitioner's employment with Respondent?

The Arbitrator finds that Petitioner's injury on February 3, 2021, occurred in the course of and arose out of his employment with Respondent. The Arbitrator finds that Petitioner was assigned the task of cleaning the 4d machine as part of his daily job duties assigned by Respondent. The Arbitrator bases this finding directly on the guidance provided by the Illinois Supreme Court in the McAllister case.

The Illinois Supreme Court in McAllister v. Illinois Worker' Compensation, 2020 IL 124848, 181 N.E.3d 656, 450 Ill.Dec. 304 (2020), comprehensively laid the foundation for the analysis of "in the course of" and "arising out of". According to the Act, in order for a claimant to be entitled to workers' compensation benefits, the injury must "aris[e] out of" and occur "in the course of" the claimant's employment. 820 ILCS 305/1(d) (West 2014). Therefore, in order to obtain compensation under the Act, a claimant bears the burden of proving by a preponderance of the evidence two elements: (1) that the injury occurred in the course of claimant's employment and (2) that the injury arose out of claimant's employment. Sisbro, Inc. v. Industrial Comm'n, 207 Ill. 2d 193, 203, 278 Ill.Dec. 70, 797 N.E.2d 665 (2003).

1.Course of Employment

The phrase "in the course of employment" refers to the time, place, and circumstances of the injury. Scheffler Greenhouses, Inc. v. Industrial Comm'n, 66 Ill. 2d 361, 366-67, 5 Ill.Dec. 854, 362 N.E.2d 325 (1977). "A compensable injury occurs 'in the course of' employment when it is sustained while a claimant is at work or while he performs reasonable activities in conjunction with his employment." Wise, 54 Ill. 2d at 142, 295 N.E.2d 459. In this case, the employer does not dispute that the evidence established that at the time claimant sustained his shoulder injury he was at work performing activities in conjunction with his employment. Because the parties do not dispute that claimant's left shoulder injury occurred in the course of his employment, we only need to address the second element that must be proved to be entitled to compensation, whether claimant's left shoulder injury arose out of his employment.

2. Arising Out of Employment

"The 'arising out of' component is primarily concerned with causal connection. To satisfy this requirement it must be shown that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." Sisbro, 207 Ill. 2d at 203, 278 Ill.Dec. 70, 797 N.E.2d 665 (citing Caterpillar Tractor, 129 Ill. 2d at 58, 133 Ill.Dec. 454, 541 N.E.2d 665); see also *666 **314 Baggett v. Industrial Comm'n, 201 Ill. 2d 187, 194, 266 Ill.Dec. 836, 775 N.E.2d 908 (2002) ("An injury 'arises out of' one's employment if it originates from a risk connected with, or incidental to, the employment, involving a causal connection between the employment and the accidental injury."). A risk is incidental to the employment when it belongs to or is connected with what the employee has to do in fulfilling his or her job duties. Orsini, 117 Ill. 2d at 45, 109 Ill.Dec. 166, 509 N.E.2d 1005. To determine whether a claimant's injury arose out of his or her employment, we must categorize the risks to which the claimant was exposed. Dukich v. Illinois Workers' Compensation Comm'n, 2017 IL App (2d) 160351WC, ¶ 31, 416 Ill.Dec. 876, 86 N.E.3d 1161; Mytnik v. Illinois Workers' Compensation Comm'n, 2016 IL App (1st) 152116WC, ¶ 38, 409 Ill.Dec. 491, 67 N.E.3d 946; Baldwin v. Illinois Workers' Compensation Comm'n, 409 Ill. App. 3d 472, 478, 351 Ill.Dec. 56, 949 N.E.2d 1151 (2011); First Cash Financial Services v. Industrial Comm'n, 367 Ill. App. 3d 102, 105, 304 Ill.Dec. 722, 853 N.E.2d 799 (2006).

a. The Three Categories of Risk

The three categories of risks recognized by the case law are "(1) risks distinctly associated with the employment; (2) risks personal to the employee; and (3) neutral risks which have no particular employment or personal characteristics." Illinois Institute of Technology Research Institute, 314 Ill. App.

3d at 162, 247 Ill.Dec. 22, 731 N.E.2d 795; Baldwin, 409 Ill. App. 3d at 478, 351 Ill.Dec. 56, 949 N.E.2d 1151; First Cash Financial Services, 367 Ill. App. 3d at 105, 304 Ill.Dec. 722, 853 N.E.2d 799.

i. Employment Risks

The first category of risks involves risks that are distinctly associated with employment. "Employment risks include the obvious kinds of industrial injuries and occupational diseases and are universally compensated." Illinois Institute of Technology Research Institute, 314 Ill. App. 3d at 162, 247 Ill.Dec. 22, 731 N.E.2d 795. Examples of employment-related risks include "tripping on a defect at the employer's premises, falling on uneven or slippery ground at the work site, or performing some work-related task which contributes to the risk of falling." First Cash Financial Services, 367 Ill. App. 3d at 106, 304 Ill.Dec. 722, 853 N.E.2d 799. Injuries resulting from a risk distinctly associated with employment are deemed to arise out of the claimant's employment and are compensable under the Act. Steak 'n Shake, 2016 IL App (3d) 150500WC, ¶ 35, 409 Ill.Dec. 359, 67 N.E.3d 571.

ii. Risks Personal to the Employee

The second category of risks involves risks personal to the employee. "Personal risks include nonoccupational diseases, injuries caused by personal infirmities such as a trick knee, and injuries caused by personal enemies and are generally noncompensable." *667 **315 Illinois Institute of Technology Research Institute, 314 Ill. App. 3d at 162-63, 247 Ill.Dec. 22, 731 N.E.2d 795; see also Illinois Consolidated Telephone Co. v. Industrial Comm'n, 314 Ill. App. 3d 347, 352, 247 Ill.Dec. 333, 732 N.E.2d 49 (2000) (Rakowski, J., specially concurring) (examples of personal risks include falls due to a bad knee or an episode of dizziness). "Injuries resulting from personal risks generally do not arise out of employment. An exception to this rule exists when the work place conditions significantly contribute to the injury or expose the employee to an added or increased risk of injury." Rodin, 316 Ill. App. 3d at 1229, 250 Ill.Dec. 486, 738 N.E.2d 955.

iii. Neutral Risks

The third category of risks involves neutral risks that have no particular employment or personal characteristics. Illinois Consolidated Telephone Co., 314 Ill. App. 3d at 353, 247 Ill.Dec. 333, 732 N.E.2d 49 (Rakowski, J., specially concurring). "Neutral risks include stray bullets, dog bites, lunatic attacks, lightning strikes, bombing, and hurricanes." Illinois Institute of Technology Research Institute, 314 Ill. App. 3d at 163, 247 Ill.Dec. 22, 731 N.E.2d 795. "Injuries resulting from a neutral risk generally do not arise out of the employment and are compensable under the Act only where the employee was exposed to the risk to a greater degree than the general public." Springfield Urban League, 2013 IL App (4th) 120219WC, ¶ 27, 371 Ill.Dec. 384, 990 N.E.2d 284. "Such an increased risk may be either qualitative, such as some aspect of the employment which contributes to the risk, or quantitative, such as when the employee is exposed to a common risk more frequently than the general public." Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Comm'n, 407 Ill. App. 3d 1010, 1014, 348 Ill.Dec. 559, 944 N.E.2d 800 (2011).

D. Injuries Caused by Common Bodily Movements

Next, we must determine whether a compensable injury can "arise out of" an employee's employment when the employee was injured performing job duties that involve common bodily movements or everyday activities. The appellate court majority held that claims involving common bodily movements and everyday activities should be analyzed under the Caterpillar Tractor test, without engaging in additional neutral-risk analysis. 2019 IL App (1st) 162747WC, ¶¶ 34-73, 430 Ill.Dec. 434, 126 N.E.3d 522; see, e.g., Steak 'n Shake, 2016 IL App (3d) 150500WC, ¶¶ 37-38, 409 Ill.Dec. 359, 67 N.E.3d 571 (waitress who injured her hand wiping down table suffered an employment-related injury because at the time of the occurrence she was engaging in an activity her employer might reasonably expect her to perform in the fulfillment of her job duties, and therefore, it was unnecessary to engage in a neutral-risk analysis to determine whether her job required her to perform this movement more frequently

than members of the general public); Mytnik, 2016 IL App (1st) 152116WC, ¶¶ 43-45, 409 Ill.Dec. 491, 67 N.E.3d 946 (assembly-line worker who injured his back reaching down to grab a bolt that had fallen onto the assembly line suffered an employment-related injury because "the risk associated with claimant's act of bending to pick up the bolt was a risk distinctly associated with his employment"); Young v. Illinois Workers' Compensation Comm'n, 2014 IL App (4th) 130392WC, ¶¶ 22-24, 383 Ill.Dec. 131, 13 N.E.3d 1252 (inspector who injured his shoulder bending down and reaching into a box to retrieve a machine part for inspection suffered an employment-related injury because at the time of the occurrence he was engaging in an activity his employer might reasonably expect him to perform in the fulfillment of his job duties, and therefore it was unnecessary to engage in a neutral-risk analysis to determine whether his job required him to perform this movement more frequently than members of the general public).

The Court in Mcallister held that Caterpillar Tractor prescribes the proper test for analyzing whether an injury "arises out of" a claimant's employment when the claimant is injured performing job duties involving common bodily movements or routine "everyday activities." In analyzing whether an injury resulting from an everyday activity or common bodily movement arises out of a claimant's employment it must first be determined whether the employee was injured performing one of the three categories of employment-related acts delineated in Caterpillar Tractor. Caterpillar Tractor, 129 Ill. 2d at 58, 133 Ill.Dec. 454, 541 N.E.2d 665; see also The Venture—Newberg-Perini, Stone & Webster, 2013 IL 115728, ¶ 18, 376 Ill.Dec. 823, 1 N.E.3d 535; Sisbro, 207 Ill. 2d at 204, 278 Ill.Dec. 70, 797 N.E.2d 665.

In Caterpillar Tractor Company v. The Industrial Commission, 129 Ill.2d 52, 541 N.E.2d 665, 133 Ill.Dec.454 (1989), the Court provided the three categories of employment delineated. 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. (Jewel Cos. v. Industrial Comm'n (1974), 57 Ill.2d 38, 40, 310 N.E.2d 12; Chmelik v. Vana (1964), 31 Ill.2d 272, 277, 201 N.E.2d 434.) Typically, an injury arises out of one's employment if, at the time of the occurrence, the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties. (Howell Tractor & Equipment Co. v. Industrial Comm'n (1980), 78 Ill.2d 567, 573, 38 Ill.Dec. 127, 403 N.E.2d 215.) A risk is incidental to the employment where it belongs to or is connected with what an employee has to do in fulfilling his duties. Orsini v. Industrial Comm'n (1987), 117 Ill.2d 38, 45, 109 Ill.Dec. 166, 509 N.E.2d 1005; Fisher Body Division, General Motors Corp. v. Industrial Comm'n (1968), 40 Ill.2d 514, 516, 240 N.E.2d 694; see, e.g., Peel v. Industrial Comm'n (1977), 66 Ill.2d 257, 5 Ill.Dec. 861, 362 N.E.2d 332 (claimant injured while pushing vehicle which was blocking entrance to parking lot); Union Starch, Division of Miles Laboratories, Inc. v. Industrial Comm'n (1974), 56 Ill.2d 272, 307 N.E.2d 118 (claimant injured during break on employer's roof).

The Court in McAllister continued, if it is established that the risk of injury falls within one of the three categories of employment-related acts delineated in Caterpillar Tractor—risks that are distinctly associated with employment—then it is established that the injury "arose out of" the employment. See, e.g., Autumn Accolade v. Illinois Workers' Compensation Comm'n, 2013 IL App (3d) 120588WC, ¶ 18, 371 Ill.Dec. 713, 990 N.E.2d 901 (claimant, a caregiver at an assisted-care facility who twisted her body and injured her neck assisting a resident in the shower, sustained an injury arising out her employment where she was attempting to ensure the safety of the resident, which was "an act which claimant might reasonably be expected to perform incident to her assigned duties"); O'Fallon School District No. 90 v. Industrial Comm'n, 313 Ill. App. 3d 413, 416-17, 246 Ill.Dec. 150, 729 N.E.2d 523 (2000) (claimant-teacher who twisted her body and injured her back pursuing student running down hallway sustained an injury arising out her employment where she "was ordered specifically to undertake the risk of pursuing a running student"); County of Peoria v. Industrial Comm'n, 31 Ill. 2d 562, 566, 202 N.E.2d 504 (1964)

(offduty sheriff's deputy who sustained fatal injuries while assisting motorist was subject to an employment-related risk rather than a neutral risk because "aiding distressed motorists and vehicles was one of the normal, incidental functions of all deputy sheriffs").

In McAllister, the Court announced that Caterpillar Tractor has not been overruled and remains the starting point for analyzing "arising out of" injuries, even those that involve common bodily movements and everyday activities. Only if it is established that the risk of injury for a worker who was on the job does not fall within one of the three categories of employment-related acts delineated in Caterpillar Tractor should the Commission consider applying a neutral-risk analysis.

Caterpillar Tractor prescribes the proper test for analyzing whether an injury "arises out of" a claimant's employment, when a claimant is injured performing job duties involving common bodily movements or routine everyday activities. Sisbro and Caterpillar Tractor make it clear that common bodily movements and everyday activities are compensable and employment related if the common bodily movement resulting in an injury had its origin in some risks connected with, or incidental to, employment so as to create a causal connection between the employment and the accidental injury. Sisbro, 207 Ill. 2d at 203, 278 Ill.Dec. 70, 797 N.E.2d 665 (citing Caterpillar Tractor, 129 Ill. 2d at 58, 133 Ill.Dec. 454, 541 N.E.2d 665). Caterpillar Tractor does not require a claimant to provide additional evidence establishing that he was exposed to the risk of injury, either qualitatively or quantitatively, to a greater degree than the general public, once he has presented proof that he was involved in an employment-related accident. Caterpillar Tractor, 129 Ill. 2d at 58, 133 Ill.Dec. 454, 541 N.E.2d 665.

The Court in McAllister, stated

> "We note that Adcock and its progeny require claimants to follow Caterpillar Tractor and prove an employment-related risk but, if a common bodily movement caused the injury, additional evidence is required: evidence that claimant's work required him to engage in everyday activity to a greater extent than general public. See Adcock, 2015 IL App (2d) 130884WC ¶¶ 42-43, 395 Ill.Dec. 401, 38 N.E.3d 587. Once it is established that the injury is work related, Caterpillar Tractor does not require claimants to present additional evidence for work-related injuries that are caused by common bodily movements or everyday activities. Therefore, we hold that Adcock and its progeny are overruled to the extent that they find that injuries attributable to common bodily movements or routine everyday activities, such as bending, twisting, reaching, or standing up from a kneeling position, are not compensable unless a claimant can prove that he or she was exposed to a risk of injury from these common bodily movements or routine everyday activities to a greater extent than the general public."

The Arbitrator finds that the Petitioner being bent over while utilizing a hose connected to an air wand with his arm extended meets the criteria under Caterpillar Tractor and McAllister for an activity that Petitioner was performing that he was instructed to perform by his employer. As such, further analysis is not needed and Petitioner's accident arose out of and was in the course of his employment with Respondent.

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

The Arbitrator finds that Petitioner's current condition of ill being is causally related to his injury of February 3, 2021. The Arbitrator bases this finding on the testimony of Petitioner as well as that of Dr. Kefalas and the actions of Dr. Moosa. Petitioner testified that he had immediate pain which caused him to stop his activities on February 3, 2021. Furthermore, Petitioner testified that he was sent to Respondent's occupational health clinic wherein Dr. Moosa assumed treatment. On June 24, 2021,

Petitioner returned to see Dr. Moosa wherein Petitioner was told he needed to establish care with his PCP to help address the radiating pain in the left upper extremity as it would not likely be work-related (MRI of c-spine was unremarkable). As for the persistent left shoulder pain, Dr. Moosa will refer to Ortho for further management of the left shoulder. (PX 1 at 34). Dr. Moosa then sent a referral form for Petitioner to see an orthopedic doctor to Martin Dybas, the adjuster for Sedgwick. (PX 1 at 36). Dr. Moosa noted a symptom history of left shoulder pain and MRI with findings of hypertrophic AC joint with impingement, supraspinatus tendinopathy, and partial tear of the infraspinatus. Subacromial injection provided approximately one week of relief. (PX 1 at 36). Adjuster Martin Dybas approved the referral to Orthopedic doctor for the left shoulder. (PX 1 at 37). It is telling regarding causation that Dr. Mossa indicated petitioner should seek care from his primary care physician (PCP) as opposed to referring him to an orthopedic surgeon for his left shoulder. This is indicative that Dr. Moussa felt the shoulder was related to the injury and the cervical spine was not related to petitioner's injury.

Respondent's section 12 examiner, Dr. Aribindi testified that all of the treatment rendered to Petitioner's left shoulder and cervical spine was reasonable and related to the accident up until the date of Dr. Aribindi's examination on September 13, 2021. (RX 8 at 55).

During Dr. Kefalas's deposition a hypothetical was posed to him to assume the HSHS notes described that on February 3 of 2021, Petitioner was cleaning the machine when he was bent over to blow debris with his left arm. He felt a sharp pain in his left shoulder and the back of his neck. When performing this maneuver, petitioner had fully extended with his left arm, and he was bent over with his right hand bearing weight on an object. He was stretched out with his left arm trying to reach around the machine to try and blow debris out and had an air hose in his hand. It was an air hose with a trigger and wand, and then at the moment that he was fully outstretched with that left shoulder bent over he had sharp pain in the left shoulder and it started to burn. After that, he had treatment with HSH and then to you. (PX 8 at 11) Dr. Kefalas replied hypothetically assuming all of those facts, it's very reasonable that he might have sustained either a partial rotator cuff tear or biceps tendon injury, which is continuing to cause him discomfort, so I think that's very reasonable. Dr. Kefalas continued that within a reasonable degree of medical certainty, I think one could state that the type of injury has resulted in his continued left shoulder symptoms, yes. (PX 8 at 12).Furthermore, Dr. Kefalas testified that within a reasonable degree of certainty, I believed he(Petitioner) has symptoms in his left shoulder. He could have symptoms in both areas. That's what I'm saying but I'm confident that his left shoulder symptomatic and that's why advise left shoulder arthroscopy. I wouldn't advise it if I didn't think there was pathology. (PX 8 at 23). Dr. Kefalas continued that he felt in high probability Petitioner's main symptoms are generating from his shoulder, and not his neck. (PX 8 at 23, 24).

J. Were the medical services that were provided to Petitioner reasonable and necessary? Has respondent paid all appropriate charges for all reasonable and necessary medical services?

Respondent shall pay reasonable and necessary medical services of $$982.47, as provided in Sections 8(a) and 8.2 of the Act.

K. Is Petitioner entitled to any prospective medical care?

Upon establishing causal connection and the reasonableness and the necessity of recommended medical treatment, employers are responsible for necessary prospective medical care required by their employees. Plantation Mfg. Co. v. Indus. Comm'n, 294 Ill.App.3d 705, 691 N.E.2d 13 (1997). The Arbitrator finds Petitioner is entitled to prospective medical care as outlined by Dr. Kefalas. The Arbitrator orders Respondent to authorize and pay for the medical care outlined by Dr. Kefalas.

Dr. Kefalas again advised that Petitioner should consider left shoulder arthroscopy subacromial decompression and A.C. Resection. (PX 2 at 16). Dr. Kefalas testified he would like to reexamine the Petitioner first, and then if his shoulder is still symptomatic once again advise that he undergo shoulder arthroscopy. (PX 8 at 15). Dr. Kefalas testified between cervical and shoulder it is difficult because they overlap, and we may very well have two problems both cervical and shoulder. Dr. Kefalas stated petitioner had continued shoulder symptoms despite therapy medicines and injection, so his symptoms persisted, so that's what may be think more likely that the shoulder was still symptomatic, and that's what I was focused on. (PX 8 at 23).

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC004904
Case Name	Mallorie Walliker v. Denny's
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0341
Number of Pages of Decision	21
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Warren Danz
Respondent Attorney	Robert M. Harris

DATE FILED: 8/9/2023

/s/ Deborah Simpson, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MARJORIE WALLIKER KRAMER,

Petitioner,

vs. NO: 21 WC 4904

DENNY'S,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causation and temporary total disability benefits and being advised of the facts and law, affirms and adopts with explanation the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

Petitioner was working for Respondent as a server. The parties stipulated that on February 3, 2021, Petitioner sustained a work-related accident/injury when hot water sprayed on her from a coffee machine. Petitioner alleged that the accident/injury aggravated a pre-existing psychological condition of PTSD. The Arbitrator found that Petitioner sustained her burden of proving that her work accident/injury did exacerbate her psychological condition. He relied in part on the opinions of Respondent's §12 medical examiner, psychologist Rothko, Ph.D. He opined that the work accident exacerbated her PTSD, currently she had psychological symptoms related to the work injury, she needed prospective psychological treatment, and she was restricted from working for the three-month period he recommended she receive such treatment. The Commission agrees with the Arbitrator's finding that Petitioner's current psychological condition of ill-being was aggravated by the stipulated accident.

The Arbitrator awarded Petitioner 60 weeks of temporary total disability benefits, medical associated with treatment of burns/psychiatric treatment though he deferred a specific medical award based on request from the parties, and awarded Respondent stipulated credit of $2,747.38 in paid temporary total disability benefits. Based on our affirmation of the Arbitrator's finding of causation of Petitioner's PTSD, we concur in the Arbitrator's award of medical and temporary total disability benefits. However, the Arbitrator awarded temporary total disability benefits from February 3, 2021, the day after the accident, through March 30, 2022, the date of arbitration, without explanation. We believe a brief explanation is appropriate here.

Initially, Petitioner was unable to work due to the burns she sustained. She treated for her burns for a couple of weeks. Thereafter, she returned to see Ms. Milhoan on February 24, 2021. She is a Psychiatric Advanced Practical Nurse, with whom Petitioner treated for PTSD prior to the instant accident. At that time, Ms. Milhoan noted Petitioner had re-emergence of PTSD and was not able to return to work. Petitioner continued to treat with Ms. Milhoan and last saw her prior to arbitration on September 13, 2021. At no time prior to arbitration did Ms. Milhoan ever release Petitioner to work, even with restrictions. In addition, when Petitioner saw Mr. Rothke, Respondent's psychological §12 medical examiner, on January 11, 2022, he opined that Petitioner was still suffering PTSD symptoms from her work accident and could not return to work until she had prospective psychological treatment. Mr. Rothke opined that Petitioner needed three-months of psychological treatment before she could return to work. Three months of treatment after January 11, 2022 would be April 11, 2022, which was after the date of arbitration. Based on the opinions of Ms. Milhoan and Mr. Rothko, the Commission finds the Arbitrator's award of 60 weeks of temporary total disability benefits to be appropriate and that award is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 23, 2022 is hereby affirmed and adopted, with the explanation specified above.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $298.11 a week for a total of 60 weeks, that being the period of her inability to work pursuant to §8(b) of the Act.

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

IT IS FURTHER ORDERED BY THE COMMISSION that the medical award is deferred to hearing upon remand.

IT IS FURTHER ORDERED BY THE COMMISSION that this Decision is not a bar to the award of additional temporary total disability benefits or for permanency, if any, upon hearing upon remand.

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 $25,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

August 9, 2023
o-7/26/23
DLS/dw
046

/s/*Deborah L. Simpson*
Deborah L. Simpson

/s/*Stephen J. Mathis*
Stephen J. Mathis

/s/*Deborah J. Baker*
Deborah J. Baker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC004904
Case Name	Mallorie Walliker v. Denny's
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	17
Decision Issued By	Bradley Gillespie, Arbitrator

Petitioner Attorney	Warren Danz
Respondent Attorney	Robert M. Harris

DATE FILED: 8/23/2022

/s/Bradley Gillespie, Arbitrator

Signature

INTEREST RATE WEEK OF AUGUST 23, 2022 3.11%

STATE OF ILLINOIS)
)SS.
COUNTY OF **Peoria**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
19(b) ARBITRATION DECISION

Mallorie Walliker
Employee/Petitioner

v.

Denny's
Employer/Respondent

Case # **21** WC **004904**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gillespie**, Arbitrator of the Commission, in the city of **Bloomington**, on **March 30, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **February 3, 2021**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**1,371.31**; the average weekly wage was $**298.11, minimum rate**.

On the date of accident, Petitioner was **34** years of age, ***single*** with **2** dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services, which is deferred to a future hearing.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services, which is deferred to a future hearing.

Respondent shall be given a credit of $**2,747.38** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**2,747.38**.

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

ORDER

Medical benefits

Respondent shall pay reasonable and necessary medical services of $0.00, as provided in Section 8(a) of the Act.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $298.11/week for 60 weeks, commencing 02/03/21 through 03/30/22, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from 02/03/21 through 03/30/22, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $2,747.38 for temporary total disability benefits that have been paid.

This decision is not a bar to future hearing on TTD and permanency.

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.

Bradley D. Gillespie

Signature of Arbitrator

August 23, 2022

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MALLORIE WALLIKER,	)	
	)	
Petitioner,	)	
vs.	)	**No. 21 WC 004904**
	)	
DENNY'S,	)	
	)	
Respondent.	)	

19(b) DECISION OF ARBITRATOR

FINDINGS OF FACT

This claim proceeded to hearing on March 30, 2022, in Bloomington, Illinois pursuant to 19(b) of the Act. (Arb. Ex. 1) The following issues were in dispute at arbitration:

- Causal Connection;
- Medical Expenses;
- and TTD.

Petitioner was the sole witness at arbitration. There is no dispute that Petitioner sustained accidental injuries while working for Respondent Denny's on February 3, 2021. The parties stipulated that Petitioner provided timely notice of the accident. There is no dispute that Petitioner had pre-existing psychological conditions for which she had been treating prior to the accident that are relevant to a determination of the disputed issues in this claim.

Petitioner testified that, on the date in question, she was a server who was training for management. (Tr. pp. 20-21) Petitioner was pouring hot water into a coffee carafe for a customer when the machine malfunctioned, and hot water sprayed onto her. (Tr. p. 22) Petitioner testified that she sustained burns from the top of her ear all the way down her right arm. *Id.* Petitioner testified she "jerked back" after she was sprayed (Tr. pp. 22-23) Petitioner testified she was burnt "from the tip of my right ear, all the way down to my right arm, my whole right side was burnt" (Tr. pp. 23-24). This included Petitioner's right chest. Petitioner further testified that "everything started hurting immediately. I mean, my shoulder, my neck, my arm…" (Tr. p. 23). Petitioner further testified she "blacked out." (Tr. pp. 24-25).

Petitioner testified that she went to the emergency room approximately an hour later. (Tr. pp. 25-26) She claimed that she was required to speak with the insurance company before seeking treatment. *Id.* Petitioner presented to the emergency room at Pekin Hospital. (PX #3) Petitioner reported a consistent history of accident. *Id.* She was noted to have burns to her torso, shoulder and forearm. *Id.* Her burns were described as a 5cm x 8 cm superficial partial thickness burn to

the right chest with three small blisters as well as a 1 cm x 1 cm burn to the right forearm. *Id.* Petitioner received Morphine for pain as well as Neosporin. (PX #3) She was prescribed Bacitracin ointment and Norco for pain. *Id.*

Subsequently, Petitioner followed up with her primary care provider, Dr. Farhana Khan on February 5, 2021. (PX #4). Petitioner provided a consistent history of injury. *Id.* She reported chest wall pain and was diagnosed with partial thickness burn of the chest wall. (PX #4 p. 6). Petitioner was taken off work and was allowed to return to work on February 15, 2021. (PX #4 p. 99) Petitioner next saw Dr. Khan on February 10, 2021. (PX #4 p. 11) She reported the burns were very painful still and had been oozing yellow drainage. *Id.* A referral was made to a Wound Clinic. (PX #4 p. 15). No notes from the Wound Clinic were placed into evidence. Petitioner was taken off work until re-evaluated on 2/18/2021. (PX #4 p. 100)

On February 19, 2021, Petitioner had a telephonic follow up with Dr. Khan (PX #4 p. 18) Petitioner reported that she may have strained a muscle when jerking her arm away from the hot water. *Id.* On February 22, 2021, Petitioner received a physical therapy referral from Dr. Khan and a prescription for Flexeril for muscle spasms. (PX #4 p. 23) The diagnosis was acute pain of right shoulder. *Id.* Petitioner presented to the office on February 22, 2021, requesting an off work note. (PX #4 p. 24) Her previous work status from February 10, 2021, was provided to her and she was taken off work until March 4, 2021. *Id.* No physical therapy notes were admitted into evidence.

On March 3, 2021, Petitioner had another telephonic visit with Dr. Khan. (PX #4 p. 25) Dr. Khan noted that Petitioner was following up with the Wound Clinic for burn care. Her assessment was acute pain of right shoulder. (PX #4 p. 29) Petitioner was taken off work. (PX #4 p. 102)

On April 13, 2021, Petitioner was evaluated by Viviane Miranda Santos, APN. (PX #4 p. 34) The notes indicate that Petitioner's burns have now been healed. *Id.* Petitioner reported right shoulder joint pain that had an onset the day of her burns. *Id.* X-rays of her shoulders were taken. Nurse Practitioner Santos noted a limited range of motion as well as a positive Hawkins test. (PX #4 p. 35) Petitioner was diagnosed with shoulder impingement syndrome. (PX #4 p. 36)

Petitioner was next assessed via telephone by Dr. Khan on May 6, 2021.(PX #4 p. 39) Petitioner reported that physical therapy was doing more harm than good, so she stopped. *Id.* Petitioner was provided a pain referral due to her chronic right shoulder pain. (PX #4 p. 42) Petitioner was taken off work. No pain referral records were admitted into evidence. Petitioner next visited Dr. Kahn on May 18, 2021. (PX #4 p. 47) A physical therapy referral was issued along with an order for an MRI of the right shoulder. (PX #4 p. 50) Trigger point injections were to be scheduled for Petitioner's upper back and neck. *Id.* at 51. Petitioner was taken off work. (PX #4 p. 103)

On May 26, 2021, Petitioner received trigger point injections for "myofascial pain." (PX #4 pp. 55-56) Petitioner visited Dr. Khan on June 23, 2021. (PX #4 p. 61) Dr. Khan's note indicates the trigger point injections did help for Petitioner's neck pain. *Id.* An off work note was issued which indicated that Petitioner will be evaluated by Arlington Orthopedics who will

determine her restrictions. (PX #4 p. 104) The Arbitrator notes that this refers to Petitioner's appointment with Respondent's Section 12 expert Dr. Neal on June 28, 2021.

On July 21, 2021, Petitioner received additional trigger point injections for "myofascial pain." (PX #4 p. 70) A referral note was issued for occupational therapy. (PX #4 p. 106) Those records were not admitted into evidence. On this date, Dr. Khan issued a note releasing Petitioner to "Regular Duty." (PX #4 p. 107)

On July 27, 2021, Petitioner had an MRI of the right shoulder. (PX #5 p. 2) The impression was: (1) Tendinosis of the supraspinatus and infraspinatus conjoined tendon insertion, no tear demonstrated; (2) and, mild degenerative changes of the acromioclavicular joint. *Id.*

On August 13, 2021, Petitioner had an MRI of the cervical spine. (PX #5 p. 4) The Impression was: (1) Mild degenerative changes most apparent is C5-C6. No significant cord/foraminal impingement. *Id.*

Petitioner returned to Dr. Khan on September 14, 2021. (PX #4 p. 80) This note indicates that Petitioner was evaluated by an "independent ortho" who recommended light duty use of the right arm. *Id.* This is a reference to Respondent's Section 12 expert, Dr. Neal. Dr. Khan did not note that Dr. Neal opined that Petitioner's shoulder condition was not causally related to the work accident. On this date, Dr. Khan issued a work note releasing Petitioner to light duty use of the right arm effective that date. (PX #4 p. 108) Petitioner testified that on September 14, 2021, Dr. Khan placed a "permanent" restriction on her (Tr. p. 32) The return to work note does not indicate that these restrictions are permanent.

Petitioner testified she continues to see Dr. Khan after September 14, 2021 (Tr. p. 33) No records were admitted into evidence for any date of service after September 14, 2021.

Petitioner testified that, immediately after she was burnt in the work accident, she started having "flashbacks" of a burn incident that occurred when she was younger. (Tr. p. 35) Petitioner further testified that after the accident she was experiencing "anxiety, depression, I could not get out of bed, just terrified to go out…Hell" (Tr. p. 37). Petitioner testified about a week later she called "Renae" (Tr. p. 35) "Renae" refers to Petitioner's treating psychiatric nurse practitioner Renae Milhoan. Petitioner had been seeing Milhoan since October 11, 2017 (RX #11). On October 17, 2017, Nurse Practitioner Milhoan diagnosed Petitioner with post-traumatic stress disorder ("PTSD") and generalized anxiety disorder ("GAD"). Petitioner had been continuously diagnosed with these conditions since she first visited Nurse Practitioner Milhoan on October 11, 2017.

Petitioner first saw Nurse Practitioner Milhoan after the accident on February 24, 2021 (Tr. p. 35) Petitioner testified she also sees a counselor (Tr. p. 38) The records of her counselor were not admitted into evidence.

Petitioner testified that Nurse Practitioner Milhoan has continued to keep her off work (Tr. p. 39). Petitioner testified that she continues to see Nurse Practitioner Milhoan (Tr. p. 41). The most recent treating record from Nurse Practitioner Milhoan admitted into evidence involves a date of service of September 13, 2021. (PX #6 pp. 14-19)

Petitioner further testified regarding her emotional complaints, "It's not getting any better. I am getting worse." (Tr. pp. 39) Petitioner testified regarding her physical complaints that "My strength is completely at a 0… My strength, it's a 0 for me… and this has literally put me to nothing" (Tr. pp. 40-41).

Petitioner testified "I don't know" regarding whether treating family physician Dr. Khan referred her to an orthopedic specialist for treatment (Tr. p. 67). Petitioner acknowledged that she has not tried on her own to visit an orthopedic specialist for treatment (Tr. 68) In her evidence deposition, Nurse Practitioner Milhoan testified, "I don't remember" to whether she has ever made a recommendation for a referral to a psychologist or psychiatrist for either new or additional treatment for Petitioner (PX #7 p. 53) Nurse Practitioner Milhoan's records do not indicate any such referral was made. (*See* PX #6)

Petitioner was examined pursuant to Section 12 of the Act at her attorney's request by orthopedic specialist Dr. Lawrence A. Nord on August 11, 2021, and September 2, 2021. (PX #8). A report was generated for each of these two examination dates, and they were admitted into evidence. (*See* PX #8) Dr. Nord's evidence deposition was taken on November 15, 2021. (PX #9). Dr. Nord retired from his orthopedic surgery practice approximately four years ago and operates a business known as "Nord Med Evals, LLC," a medical/legal consulting business. (PX #9, pp. 48-50). Dr. Nord testified that 90% of his business is done for Plaintiff attorneys and 90% of his Plaintiff work comes from Petitioner's attorney, in other words, 90% of his business comes from Petitioner's attorney. (PX #9, p. 49-50).

Dr. Nord testified that he specifically answered Petitioner's attorney's questions that were proposed to him. Dr. Nord did not write up a specific IME but only responded to the questions presented to him by Petitioner's counsel. Dr. Nord did that because that is what Petitioner's attorney asked him to do. (PX #9, pp. 55-58) Dr. Nord testified that he goes through all the records with the patient and then goes through the questions with the patient and tells her how he is going to answer the questions. (PX #9, p. 58) Dr. Nord testified that he went over the questions Petitioner's attorney sent him with Petitioner. (PX #9, p. 58) Dr. Nord testified that Petitioner's right shoulder condition would be considered permanent unless she receives further medical treatment. (PX #9, 24-25)

Dr. Nord testified that Petitioner's complaints and history were consistent with a diagnosis of right shoulder impingement. (PX #9, p. 32) Dr. Nord testified that his review of the records, history and his physical examination support his opinion that Petitioner's right shoulder condition was either caused by or aggravated by the work accident. (PX #9, pp. 40-41)

Dr. Nord testified that the work accident caused a new PTSD not related to the first PTSD (PX #9, p. 44). Regarding Petitioner's PTSD, Dr. Nord further testified that Petitioner told him that she was having nightmares and flashbacks from her childhood trauma and she is having nightmares and flashbacks from the burn injury (PX #9, pp. 65-66) Dr. Nord further testified that Petitioner has had PTSD ever since her childhood trauma and still has it today. She has flashbacks and nightmares from her childhood experiences. She is also having nightmares and flashbacks regarding the hot water incident at work that is ongoing today. (PX #9, pp. 66-67) Lastly, Dr. Nord

testified that based on the statements in the records and Petitioner's history, she has a new episode of PTSD that alone was the basis for Dr. Nord to independently diagnose PTSD. (PX #9, p. 67)

Dr. Nord testified that is not surprising that trigger point injections did not work, because there was no indication it was even needed for Petitioner's diagnosis. (PX #9, p. 80) Dr. Nord confirmed that there was no indication that the injections were needed and that an orthopedic surgeon would not do those injections. (PX #9, pp. 82-83)

Dr. Nord testified that the results of the physical examination Dr. Khan performed on June 23, 2021, indicate a "normal exam." (PX 9, pp. 84-87) Dr. Nord testified, however, that "the physical exam is inaccurate." (PX #9, p. 85) Dr. Nord agreed that according to the medical records we do not have an explanation as to why Petitioner did not offer complaints regarding her neck or shoulder until February 19, 2021. (PX #9, p 110) Dr. Nord agreed that a review of Dr. Khan's notes from June 23, 2021, indicates that "it sounds like she is getting better." Dr. Nord testified that he recommended to Petitioner that she be evaluated and treated by an orthopedic surgeon. (PX #9, p. 112) There is no evidence in the record that Petitioner followed this recommendation.

The evidence deposition of Respondent's Section 12 examining orthopedic expert, Dr. M. Bryan Neal, was held on September 17, 2021. (RX #9) Dr. Neal performed a Section 12 examination on June 28, 2021. Dr. Neal produced three separate reports as result of this Section 12 examination and all three reports were admitted into evidence.

After taking a history from Petitioner, reviewing the records and performing his examination Dr. Neal formulated his diagnoses: medically unexplainable right shoulder girdle, trapezius, and lateral neck pain of unknown etiology. (RX #9, p. 34) Based upon Petitioner's subjective complaints during her examination, Dr. Neal explained why Petitioner's symptoms were of an unknown etiology because he did not know of any single organic musculoskeletal diagnosis to explain all of her subjective symptoms. (RX #9, p. 34) Dr. Neal's other diagnosis was "confounding biopsychosocial undercurrents" which included her past medical history as found in the medical records. (RX #9, 35)

Dr. Neal offered his opinion that he did not find a causal connection between Petitioner's shoulder and neck symptoms and the work accident. (RX #9, pp. 35-36) Dr. Neal opined that Petitioner has a condition for which there is no orthopedic condition or musculoskeletal diagnosis to explain it and the cause of her complaints are not orthopedic and are more grounded in her intrinsic biopsychosocial confounders which are independent of her occupational events. (RX #9, pp. 36-37) Dr. Neal further opined that Petitioner's subjective symptoms were not supported by the evidence and make no anatomic sense because her symptoms were disproportional to the objective findings and were medically unexplainable and non-physiological. (RX #9, pp. 37)

Dr. Neal commented on the right shoulder MRI which had some observations but none that are necessarily significant in and of themselves. (RX #9, p. 45) Dr. Neal opined there was nothing of clinical significance on the cervical spine MRI. (RX #9, p. 47)

Dr. Neal opined that the shoulder MRI had no clinical significance. (RX #9, pp. 48-49) Dr. Neal did not find that Petitioner's history was consistent with the shoulder joint pathologic state, and he did not find Petitioner's physical examination consistent with the shoulder joint pathologic

condition. (RX #9, p. 49) Dr. Neal opined that Petitioner does not have a clinical rotator cuff problem, nor would you expect one from the events, as there was no significant rotator cuff abnormality. *Id.* Dr. Neal stated that there was certainly no evidence of any acute fracture, any acute fluid collection, edema or inflammation. (PX #9 pp. 49-50) He went on to state that mild capsular hypertrophy is not an uncommon finding and probably much more often normal than not normal. *Id.* at 50. Dr. Neal felt the fact that there was a specific comment about there being no mass effect into the subacromial space leads one to strongly suspect that there should be no impingement. *Id.* Impingement by definition is a process involving the subacromial space. *Id.*

Dr. Neal testified that "acromioclavicular joints are notorious for having subtle technical abnormalities and imaging which are frequently called mild but yet of no clinical significance." (RX #9, p. 66) Dr. Neal testified that the findings of the cervical MRI showed some disc desiccation at C6-C7 but, the disc height was preserved so that may have no relevance or clinical significance in his opinion. (RX #9, p. 67) Dr. Neal testified that he did not diagnose Petitioner with impingement. (RX #9, p. 69) Dr. Neal did not expect to find impingement from the burn event. *Id.* Dr. Neal opined that the accident would not have aggravated any pre-existing condition. (RX #9, pp. 70-71)

Dr. Neal testified that impingement syndrome is almost always more of a chronic process. (PX #9 p. 79) The most common cause of extrinsic impingement is arthritis producing bony spurs which impinge into the subacromial space. *Id.* Petitioner does not have that based upon her MRI imaging or x-rays. (PX #9 p. 80) An impingement is a condition where there is soft tissue irritation, inflammation, abrasion, of the soft tissues that transit the subacromial space, namely, the rotator cuff, the bursa, and the biceps tendon and is usually a chronic process which is a progressive process over time. (RX #9, pp. 79-80) Dr. Neal lastly testified that when he saw the Petitioner's body movements in the accident video, those body movements would not have been a competent cause for any of the conditions that Petitioner currently has. (RX #9, p. 80)

The evidence deposition of treating Psychological Nurse Practitioner Renae Milhoan ("Milhoan") was taken on February 22, 2022. (PX #7**)** Nurse Practitioner Milhoan testified that on September 28, 2020, Petitioner was employable and was able to work. (PX #7, p. 7) Nurse Practitioner Milhoan was asked whether she began to treat Petitioner for her PTSD condition on February 24, 2021, and she answered, "I'm unsure what you're asking." Petitioner's attorney asked Nurse Practitioner Milhoan whether at this visit she had an opinion whether this work accident had aggravated her post-traumatic stress disorder to cause it to become increasingly symptomatic and she answered, "Yes." (PX #7, p. 10) Nurse Practitioner Milhoan was asked whether Petitioner told her about the physical injury she had, which was the "scalding burn on her chest and her shoulder" and she answered, "She told me about the injury" and that it was painful. (PX #7, p. 12). Nurse Practitioner Milhoan answered "Yes" that the accident both aggravated and exacerbated her posttraumatic stress that may have been pre-existing. (PX #7, pp. 18-19).

Nurse Practitioner Milhoan was asked about the IME report from Dr. Rothke and she testified "I did not review it." (PX #7, p. 19) Nurse Practitioner Milhoan was asked about the psychological tests Dr. Rothke administered to Petitioner. She testified, "I don't use these tests. That is outside what I do, you could ask Dr. Rothke, the doctor." (PX #7, p. 19) Nurse Practitioner Milhoan was asked whether she relied upon Dr. Rothke's report to support her opinion that this

burn accident aggravated her posttraumatic stress disorder. She answered, "This is not -- you would have to ask Dr. Rothke." (PX #7, p. 22) Nurse Practitioner Milhoan was asked if she relied on Dr. Rothke for her own causation opinion and she answered, "I don't rely upon this to support my opinion. This is a doctor's work that I have never met and that you would have to speak to him about his opinion." (PX #7, p. 23) Regarding Dr. Rothke, Nurse Practitioner Milhoan testified, "I'm not going to speak to his opinion. You'll have to ask him." (PX #7, p. 23)

Nurse Practitioner Milhoan would not answer whether or not Petitioner's "pain or burns" could be a component of the continuation of her posttraumatic stress disorder. She answered, "That's outside my scope. I don't treat pain or burns." (PX #7, p. 24)

Nurse Practitioner Milhoan testified that on February 24, 2021, when she first saw Petitioner after the accident, she did not know whether Petitioner told her that she had hurt her neck or right shoulder in the work accident. (PX #7, p. 34) She did not know if Petitioner told her anything further about her work accident other than getting burned during the June 15, 2021, visit. (PX #7, p. 35) Nurse Practitioner Milhoan acknowledged that her prior notes indicate that Petitioner had PTSD and GAD before the date of accident. (PX #7, pp. 36-37) She acknowledged that during this continuous period of time she was consistently diagnosing PTSD and GAD. (PX #7, p. 37). Nurse Practitioner Milhoan testified she was "not sure who Dr. Kahn is." (PX #7, p. 37)

Nurse Practitioner Milhoan testified she did not rely upon any treating medical records from any other healthcare professional (PX #7, p. 43) She testified that she recognized Petitioner had diagnosed mental conditions prior to their meeting. (PX #7, p. 46) Nurse Practitioner Milhoan was unable to remember whether or not in the three and a half years she has been treating Petitioner if she ever made a recommendation for a referral to a psychologist or psychiatrist for either new or additional treatment. (PX #7, p. 53)

Nurse Practitioner Milhoan was asked whether through all of her visits Petitioner has ever complained to her or talked to her about her neck or her right shoulder pain symptoms or problems related to the accident. Milhoan answered, "I don't know." (PX #7, p. 81) Nurse Practitioner Milhoan testified that she remembered that Petitioner specifically told her about the burns but she does not recall Petitioner ever saying anything about her other physical injuries or complaints to her neck and especially her shoulder. (PX #7, p. 85) Nurse Practitioner Milhoan testified that what she wrote regarding causation in her June 15, 2021, notes was not her intended to offer a causation opinion and she was doing "medical documentation" (PX #7, pp. 89-90).

Respondent's Section 12 psychological examination with licensed clinical psychologist Dr. Steven Rothke, Ph.D., was performed on January 11, 2022. Dr. Rothke issued his report dated January 18, 2022, and a slightly revised version on February 2, 2022. (RX #8) Dr. Rothke reviewed records, conducted a clinical interview, and performed psychological testing. The PCL-5 test indicated Petitioner's score of 66/85 "falls in the clinical range of PTSD." (RX #8 p. 4) Petitioner's score on the PCS test of 44/52 falls at the 96th percentile of injured workers. *Id.* Dr. Rothke opined that Petitioner's MMPI-3 score indicated a "significant sense of demoralization, somatic/physical complaints, depression, ideas of persecution, anxiety, agitation, and feeling ineffective at what she does." *Id.* Lastly, Dr. Rothke opined that the SIMS test score exceeded the

cutoff scores for raising concerns about exaggeration in all areas except for the intelligence scale. (RX #8 p. 5)

Dr. Rothke indicated his impressions in response to referral questions. In summary, Dr. Rothke opined that the work accident "exacerbated" Petitioner's long-standing PTSD. (RX #8 p. 5)

Dr. Rothke opined that, "The extent of over-statement of symptoms on all current psychological tests administered raises questions about the actual severity of her psychological conditions, level of distress, and any limitations in daily or occupational functioning she has from a psychological perspective. *Id.* Most likely, the severity of her 2021 injury-related symptoms is milder than she reports." *Id.* Dr. Rothke opined that Petitioner needs weekly psychological care for three months and should then reach MMI from a psychological standpoint. (RX #8 p. 6) Petitioner is likely to require ongoing medication management for anxiety even after eventual return to work in some capacity in order to prevent relapse. *Id.*

Regarding Petitioner's work restrictions, Dr. Rothke opined that Petitioner "has a temporary restriction for three months (while obtaining the psychological treatment recommended) from working in food service settings that involve direct contact with hot beverage dispensers similar to the one that injured her. (RX #8 p. 6)There are no other restrictions from a psychological standpoint. *Id.* With brief vocational counseling, she should be able to find a line of work with fewer physical demands and without exposing her to the potential to become burned again." *Id.*

On February 2, 2022, Dr. Rothke slightly revised his prior report and issued the following Addendum paragraph: "In my opinion, the 02/03/2021 work-related accident resulted in an exacerbation of her earlier life traumas, not an aggravation of those earlier life events. In my opinion, she has a very good prognosis for a full recovery (from a psychological perspective) of this exacerbation and her psychological response to the 02/03/21 event with the treatment outline response to the questions above" (PX #8 p. 7)

Finally, the Arbitrator notes that he has reviewed the CD of the video recording of the accident admitted into evidence. (RX #10). The video is brief but does confirm Petitioner's account of the accident and shows that she drew her arm back quickly upon the machine malfunctioning and spraying water.

CONCLUSIONS OF LAW

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

The parties agreed that Petitioner sustained accidental injuries on February 3, 2021, arising out of and in the course of her employment with Respondent. The parties also agreed that Petitioner reported the accident in a timely matter. The Arbitrator incorporates by reference the findings of fact as set forth in the paragraphs above. Reiteration of those factual findings will only be made to clarify the conclusions set forth below.

Burn Injuries

Petitioner credibly testified that she was working at Respondent's restaurant when a Bunn coffee maker malfunctioned while she was trying to obtain hot water for a customer's tea. (Tr. pp. 20-26) The video, which was submitted by both parties, appears to show this incident and confirms Petitioner's account of the accident. (PX #1; RX # 10) Petitioner presented to the emergency room at Pekin Hospital. (PX #3) Petitioner reported a consistent history of accident. *Id.* She was noted to have burns to her torso, shoulder and forearm. *Id.* Her burns were described as a 5cm x 8 cm superficial partial thickness burn to the right chest with three small blisters as well as a 1 cm x 1 cm burn to the right forearm. *Id.* Petitioner received Morphine for pain as well as Neosporin. (PX #3) She was prescribed Bacitracin ointment and Norco for pain. *Id.*

The foregoing chain of events and medical records support the finding that Petitioner's burn injuries to her torso, shoulder and forearm are causally connected to her February 3, 2021, work injury. Therefore, the Arbitrator finds and concludes that Petitioner's burn injuries are causally connected to her workplace accident on February 3, 2021.

Right Shoulder and Cervical Injuries

The factual findings and causal connection determination above are incorporated herein by reference. Following her evaluation and treatment at the Pekin Hospital Emergency Department, Petitioner followed up with her primary care physician, Dr. Farhana Khan on February 5, 2021. (PX #4). Petitioner again reported a consistent history of injury and her doctor placed her off work. She returned to her doctor's office on February 10, 2021, reporting that her burns were still painful and were oozing yellow drainage. (PX #4 p. 11) A referral was made to a Wound Clinic. (PX #4 p. 15). No notes from the Wound Clinic were placed into evidence. Petitioner was taken off work until re-evaluated on 2/18/2021. (PX #4 p. 100) The Arbitrator notes for the record that the COVID-19 pandemic was in full swing, so medical offices were offering telemedicine appointments. Petitioner's next appointment was done telephonically.

On February 19, 2021, Petitioner had a telephonic follow up with Dr. Khan (PX #4 p. 18) Petitioner reported that she may have strained a muscle when jerking her arm away from the hot water. *Id.* On February 22, 2021, Petitioner received a physical therapy referral from Dr. Khan and a prescription for Flexeril for muscle spasms. (PX #4 p. 23) The diagnosis was acute pain of right shoulder. *Id.* Petitioner presented to the office on February 22, 2021, requesting an off work note. (PX #4 p. 24) Her previous work status from February 10, 2021, was provided to her and she was taken off work until March 4, 2021. *Id.* No physical therapy notes were admitted into evidence.

On April 13, 2021, Petitioner was evaluated by Viviane Miranda Santos, APN. (PX #4 p. 34) The notes indicate that Petitioner's burns have now been healed. *Id.* Petitioner reported right shoulder joint pain that had an onset the day of her burns. *Id.* X-rays of her shoulders were taken. Nurse Practitioner Santos noted a limited range of motion as well as a positive Hawkins test. (PX #4 p. 35) Petitioner was diagnosed with shoulder impingement syndrome. (PX #4 p. 36) Petitioner continued to follow up with Dr. Khan's office.

Eventually, an MRI of the right shoulder was ordered by Dr. Khan. Before the MRI was obtained, Petitioner was sent to Dr. Neal for a Section 12 examination on June 28, 2021. (RX #9) His initial report was issued on July 7, 2021. (RX #9, Depo Exhibit 2) On July 27, 2021, Petitioner

had an MRI of the right shoulder. (PX #5 p. 2) The impression was: (1) Tendinosis of the supraspinatus and infraspinatus conjoined tendon insertion, no tear demonstrated; (2) and, mild degenerative changes of the acromioclavicular joint. *Id.* On August 13, 2021, Petitioner had an MRI of the cervical spine. (PX #5 p. 4) The Impression was: (1) Mild degenerative changes most apparent is C5-C6. No significant cord/foraminal impingement. *Id.* Petitioner was subsequently examined by Dr. Nord at the behest of Petitioner's counsel on August 11, 2021, and again on September 2, 2021. (PX #8)

Dr. Nord testified that Petitioner's complaints and history were consistent with a diagnosis of right shoulder impingement. (PX #9, p. 32) Dr. Nord testified that his review of the records, history and his physical examination support his opinion that Petitioner's right shoulder condition was either caused by or aggravated by the work accident. (PX #9, pp. 40-41) Dr. Nord retired from his orthopedic surgery practice approximately four years ago and operates a business known as "Nord Med Evals, LLC," a medical/legal consulting business. (PX #9, pp. 48-50). Dr. Nord testified that 90% of his business is done for Plaintiff attorneys and 90% of his Plaintiff work comes from Petitioner's attorney, in other words, 90% of his business comes from Petitioner's attorney. (PX #9, p. 49-50).

After taking a history from Petitioner, reviewing the records and performing his examination Dr. Neal formulated his diagnoses: medically unexplainable right shoulder girdle, trapezius, and lateral neck pain of unknown etiology. (RX #9, p. 34) Dr. Neal offered his opinion that he did not find a causal connection between Petitioner's shoulder and neck symptoms and the work accident. (RX #9, pp. 35-36) Dr. Neal opined that Petitioner has a condition for which there is no orthopedic condition or musculoskeletal diagnosis to explain it and the cause of her complaints are not orthopedic and are more grounded in her intrinsic biopsychosocial confounders which are independent of her occupational events. (RX #9, pp. 36-37) Dr. Neal further opined that Petitioner's subjective symptoms were not supported by the evidence and make no anatomic sense because her symptoms were disproportional to the objective findings and were medically unexplainable and non-physiological. (RX #9, pp. 37)

Petitioner could not recall whether Dr. Khan had made a referral for her to an orthopedic specialist. (Tr. p. 67). Petitioner acknowledged that she has not tried on her own to visit an orthopedic specialist for treatment (Tr. 68) Although Petitioner discussed how her right shoulder and neck felt at certain times throughout her treatment, she did not provide any specific testimony as to any ongoing symptoms to her right shoulder or cervical spine. The Arbitrator finds Dr. Neal's opinions to be more credible than those of Dr. Nord. While Dr. Nord did see Petitioner on two occasions, the Arbitrator finds that his method of conducting an Independent Medical Examination not conducive to an accurate evaluation of an injured worker. Going over the questions provided by Petitioner's attorney with Petitioner and telling her how he will answer said questions would seem to influence how the doctor answers those questions. (PX #9, p. 58) Moreover, the fact that 90% of Dr. Nord's Petitioner IME's are done at the behest of Petitioner's counsel leads the Arbitrator to question the independence of his opinions.

Wherefore, based on the foregoing, the Arbitrator finds and concludes that Petitioner has failed to prove that her right shoulder and cervical complaints are causally connected to her February 3, 2021 accident.

Psychological Injuries

Petitioner alleges that her psychological condition was made worse by the work accident of February 3, 2021. Respondent disputes that assertion. Petitioner testified that, immediately after she was burnt in the work accident, she started having "flashbacks" of a burn incident that occurred when she was younger. (Tr. p. 35) Petitioner further testified that after the accident she was experiencing "anxiety, depression, I could not get out of bed, just terrified to go out…Hell" (Tr. p. 37). Petitioner testified about a week later she called "Renae" (Tr. p. 35) "Renae" refers to Petitioner's treating Psychiatric Nurse Practitioner Renae Milhoan. Petitioner had been seeing Nurse Practitioner Milhoan since October 11, 2017 (RX #11). On October 17, 2017, Nurse Practitioner Milhoan diagnosed Petitioner with post-traumatic stress disorder ("PTSD") and generalized anxiety disorder ("GAD"). Petitioner had been continuously diagnosed with these conditions since she first visited Nurse Practitioner Milhoan on October 11, 2017.

Petitioner first saw Nurse Practitioner Milhoan after the accident on February 24, 2021 (Tr. p. 35) Petitioner testified she also sees a counselor (Tr. p. 38) Those records were not admitted into evidence. Petitioner testified that Nurse Practitioner Milhoan has continued to keep her off work (Tr. p. 39). Petitioner testified that she continues to see Nurse Practitioner Milhoan (Tr. p. 41). The most recent treating record from Nurse Practitioner Milhoan admitted into evidence involves a date of service of September 13, 2021. (PX #6 pp. 14-19)

Petitioner further testified regarding her emotional complaints, "It's not getting any better. I am getting worse." (Tr. pp. 39) Petitioner testified regarding her physical complaints that "My strength is completely at a 0… My strength, it's a 0 for me… and this has literally put me to nothing" (Tr. pp. 40-41).

The evidence deposition of treating Psychological Nurse Practitioner Renae Milhoan ("Milhoan") was taken on February 22, 2022. (PX #7**)** Nurse Practitioner Milhoan testified that on September 28, 2020, Petitioner was employable and was able to work. (PX #7, p. 7) Nurse Practitioner Milhoan was asked whether she began to treat Petitioner for her PTSD condition on February 24, 2021, and she answered, "I'm unsure what you're asking." Petitioner's attorney asked Nurse Practitioner Milhoan whether at this visit she had an opinion whether this work accident had aggravated her post-traumatic stress disorder to cause it to become increasingly symptomatic and she answered, "Yes." (PX #7, p. 10)) Nurse Practitioner Milhoan answered "Yes" that the accident both aggravated and exacerbated her posttraumatic stress that may have been pre-existing. (PX #7, pp. 18-19).

Later in her deposition, Nurse Practitioner Milhoan testified that what she wrote regarding causation in her June 15, 2021, note was not her intended to offer a causation opinion and she was doing "medical documentation" (PX #7, pp. 89-90). Clearly, Nurse Practitioner Milhoan's opinions are less reliable based upon her retracting her "causation" opinion at this point in the deposition. The Arbitrator observes that Nurse Practitioner Milhoan did not appear to understand the purpose of her deposition and that she was being asked to provide psychiatric causation

opinions therein. While she does appear competent to provide opinions, Nurse Practitioner Milhoan is less qualified and credentialed than Dr. Rothke.

Dr. Nord testified that the work accident caused a new PTSD not related to the first PTSD. (PX #9, p. 44) Regarding Petitioner's PTSD, Dr. Nord further testified that Petitioner told him that she was having nightmares and flashbacks from her childhood trauma and she is having nightmares and flashbacks from the burn injury. (PX #9, pp. 65-66) Dr. Nord further testified that Petitioner has had PTSD ever since her childhood trauma and still has it today. She has flashbacks and nightmares from her childhood experiences. She is also having nightmares and flashbacks regarding the hot water incident at work that is ongoing today. (PX #9, pp. 66-67) Lastly, Dr. Nord testified that based on the statements in the records and Petitioner's history, she has a new episode of PTSD that alone was the basis for Dr. Nord to independently diagnose PTSD. (PX #9, p. 67) As noted above, Dr. Nord is a retired orthopedic surgeon. He is not a psychologist or psychiatrist. Therefore, his opinion regarding PTSD is less credible than Dr. Rothke.

Respondent's Section 12 psychological examination with licensed clinical psychologist Dr. Steven Rothke, Ph.D., was performed on January 11, 2022. Dr. Rothke issued his report dated January 18, 2022, and a slightly revised version on February 2, 2022. (RX #8) Dr. Rothke reviewed records, conducted a clinical interview, and performed psychological testing.

Dr. Rothke indicated his impressions in response to referral questions. In summary, Dr. Rothke opined that the work accident "exacerbated" Petitioner's long-standing PTSD. (RX #8 p. 5) Dr. Rothke opined that Petitioner needs weekly psychological care for three months and should then reach MMI from a psychological standpoint. (RX #8 p. 6) Petitioner is likely to require ongoing medication management for anxiety even after eventual return to work in some capacity in order to prevent relapse. *Id.*

Regarding Petitioner's work restrictions, Dr. Rothke opined that Petitioner "has a temporary restriction for three months (while obtaining the psychological treatment recommended) from working in food service settings that involve direct contact with hot beverage dispensers similar to the one that injured her. (RX #8 p. 6)There are no other restrictions from a psychological standpoint. *Id.* With brief vocational counseling, she should be able to find a line of work with fewer physical demands and without exposing her to the potential to become burned again." *Id.*

On February 2, 2022, Dr. Rothke slightly revised his prior report and issued the following Addendum paragraph: "In my opinion, the 02/03/2021 work-related accident resulted in an exacerbation of her earlier life traumas, not an aggravation of those earlier life events. In my opinion, she has a very good prognosis for a full recovery (from a psychological perspective) of this exacerbation and her psychological response to the 02/03/21 event with the treatment outline response to the questions above" (PX #8 p. 7) No explanation was offered as to why Dr. Rothke added the addendum to his previous IME report. The Arbitrator finds Dr. Rothke's opinions to be more credible and well-reasoned than those of Petitioner's treating Nurse Practitioner or Dr. Nord.

Wherefore, based on foregoing and the entire record on arbitration, the Arbitrator finds and concludes that Petitioner's underlying psychological condition was exacerbated by her February

3, 2021, work accident. Thus, her psychologic injury is causally related to her February 3, 2021 injury.

In support of the Arbitrator's decision relating to ("J"), were the medical services provide to Petitioner reasonable and necessary, the Arbitrator finds the following:

The findings of fact and conclusions regarding the causal connection or Petitioner's various injuries are incorporated by reference. Therefore, the Arbitrator finds and concludes as follows:

Burn Treatment

As the Petitioner's burn injuries were found to be causally related to her workplace injuries on February 3, 2021, the medical treatments relating to such burn injuries are found to be reasonable and necessary.

However, the Arbitrator was asked not to make an award of medical bills and that the bills be addressed in a future hearing of this matter. It should be noted that the Arbitrator could not have awarded specific treatments as the record on arbitration is missing some of the treatment records and necessary billing statements.

Right Shoulder and Cervical Treatment

As set forth above, the Arbitrator did not find Petitioner's right shoulder and cervical condition to be causally related to her workplace injuries on February 3, 2021. Therefore, the Arbitrator finds that the treatment related to the right shoulder and cervical complaints is not reasonable and necessary.

Psychological Treatment

As discussed in the paragraphs above, the Arbitrator found that Petitioner's psychological condition had been exacerbated by the February 3, 2021 workplace accident. The Arbitrator finds and concludes that the psychological treatment incurred following the workplace accident on February 3, 2021 to be reasonable, necessary and causally related to her work injuries.

In support of the Arbitrator's decision relating to ("K"), What temporary benefits are in dispute, the Arbitrator finds the following:

The Arbitrator's findings of fact and conclusions of law set forth in the above paragraphs are incorporated by reference. The Arbitrator finds that Petitioner is entitled to Temporary Total disability benefits from February 3, 2021 through March 30, 2022 at the minimum rate of $298.11.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	12WC034283
Case Name	Ellen T Floyd v. City of Chicago
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0342
Number of Pages of Decision	48
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	David Martay
Respondent Attorney	Stephanie Lipman

DATE FILED: 8/9/2023

/s/ Deborah Baker, Commissioner

Signature

23IWCC0342

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ELLEN FLOYD,

Petitioner,

vs. NO: 12 WC 34283

CITY OF CHICAGO,

Respondent.

DECISION AND OPINION ON REVIEW

This matter comes before the Commission pursuant to Petitioner's timely filed Petition for Review of the Decision of the Arbitrator. Therein the Arbitrator found Petitioner's current right foot/ankle and right leg (knee) conditions are causally related to her undisputed September 23, 2012 accident, but her low back, neck, bilateral arm, left leg, asthma, anxiety, post-traumatic stress disorder, and gynecological conditions are unrelated. The Arbitrator further found Petitioner's concurrent employment wages were not includable in her average weekly wage. The Arbitrator awarded $5,815.00 in medical expenses as well as the stipulated period of Temporary Total Disability ("TTD") benefits, and found Petitioner sustained 5% loss of use of the right foot and 15% loss of use of the right leg. Notice having been given to all parties, the Commission, after considering the issues of whether Petitioner's right knee, low back, and neck conditions of ill-being are causally related to her accidental injury, whether her concurrent employment wages are includable in her average weekly wage, entitlement to TTD benefits, entitlement to medical expenses, and the nature and extent of Petitioner's permanent disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below, and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

PROLOGUE

The Commission observes Petitioner's personal identity information was unredacted from Petitioner's Exhibit 4. The Commission cautions Counsel to adhere to Supreme Court Rule 138. *Ill. S. Ct. R. 138* (eff. Jan. 1, 2018).

CONCLUSIONS OF LAW

In finding only Petitioner's right foot/ankle and right leg conditions are causally related to the undisputed September 23, 2012 work accident, the Arbitrator first made an adverse credibility determination. The Arbitrator further found the opinions of Respondent's §12 physicians, Dr. Kathleen Weber and Dr. Alexander Ghanayem, more credible than the opinions of Petitioner's treating physicians, Dr. Ronald Silver and Dr. Christopher Bergin. The Commission views the evidence differently.

I. Credibility

The Commission does not share the Arbitrator's credibility assessment. The Commission finds nothing "argumentative" or "evasive" about Petitioner's testimony, nor do we find her demeanor lacked candor; to the contrary, Petitioner was plain spoken and the Commission finds Petitioner responded to questioning to the best of her recollection of events that occurred up to 10 years prior to the hearing. We further find Petitioner's belief that all of her current medical ailments are causally related to the work accident stems not from a deceitful purpose but rather a non-practitioner's understanding of the Act. The Commission finds Petitioner was credible. *See R & D Thiel v. Illinois Workers' Compensation Commission*, 398 Ill. App. 3d 858, 866 (1st Dist. 2010) (When evaluating whether the Commission's credibility findings which are contrary to those of the arbitrator are against the manifest weight of the evidence, "resolution of the question can only rest upon the reasons given by the Commission for the variance.")

II. Causal Connection

As noted above, at trial Petitioner alleged a causal connection between the work accident and a multitude of conditions. On Review, Petitioner has abandoned a majority of those previously claimed conditions and only argues she proved causal connection for her right knee, low back, and neck conditions of ill-being. We address each condition in turn.

A. Right Knee

The Arbitrator concluded Petitioner sustained a compensable right knee injury, and Dr. Silver's treatment and the November 19, 2013 surgery were reasonable, necessary, and related to the work accident. However, the Arbitrator also concluded that Petitioner's current right knee complaints are unrelated based on Dr. Weber's contrary opinions. The Commission disagrees.

On November 19, 2013, Dr. Silver performed arthroscopic partial medial and lateral meniscus surgery. Pet.'s Ex. 5. The record reflects Petitioner made slow progress after surgery, with the post-operative records documenting persistent effusion and quadriceps atrophy. On June 24, 2014, Dr. Silver noted Petitioner's effusion "is almost gone" and her quadriceps atrophy had decreased; he directed Petitioner to continue physical therapy. Pet.'s Ex. 5. When Petitioner was re-evaluated on August 5, 2014, however, Dr. Silver documented a "recurrence of effusion and inflammation." Pet.'s Ex. 5. Dr. Silver recommended additional therapy and prescribed pain medication. Pet.'s Ex. 5. Dr. Silver's September 16, 2014 office note reflects these measures were unsuccessful and Petitioner's right knee had "deteriorated," with examination revealing decreased

range of motion, worsened effusion, and positive provocative testing. Dr. Silver ordered a repeat MRI to evaluate Petitioner's cartilage. Pet.'s Ex. 5. Over the next nine months, Petitioner's right knee continued to "do poorly" while Petitioner awaited approval for the MRI; Dr. Silver's examinations repeatedly revealed worsening effusion, decreased range of motion, medial joint line tenderness, and positive McMurray's tests. Pet.'s Ex. 5. The MRI was ultimately done on June 23, 2015, and on review of the scan, Dr. Silver noted it "demonstrated further deterioration of her articular cartilage as a continuation of her original work injury of September 23, 2012." Pet.'s Ex. 5. A cortisone injection was done on August 11, 2015, and when this provided only two or three weeks of relief, Dr. Silver recommended arthroscopy.

On October 5, 2015, Dr. Weber performed a §12 examination and record review at Respondent's request. On review of the June 23, 2015 MRI, Dr. Weber noted progression of Petitioner's patellofemoral arthritic changes, with increase in osteophytes and "significant patellofemoral, trochlear degenerative changes with cystic changes and bone edema," as well as evidence of medial and lateral femoral condyle thinning, but no evidence of a meniscal tear or ligamentous damage. Resp.'s Ex. 6. Dr. Weber diagnosed osteoarthritis and opined Petitioner's symptoms were "related to the underlying arthritis and not related to the event, but rather progression of the natural history of her arthritis." Resp.'s Ex. 6. Dr. Weber further opined Petitioner's complaints were out of proportion to the imaging, and surgery was not indicated, though consideration could be given to viscosupplementation. Resp.'s Ex. 6.

On December 1, 2015, Dr. Silver performed the Synvisc injection as recommended by Dr. Weber. The record reflects Petitioner had approximately one month of relief, but by January 26, 2016, the beneficial effects had ended and she was "very painful"; Dr. Silver again recommended repeat arthroscopy, which he continued to recommend through his last appointment with Petitioner on July 12, 2016. Pet.'s Ex. 5.

In the Commission's view, Dr. Weber's opinions are irreconcilable with the medical evidence. To be clear, the September 23, 2012 accident necessitated the November 19, 2013 right knee surgery, and that surgery unquestionably disrupted the "natural progression" of Petitioner's underlying arthritis. See *Krantz v. Industrial Commission*, 289 Ill. App. 3d 447, 450-51 (5th Dist. 1997) (The Commission is an administrative tribunal that hears only workers' compensation cases and deals extensively with medical issues) and *Long v. Industrial Commission*, 76 Ill. 2d 561, 566 (1979) (The Commission possesses inherent expertise regarding medical issues). Moreover, the medical records demonstrate Petitioner's post-operative symptoms never resolved and, to the contrary, her previously-damaged cartilage continued to deteriorate. The Commission finds Petitioner's current right knee condition is causally related to the September 23, 2012 accident. We further find Petitioner's right knee condition reached maximum medical improvement on July 12, 2016, the last time Petitioner was seen by Dr. Silver.

B. Low Back

In concluding Petitioner did not sustain a low back injury in her work accident, the Arbitrator relied on Dr. Ghanayem's opinions, which he found more credible than the opinions of the treating orthopedist, Dr. Bergin. The Commission views the evidence differently.

The Commission initially observes that although the only direct impact to Petitioner's person was to her right leg, there was a twisting component to Petitioner's injury; specifically,

Petitioner testified that when the SUV struck her leg, her "body twisted to the right." T. 7-8. While the emergency room records do not include low back complaints, just three days later, at the September 26, 2012 evaluation with Dr. Stephen Hartsock, Petitioner reported "discomfort in her lower back and in the right posterior pelvis which occurred when she jerked around as she was initially struck." Pet.'s Ex. 8. After examination revealed lumbar tenderness and spasm, pain radiating into the right buttock, and decreased lumbar range of motion, Dr. Hartsock diagnosed, *inter alia*, lower back strain, lumbago, and muscle spasm. The Commission observes the remainder of Dr. Hartsock's office notes are handwritten and difficult to read, but the doctor's work status reports continue to note a diagnosis of lower back strain with spasm and radicular symptoms, unchanged, and on October 17, 2012, Dr. Hartsock ordered a lumbar spine MRI. Pet.'s Ex. 8. The MRI was completed on October 31, 2012, and on November 5, 2012, Dr. Hartsock ordered physical therapy for Petitioner's lower back. Pet.'s Ex. 8.

On November 14, 2012, Dr. J.M. Morgenstern, who had initially evaluated Petitioner's right leg, documented Petitioner also "continued with significant symptoms of low, mid [back pain]" due to the work accident. Pet.'s Ex. 11. On examination, the doctor noted lumbar tenderness and rigidity, decreased range of motion, and a positive straight leg raise test. Upon review of the October 31, 2012 MRI, Dr. Morgenstern reiterated Dr. Hartsock's recommendation for physical therapy. Pet.'s Ex. 11.

Dr. Hartsock continued to document Petitioner's low back complaints through November and into December; a December 14, 2012 chart note indicates the insurance adjuster would not approve any further treatment with Dr. Hartsock or Advanced Occupational Medicine. Pet.'s Ex. 8. Petitioner thereafter followed up with Dr. Morgenstern, who recommended additional physical therapy as well as epidural steroid injections, and repeatedly opined Petitioner's pre-existing low back condition had been aggravated by the work accident. Pet.'s Ex. 11. Dr. Morgenstern ultimately referred Petitioner to Dr. Christopher Bergin.

At the April 9, 2013 evaluation, Dr. Bergin documented that Petitioner complained of low back pain radiating into the right buttock down to the calf and foot, which started shortly after a pedestrian versus vehicle incident. The mechanism of injury was described as the tire of the truck hit her right leg and rolled partly up the leg, twisting her body and throwing her backwards; although she did not strike the ground she had to forcibly twist her body and grasp for a handhold on the vehicle to keep from being thrown to the ground. Petitioner advised Dr. Bergin of a "prior minor injury to her low back and leg after a fall in April of [2012], but all symptoms from that dissipated within a short period of time, and she was completely asymptomatic prior to [September 23, 2012]." Pet.'s Ex. 4. Dr. Bergin's physical examination findings included lumbosacral spasm and tenderness, decreased extension and flexion, and decreased strength; on review of the October 31, 2012 lumbar spine MRI, the doctor noted it was a poor quality scan, but it revealed degenerative disc disease, worse at L4-5, and a foraminal herniated disc at L3-4 on the right side. Dr. Bergin diagnosed, among other issues, spondylolisthesis L4-5, right-sided herniated disc L3-4, and lumbar radiculopathy. Dr. Bergin ordered higher quality scans as well as physical therapy, and opined Petitioner's complaints were consistent with her imaging and, based on her reported history, causally related to the work accident: "I feel that the injury as described aggravated her underlying degenerative condition at L4-5 and caused the herniated disc at L3-4." Pet.'s Ex. 4. Thereafter followed nearly two years of follow-up visits wherein Dr. Bergin noted Petitioner's complaints and exam were unchanged, and they were awaiting approval of the imaging. Pet.'s Ex. 4. Ultimately, on January 27, 2015, Dr. Bergin concluded Petitioner's low back treatment would

be deferred until after her neck was addressed.

There are two conflicting opinions as to the low back condition: Dr. Bergin's and Dr. Ghanayem's. In his February 21, 2013 §12 report Dr. Ghanayem concluded Petitioner suffered only a right foot injury in the work accident. Dr. Ghanayem highlighted that Petitioner demonstrated symptom magnification and had nonanatomic complaints; on review of the October 2012 MRI, the doctor noted degenerative changes but no neurocompressive lesions. Resp.'s Ex. 2. Dr. Ghanayem opined the mechanism of injury could not have caused spine injuries: "Mechanistically, I do not see how she could even hurt those regions of her body." Resp.'s Ex. 2. During his deposition, Dr. Ghanayem reiterated that he did not see how spine injuries could result from the September 23, 2012 accident: "But given the mechanism that she described to me, I just can't imagine with any reasonable degree of medical and surgical certainty a spine injury." Resp.'s Ex. 13, p. 16. While Dr. Ghanayem agreed a traumatically induced twisting motion of the back can cause a back injury, the doctor did not find any organic findings in Petitioner. Resp.'s Ex. 13, p. 36. The Commission notes Dr. Ghanayem examined Petitioner a second time in December 2021, however the doctor was not provided with the updated MRI.

Dr. Bergin, in turn, opined Petitioner's low back condition was related to the accident. During his deposition, Dr. Bergin testified that Petitioner's symptoms were consistent with the diagnostic imaging and explained the L3-4 pathology seen on the 2012 MRI was a "new finding…within a few weeks or months of the MRI" and, given Petitioner's history and exam, was related to the work accident. Pet.'s Ex. 24, p. 21. Dr. Bergin further explained the timeframe for a new herniation to appear as soft disc material on MRI was three to six months. Pet.'s Ex. 24, p. 39. Dr. Bergin testified he disagreed with Dr. Ghanayem's assessment of Petitioner as a malingerer and stated he observed no nonorganic pain behaviors or symptom magnification. Pet.'s Ex. 24, p. 26-28. Dr. Bergin also disagreed with Dr. Ghanayem's dismissal of the mechanism of injury: "…what she described to me, having her foot pinned under an SUV tire and having to grasp onto the vehicle, twisting herself to keep from being thrown to the ground, is a competent cause" of a spine injury. Pet.'s Ex. 24, p. 29.

The Commission finds Dr. Bergin's opinions are persuasive and credible and we adopt same. We observe Dr. Bergin's opinions are supported by the medical evidence, including the documentation of low back symptoms within three days of the accident as well as the findings and opinions of Dr. Morgenstern. The Commission finds Petitioner's low back condition is causally related to the accident. We further find Petitioner's low back condition reached maximum medical improvement on May 31, 2016, the date of Petitioner's last evaluation by Dr. Bergin.

C. Neck

The Arbitrator found Petitioner did not sustain a neck injury in the September 23, 2012 accident. Our analysis of the evidence yields the same result. Unlike Petitioner's low back complaints, which were documented within three days of the incident, the first mention of neck pain is not until the November 5, 2012 re-evaluation with Dr. Hartsock. Pet.'s Ex. 8. The Commission finds the six-week gap between the accident and the first report of neck complaints is fatal to a finding of causal connection.

III. Medical Expenses

Petitioner submitted medical bills for treatment rendered through January 2017. Consistent with our causal connection and maximum medical improvement determinations, the Commission finds Petitioner is entitled to the medical expenses incurred for right foot/ankle treatment rendered through April 18, 2016; right knee treatment rendered through July 12, 2016; and low back treatment rendered through May 31, 2016.

IV. Permanent Disability

Section 8.1b(b)(i) – impairment rating

Neither party submitted an impairment rating. As such, the Commission assigns no weight to this factor and will assess Petitioner's permanent disability based upon the remaining enumerated factors.

Section 8.1b(b)(ii) – occupation of the injured employee

Petitioner was a traffic aide for Respondent. Petitioner was under work restrictions for nearly four years following her accident and she did not return to her pre-injury job. In late 2021, Petitioner began working a sedentary position with the U. S. Post Office. The Commission finds this factor weighs in favor of increased permanent disability.

Section 8.1b(b)(iii) – age at the time of the injury

Petitioner was 51 years old on the date of her accidental injury. The Commission notes that due to her age, Petitioner will experience her residual complaints for an extended period. This factor weighs in favor of increased permanent disability.

Section 8.1b(b)(iv) – future earning capacity

There is no evidence Petitioner's work accident had an adverse impact on her future earning capacity. Petitioner works for the U.S. Post Office and earns between $380.00 and $570.00 per week. T. 37-38. The Commission observes Petitioner's current part-time wages exceed her pre-accident weekly earnings with Respondent ($362.21). The Commission finds this factor weighs in favor of reduced permanent disability.

Section 8.1b(b)(v) – evidence of disability corroborated by treating medical records

As a result of the September 23, 2012 accident, Petitioner sustained injuries to her right foot/ankle, right knee, and low back. Petitioner's right foot/ankle condition was ultimately diagnosed as a crush injury with neuritis and insertional Achilles tendinitis with Haglund's deformity; Dr. Rajeev Garapati offered surgery but Petitioner has not sought further right foot/ankle treatment since 2016. Pet.'s Ex. 10. Petitioner's right knee condition was diagnosed as internal derangement of the medial and lateral menisci. Dr. Silver performed arthroscopic partial medial and lateral meniscus tricompartment synovectomy, lysis of adhesions, and debridement, but the records reflect Petitioner had a poor outcome, with persistent pain and further deterioration of her cartilage. Pet.'s Ex. 5. Dr. Silver has recommended further surgery, but Petitioner has not

sought right knee treatment since 2016. Petitioner's low back condition was diagnosed as L3-4 herniated disc and aggravation of pre-existing degenerative condition at L4-5. Dr. Bergin placed Petitioner's low back treatment on hold pending surgery for her unrelated neck condition, but Petitioner has not sought further spine treatment since 2016. Petitioner testified she has residual complaints in all three areas. She has pain in her low back which radiates to her buttocks. T. 51-52. She also has foot pain and wears a brace every day, and her knee routinely gets swollen. T. 52. The Commission finds this factor is indicative of decreased permanent disability for the right foot and low back, and increased permanent disability for the left knee.

Based on the above, the Commission finds Petitioner sustained 5% loss of use of the right foot, 20% loss of use of the right leg, and 5% loss of use of the person as a whole.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 31, 2022, as modified above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $253.00 per week, that being the applicable statutory minimum rate for a married claimant, for a period of 203 5/7 weeks, representing September 24, 2012 through August 19, 2016, that being the stipulated period of temporary total incapacity for work under §8(b) of the Act. Respondent shall have a credit of $43,544.01 for TTD benefits already paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the medical expenses incurred for right foot/ankle treatment rendered through April 18, 2016, as provided in §8(a), subject to §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the medical expenses incurred for right knee treatment rendered through July 12, 2016, as provided in §8(a), subject to §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the medical expenses incurred for low back treatment rendered through May 31, 2016, as provided in §8(a), subject to §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $253.00 per week for a period of 8.35 weeks, as provided in §8(e)11 of the Act, for the reason that the injuries sustained caused the 5% loss of use of the right foot.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $253.00 per week for a period of 43 weeks, as provided in §8(e)12 of the Act, for the reason that the injuries sustained caused the 20% loss of use of the right leg.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $253.00 per week for a period of 25 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 5% loss of use of the person as a whole.

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

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

Under Section 19(f)(2), no "county, city, town, township, incorporated village, school district, body politic, or municipal corporation" shall be required to file a bond. As such, Respondent is exempt from the bonding requirement. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

August 9, 2023

/s/ *Deborah J. Baker*

DJB/mck

O: 6/14/23

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/s/ *Stephen J. Mathis*

/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	12WC034283
Case Name	FLOYD, ELLEN v. CITY OF CHICAGO
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	39
Decision Issued By	David Kane, Arbitrator

Petitioner Attorney	David Martay
Respondent Attorney	Lucy Huang

DATE FILED: 5/31/2022

THE INTEREST RATE FOR THE WEEK OF MAY 24, 2022 1.53%

/s/ David Kane, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF **Cook**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Ellen Floyd
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **12** WC **34283**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the **Honorable David Kane**, Arbitrator of the Commission, in the city of **Chicago**, on **4/27/22**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **9/23/12**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**18,834.92**; the average weekly wage was $**362.21**.

On the date of accident, Petitioner was 51 years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**43,544.01** for TTD, $**0** for TPD, $for maintenance, and $**869.28** for PPD advance, for a total credit of $.

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

ORDER

For the reasons stated in the decision, the Arbitrator finds that Petitioner's right leg and right ankle/foot are casually related to the 9/23/12 work accident. The Arbitrator further finds that Petitioner's current conditions if ill-being (back, neck, joint pain with the upper extremities and left lower extremity, asthma, anxiety, PTSD, and other gynecological issues) are not causally related to the 9/23/12 work injury.

The Arbitrator finds that Petitioner's AWW under the Act is $362.21.

Petitioner's request for the TTD benefits for the period from 8/20/16 through 11/15/21 is hereby denied.

For the reasons stated in the decision, the total amount of medical bills that are awarded is **$5,815.00**. All other bills are hereby denied. With regard to the awarded bills, Respondent shall pay reasonable and necessary medical services directly to the medical provider, pursuant to the medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $220.20/week for 40.6 weeks because she sustained a loss of 15% loss of use of the right leg and 5% loss of use of the right foot, as provided in Section 8(e) of the Act.

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

Respondent shall pay Petitioner compensation that has accrued from through , and shall pay the remainder of the award, if any, in weekly payments.

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

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

David A. Kane

Signature of Arbitrator

MAY 31, 2022

Ellen Floyd v. City of Chicago
12WC034283
Arbitrator Kane

STATEMENT OF FACTS

It is stipulated to by the parties that on 09/23/12 that Ellen Floyd (hereinafter referred to as "Petitioner") sustained an injury in the course and scope of her employment with the City of Chicago (hereinafter referred to as "Respondent"). Her job title was a Traffic Control Aide.

The record shows that prior to the alleged accident of 9/23/12, on 4/16/12, Petitioner was seen at Northwestern Hospital emergency room. At this visit, it was noted, " Petitioner complained of right calf pain radiating to knee and foot onset today. Patient states fell on March 20th and also wants lower back checked, Petitioner complained pain to low back and bilateral hips." It was noted that Petitioner's chief complaint was right calf pain. Petitioner was diagnosed with right leg pain and back pain (Px. 6).

On 9/23/12, while directing traffic, Petitioner was hit by a vehicle and injured her right and foot (Rx. 1, Px. 2). Petitioner was brought to the emergency room at Northwestern Hospital. Treatment notes from the attending physician showed, "She is a traffic cop and reports having her back turned while a car pulled up alongside her right side and was attempting to turn and rolled up on her right leg. She says she did not fall forward and strike her head or hurt neck/back/chest/abdomen. She complained pain only in the right foot and ankle" (Px. 6).

It was further notes that Petitioner had pain and swelling in the right lower extremity. Petitioner reported no injury to any other body parts. Physical examination of the cervical spine, lumbar spine and the upper

extremities were within normal limits. Only x-rays for the right foot were taken. No x-rays were taken for the cervical spine, lumbar spine, upper extremities, and left lower extremity. X-rays of the right foot showed a fracture fragment involving the proximal fibular head. Petitioner was diagnosed with a fibular fracture of the right foot (Px. 6).

On 9/26/12, Petitioner was seen by Dr. Stephen Hartsock at Advanced Occupational Medicine Specialist. Dr. Hartsock wrote, “She states on September 23, 2012, she was working and talking too the driver of a vehicle when an SUV hit her right knee and rolled onto her foot. She states that the car stopped when she jerked around and had to be told [the driver] to drive off her foot.” (Px.8) Petitioner complained of right foot pain and lower back pain. It was noted that Petitioner denied having any prior injuries to her right leg and lower back. Physical examination of the back revealed no tenderness to palpation over the spine. It was noted that there was tenderness to palpation in the lumbar area on the right side (Px. 8).

Examination of the right foot and ankle revealed tenderness to palpation over the lateral foot and ankle joint with swelling. X-rays of the right foot and ankle were performed, which showed normal findings. There were no acute abnormalities or fractured noted. X-rays of the lumbar spine, pelvis and right hip were obtained, which showed normal findings. With regard to the x-rays of the lumbar spine, it was noted that Petitioner had diffuse degenerative disk disease along the lumbar spine with diminished disk space at all levels of the lumbar spine. Dr. Hartsock diagnosed her with a right proximal fibular fracture/knee contusion, right ankle/foot contusion, and a back strain. Petitioner was prescribed with a long cam boot walker and a knee brace (Px. 8).

On 10/22/12, Petitioner attended the initial evaluation with Dr. J.M. Morgenstern. Petitioner was diagnosed with a right proximal fibular head fracture (Px. 11).

On 10/31/12, an MRI of the lumbar spine was performed, which revealed minimal right lateral subluxation and Grade 1 and anterolisthesis of L4 relative to L5, multiple degenerative disc disease and facet arthropathy with associated central spinal canal stenosis and neural foraminal narrowing, and mild diffuse atrophy of the paraspinal musculature (Px. 11).

At the follow-up visit on 11/14/12, Dr. Morgenstern ordered an MRI of the cervical spine and thoracic spine, and right knee (Px. 11).

On 11/29/12, MRI of the right knee was performed, which showed normal alignment and mild diffuse chondromalacia with minimal subchondral fluid of the patellofemoral joint and a small joint effusion; subacute low-grade sprain of the anterior cruciate ligament; mild chondromalacia the medial joint compartment; 4.9 cm slender Baker's cyst; moderate chondromalacia with marginal spurring and subchondral fluid of the proximal tibiofibular joint; and no evidence of fracture.

An MRI of the thoracic spine was performed on the same day, which revealed disc degenerative throughout the thoracic spine. An MRI of the cervical spine was performed, which revealed disc generation throughout the cervical spine with loss of the normal cervical lordosis and canal and foraminal stenosis (Px. 11).

Petitioner attended one more follow-up visit with Dr. Morgenstern on 12/3/12, and she attended the last office visit with Dr. Morgenstern on 1/7/13 (Px. 11).

The record reveals that after Petitioner stopped seeing Dr. Morgenstern, she had started treating with Dr. Ronald Silver for her bilateral knees. She was seen by Dr. Bergin for her cervical and lumbar spine, and she was seen by Dr. Garapati for treatment of her bilateral feet.

Moreover, at the request of the City, Petitioner had attended several independent medical examination ("IME") several doctors. She underwent the 2 IMEs with Dr. Alexander Ghanayem for her lumbar and cervical spine. She attended 3 IMEs with Dr. Kathleen Weber for her right ankle and right knee. She attended 2 IMEs Dr. Michael Pinzur for her right ankle.

First, with regard to Petitioner's right knee, on 02/25/13, Petitioner attended the initial IME with Dr. Weber. On physical examination, Petitioner's bilateral extremities showed no asymmetric appearance. Petitioner had no obvious deformity. There was no erythema, warmth, or skin color changes, comparing side to side of her lower extremities. It was noted that she was tender to palpation with minimal palpation along the posterior right calf, but also complained circumferentially about the lower leg and foot. She had marked tenderness with any palpation of the tibia or fibular, proximally to distally. She was tender in the soleus, gastric, medial and lateral malleolus, along the talar dome. Palpation of her midfoot and forefoot caused her pain (Px. 3).

Dr. Weber noted, "When I mover her left great toe, she complained of significant pain, but also complained od pain when I moved any of the digits on the right foot. When I palpated the same areas when I was distracting her, she did not complain of pain." (Px. 3)

X-rays of the right ankle were taken, which showed essentially normal findings with no acute fracture. Dr. Weber further noted, "In regard to the fibular fracture, and MRI revealed no evidence of fracture as of November

29, 2012, and I would anticipate a good prognosis based on her injury. Unfortunately, her examination today showed significant symptom magnification and I think that her prognosis for recovery is poor, secondary to her non-physiological findings today." (Rx.3)The doctor further opined that based on a non physiological exam and the doctor's review of an MRI that showed her fibular fracture had healed, it appears that "her current complaints are not causally related to the incident of September 23, 2012." (Rx. 3).

The doctor opined that no further treatment would be needed for the right foot. Dr. Weber also opined that Petitioner had reached MMI with regard to her right lower extremity and that she could return to work full duty without restrictions with regard to her right fibular and right ankle/foot injury (Rx. 3).

On 3/12/13, Petitioner was seen by Dr. Silver for an evaluation regarding her right leg. Dr. Silver recommended surgery for the right knee (Px. 5).

On 6/13/13, Dr. Weber completed an IME addendum clarifying that based on the last IME on 2/25/13, she believed that Petitioner would only need injection for the right knee and no other treatment would be needed for the right knee (Rx.4)

On 8/12/13, Petitioner attend the second IME with Dr. Weber regarding her right knee. Dr. Weber review the MRI of the right knee dated 11/29/12, which showed mild diffuse chondromalacia with minimal subchondral fluid of the patellofemoral compartment and a small joint effusion, mild chondromalacia of the medial joint line, moderate chondromalacia with marginal spurring and subchondral fluid of the proximal tib/fib joint, and no

evidence of any fracture. Dr, Weber diagnosed Petitioner with right knee chondromalacia/early arthritis (Rx. 5).

Dr. Weber noted, "Based on her examination today, she had significant pain behavior and subjective pain that is out of proportion to the x-rays and MRI findings. I am not able to localize her pain on examination but rather she has extreme complaints of pain with palpation or any movement of the knee. pain that for both diagnostic as well as potentially therapeutic reasons a combination of corticosteroid with anesthetic should be injected into the knee. Depending on her response would dictate further, if any, treatment recommendations. I would anticipate based on her imaging that the injection should suffice and bring her back to a normal baseline. She clearly has pre-existing mild degenerative changes of the knee and an injection at this time would be appropriate. In regard to any surgical intervention, I think it is very premature based on a nonlocalizing examination, her imaging, and the significant subjective complaints that any intervention in regard to arthroscopic treatment is premature and would likely have a very guarded outcome. I would suggest that conservative management should be maximized, which would include formal physical therapy, the steroid injection, and scheduled anti inflammatory medications." (Rx. 5)

Dr. Weber further opined, "In my opinion, based on review of Dr. Silver's record, her MRI and Ms. Floyd's examination that it is premature to consider surgical intervention at this time. She has subjective complaints that appear out of proportion to her imaging and her examination. I think that proceeding with a surgical intervention at this time without first trying a steroid injection and evaluating her response to the injection would unreasonable. I would anticipate, based on a nonlocalizing examination,

that following corticosteroid injection she will likely be able to return to work full duty without restrictions." (Rx. 5)

On 11/29/13, Petitioner underwent am arthroscopic partial medial and lateral meniscus tricompartmental synovectomy, lysis of adhesions, and debridement, which was performed by Dr. Silver (Px. 5)

Postoperatively, Petitioner underwent physical therapy and attended follow-visits with Dr. Silver for the right knee (Px. 5).

On 5/26/15, Dr. Silver noted that Petitioner complained of left knee pain and Dr. Silver stated if Petitioner's symptoms persisted, he would order an MRI of the left knee (Px. 5).

On 6/23/15, Petitioner underwent an MRI of the right knee which revealed progression of her patellofemoral arthritic change, some increase in osteophytes and significant patellofemoral, trochlear degenerative changes with cystic changes and bone edema (Px. 5).

On 6/30/15, Dr. Silver reviewed the right knee MRI report and stated that the MRI showed further deterioration of her articular cartilage. Dr. Silver stated that he will hold off treatment for the left knee pending treatment for the right knee (Px. 5).

On 10/5/15, Petitioner attended the third IME with Dr. Weber. Dr. Weber wrote, "In regard to her left knee, she purports to me she has left knee pain from the onset and began at the time of the incident . She states that it was not as bad as the right knee and Dr. Silver does not want to focus on the left leg at this point because they are still treating the right knee, She describes it globally. She described some mechanical symptoms and does have some swelling, but not as significant as the right knee swelling. She reports that she has never had prior injuries or issues with either knee prior to this event. MRI of the right knee without contract June

23, 2015, showed progression of her patellofemoral arthritis changes. She has some increase in her osteophytes and significant patellofemoral, trochlear degenerative changes with cystic changes and bone edema. There is no evidence of medial and lateral femoral condyle thinning. I see no evidence of a meniscus tear or ligamentous damage. Radiographs obtained in the office today were four weight bearing views of her bilateral knees. The x-rays look very similar to her August 20, 2013, films which show tricompartmental arthritis. The tibiofemoral compartments appears to be similar, but there is increased osteophyte formation, The patellofemoral compartment also has progressed bilaterally, slightly greater on the right. Her diagnosis is bilateral knee osteoarthritis. Her supporting records such as x-rays and MRI would support this diagnosis. She does have evidence of pre-existing osteoarthritis from prior knee MRI and bilateral knee radiographs. Her objective findings in my opinion are out of the proportion to her MRI findings." (Rx. 6)

Dr. Weber further noted, "In her records show an onset of her right knee symptoms at the time of the incident and there is clear documentation of the right knee following the injury, therefore, it is my opinion that there was causal relationship to her injury. However, at this point it appears that her symptoms are related to the underlying arthritis and not related to the event but rather progression of the natural history of her arthritis. It is unclear why she has significant global complaints, her exam appears to be out of proportion to her findings. In regard to the left knee, there is no mention of any left knee complaints until 2015 and in my opinion the left there is no causal relationship to the event that she described without complaints of discomfort at the time or within a 10 to 14 day period of the injury. I have no records to suggest that that is the case and therefore there

is no causal relationship. No further treatment for right knee is needed. In regard to her left knee, no further treatment needed." (Rx. 6)

Dr, Weber opined, "It appears that Ms. Floyd described severe disability related to multiple injured body parts. In regard to her knee, she has complaints that are out of proportion to her x-rays and MRI findings. She has, in my opinion, an over exaggeration of her complaints and it appears that the overlying other complaints seemed to cloud her ability to separate out of the knee from the rest of her body . It does not appear that she has significant disability related to her right knee but rather subjective complaints that are out of Proportion to her exam findings. Consideration of an FCE for validity may be helpful to determine true functional issues." (Rx. 6)

On 12/1/15, Dr. Silver stated that if Petitioner's right knee symptoms were not improved, he recommended an arthroscopic surgery of Petitioner's right knee (Px. 5).

Petitioner continued to see Dr. Silver from 2015 through July 2016 (px. 5).

Second, with regard to Petitioner's lumbar and cervical spine, Dr. Silver referred Petitioner to Dr. Christopher Bergin for further evaluation for her cervical spine and lumbar spine.

On 4/9/13, Petitioner attended the initial visit with Dr. Christopher Bergin. Dr. Bergin reviewed the 11/29/12 MRI of the cervical spine and noted that the MRI showed loss of cervical lordosis, moderate to severe stenosis at multiple levels, and a component of OPLL from C3-4 to C6-7. Dr. Bergin noted, "In terms of causation, the patient states that she never had symptoms referable to her cervical spine prior to 9/23/12. A pedestrian versus motor vehicle collision as she described to me can certainly

aggravate her underlying spinal stenosis and negative condition and cause her to have symptoms. A twisting injury such as she describes may be the cause if the soft disc material protruding at C3-4 and C4-5. Her neck and arm complaints are consistent with the imaging study I reviewed. In making this statement, I am relying on her history and subjective complaints. I n terms of her lumbar spine, she has had one episode of low back pain documented from April of this year, but she sates the prior to 9/23/12, her back pain had resolved completely." (Px. 4)

On 12/4/13, Deposition of Dr. Begin was taken. Although Dr. Begin opined that Petitioner's cervical stenosis and OPLL were pre existing, he maintained his opinion that Petitioner's cervical condition was causally related to the work injury and she would need surgery. With regard to the lumbar spine, the doctor opined that Petitioner had sustained a lumbar herniated disc at L3-4 and aggravated spondylolisthesis at l4-5. On cross-examination, Dr. Bergin also acknowledged that Petitioner had informed him she sustained a back injury in April 2012, which is approximately 5 months before that date of the 9/23/12 work injury occurred. In addition, with regard to the cervical spine the doctor stated that MRI report that he had used to form his opinion regarding the cervical diagnosis is "poor quality." (Px. 24)

Petitioner attended the first IME with Dr. Ghanayem on 02/21/13 with regard to her lumbar spine and cervical spine. At this visit, Petitioner reported to the doctor that while she was directing traffic on the date of the work accident, a car ran over her right lower extremity. The doctor noted that Petitioner walked into the exam room with a slight limp on the right side but with normal posture when she left the exam room. Dr. Ghanayem noted that he reviewed Petitioner's lumbar MRI scan, which revealed some

degenerative changes, predominantly at L4-L5. There were no neurocompressive lesions. Her thoracic MRI scan was normal. Her cervical MRI revealed a chronic condition of OPLL (ossification of her posterior longitudinal ligament). There were no spinal cord signal changes. Dr. Ghanayem opined, “My impression is that Ms. Floyd sustained an injury to her right foot when the can ran over the foot, apparently to her right knee. I see no evidence of any injury to her cervical, thoracic, or lumbar region. Mechanically, I do not see how she could even hurt those regions of her body. I am very concerned about the findings nonorganic pain behavior, consistent with symptoms magnification. I do not see any evidence of a structural injury that would have been aggravated or caused by the accident, given its mechanism. She requires no treatment for her spine. I have no opinion with regard to her right lower extremity as it relates to any injury to her knee, ankle, or foot. Relative to her spine, issues of maximum medical improvement (“MMI”) are mute, given the fact that I do not believe she injured those parts of her body from the injury that she described to me. Furthermore, her symptoms complex does not fit any anatomic spine problem. Relative to her neck, mid-back, and lower back, she can return back to work at regular duty.” (Rx. 2)

On 4/16/14, deposition of Dr. Ghanayem was taken. Dr Ghanayem testified that he noticed on the day of the examination on 2/25/13 when Petitioner walked into the exam room, she had a limp on the right side; however, he noted when she left the exam room she did not have a limp anymore. It was observed that she walked normally (Dr. Ghanayem Deposition Tr p. 7-8). Dr. Ghanayem testified that Petitioner’s lumbar spine showed some degenerative changes most prominent at the L4-5 levels. There was nothing traumatic, nothing neurocompressive, no disk

herniations. Petitioner's thoracic MRI was normal . Petitioner's cervical MRI showed condition of OPLL (p.10-11). Dr. Ghanayem explained that with regard to the OPLL condition, the most common problem to get with this a condition of myelopathy which is a painless neurological dysfunction usually a clumsiness in the hands, gait disturbance bowel and bladder dysfunctions but its not associated with pain (p. 11-12) Dr. Ghanayem further opined Petitioner's condition of OPLL is not caused by the 9/23/12 work injury. The doctor explained the OPLL condition takes many years to develop, probably had its onset at least five to ten years prior to the date the work injury (p.12). Dr. Ghanayem also opined that Petitioner's cervical MRI showed no evidence of symptomatic cord impression and no cervical disk protrusion/herniation (p.12-13).

Dr. Ghanayem opined that Petitioner does not suffer an injury to cervical, thoracic, and lumbar spine as a result of the 9/23/12 work injury (p. 15). The doctor opined, "Given the mechanism that she described to me , I just cant imagine with any reasonable degree of medical and surgical certainly a spine injury"(p.16). The doctor further opined that the work injury has not accelerated, aggravated or excavated a preexisting condition in Petitioner's spine (p.16-17).

Petitioner attended the last office visit with Dr. Bergin on 5/31/16.

Third, with regard to Petitioner's right foot/ankle, treatment notes from Dr. Rajeev Garapati from Illinois Bone and Joint showed that Petitioner missed her appointment on 10/7/13 and again on 10/15/13 (Px. 10).

On 9/2/15, an MRI of the right ankle/foot was performed, which revealed a partial-thickness tear of the distal part if the Archilles tendon. On 10/9/15, Petitioner was seen by Dr. Garapati. Dr. Garapati noted that Petitioner reported she was hit by a truck which rolled over her right foot.

Petitioner complained of right foot pain mostly over the intersection of her Achilles. X-rays of the right foot ankle were performed on the same day, which reviewed no fracture or dislocation. Dr. Garapati review the MRI report of the right ankle/foot dated 9/2/15 and noted that the MRI report showed some partial tear of the Achilles tendon near the insertion of the posterior aspect of the calcaneus with some marrow edema in that area. Dr. Garapati diagnosed Petitioner with right foot crush injury with neuritis and right foot insertional Achilles tendinitis with Haglund's deformity. Dr. Garapati noted, "I had not seen her in three years, so I do not know if this is all caused by her injury, but she states she had no pain prior to it and thus it does appear to be causally related to the injury that she had. She does have an insertional Achilles tendinitis that is not getting better after 3 years and even with conservative treatment. I would recommend debridement of the Achilles, excision of the Haglund's, possible FHL, tendon transfer in that area." (Px. 10)

On 10/27/15, Petitioner attended the initial IME with Dr. Pinzur regarding her right foot/ankle.

At this exam, Dr. Pinzur noted, "She described a significant amount of pain this lower extremity from the time of the injury." Dr. Pinzur further noted, **"**Her examination is consistent with a mild degree of insertional Achilles tendinopathy with a small Haglund's deformity. The MRI shows a small amount of significant changes. Her symptoms are significantly out of proportion to the findings of the MRI. It is very difficult to correlate her history, physical examination and evaluation of the MRI. It appears that her complaints and symptoms are far deformity. She does have a small amount of signal change within the Achilles tendon at the insertion. If she in fact has complained if these symptoms from the time of the original injury and

in fact has pain of sufficient magnitude, it is reasonable to consider the surgery described by Dr. Garpati. Again, I feel that her description of the symptoms is out of proportion to the findings, both on history and clinical examination. This woman described a good bit of pain and disability that appear to be somewhat out of proportion to my physical examination and the findings on the MRI." (Rx. 7)

Dr. Pinzur further opined, "Again, I have described that her symptoms are somewhat out of proportion to the findings, both on clinical examination and the MRI. The treatment up until now has been appropriate. Surgery at this point is very subjective. Again, I feel that her symptoms are somewhat greater than the findings on the examination. I do not feel that any further testing would be beneficial. " (Px. 7)

Petitioner attended two more office visits with Dr. Garparti on 1/25/16 and 2/22/16 regarding her right foot/ankle. It was noted that Petitioner did not want to proceed with the recommended surgery because she was scared to undergo general anesthesia (Px. 7).

On 4/18/16, Petitioner attended the last office visit with Dr. Garapati. Although Dr. Garparti's recommended surgery was authorized by Respondent, pursuant to Dr. Pizur's 10/27/15 IME report, Petitioner refused to proceed with the surgery, and she did not return to see Dr. Garparti after 4/8/16 (Px. 7)

On 5/31/16, Petitioner attended the last office visit with Dr. Bergin (Px. 4).

On 7/12/16, Petitioner attended the last office visit with Dr. Silver (Px. 5).

Due to Petitioner's noncompliance with treatment for the right foot, Petitioner's TTD benefits were suspended on 8/20/16.

Respondent sent out a letter dated 8/15/16. The letter noted that the reason for the suspension is “non-compliant with recommended medical treatment.” (Rx. 10)

On 1/7/17, Petitioner presented at Northwestern emergency room with complaints of back pain. Again, at this visit, denied having any back injury prior to the 9/23/12 work injury. She was seen by Dr. Terry. X-rays of the right ankle were reviewed which showed no fracture or dislocation. Dr. Terry wrote, “There are no restrictions at this time. She may weightbearing as tolerated. She was instructed to take Motrin as needed for pain and limit use of muscle relaxers. We will see her back approximately 4-6 weeks times for repeat clinical examination. We will hold her out from returning to work at this time given the severity of her pain. However, we will potentially release her at the next follow-up visit appointment pending progression of her symptoms.” (Px. 7)

Petitioner did not return to see Dr. Terry. There are no other treatment records after 1/7/17 (px. 7).

The record reveals that Petitioner did not see any doctor regarding treatment for the neck, back, and right lower extremity. Petitioner had gone approximately 5 years without receiving any further treatment for the work injuries.

On 12/9/21, Petitioner attended the second IME with Dr. Ghaynamem regarding her lumbar spine and cervical spine.

Dr. Ghanayem wrote, “I had the opportunity to reevaluate Ellen Floyd at your request. I saw her roughly 9 years ago. The history is unchanged in that she states her foot got run over a vehicle and she turned to get away from the vehicle. This occurred on her tight foot. She still has complaints of global neck and back pain as well as mid back pain, She has numbness in

both hands, pain down both shoulder girls and complaints of circumferential pain involving her thighs and lower legs except for the left calf and the front portion of the left thigh. She was upset at me because she states I denied her having surgery a number of years ago. She states she developed bladder dysfunction a bout 3 years ago." (Rx. 14)

Dr. Ghanayem stated, "On physical exam, she is 5 feet 9 inches tall and 200 pounds. She stands with a normal posture, and when she walked into the exam room and then out of the building into the parking lot, I observed her walking with a normal gait. When she walked in the exam room , she walked with an antalgic gait. Exam of her cervical, thoracic, and lumbar spine reveals multiple areas of soft tissue tenderness including tenderness to light palpation. She has normal cervical range of motion. Her lumbar range of motion is self-limited to 10 degrees of extension and 10 degrees of flexion. Neurological exam of the upper extremities revealed no focal deficits. Sensation is intact to light touch, Hoffman's sign is negative." (Rx. 14)

Dr. Ghanayem further opined, "My impression is unchanged from my prior report authored nearly 8 to 9 years. She does not have a spine problem relative to her work injury. She exhibits multiple nonorganic physical exam findings consistent with symptoms magnification. Treatment for her spine is unrelated to factors of her employment, specifically the work injury she alleges from 09/23/2012. She did have a condition of OPLL in her cervical spine. That may have progressed given its own natural history. I have no new imaging to determine if that has indeed happened. If it dis progress, it would not be related to her work injury, Having someone run over your foot cannot cause a condition of OPLL to become aggravated or progressed. She requires no treatment relative to her neck or back as it

relates to her work accident. I anticipated in the past that she will be able to return back to work at regular duty. I maintain that opinion. She was at MMI when I saw her bout 9 years ago. My opinions have not changes since then." (Rx. 14)

On 12/7/21, Petitioner attended the second IME with Dr. Pinzur regarding her right foot/ankle. Physical examination of the right foot and ankle was virtually unremarkable and she had reached MMI with regard to right foot (Rx. 15).

On 02/10/22, Dr. Pinzur completed an IME addendum. Dr. Pinzur noted, "I have evaluated Mr. Floyd on two occasions. The first evaluation was in October 2015,. The second evaluation was in December 2021. I have also reviewed the updated report from Dr. Ghanayem. I would tend to agree with Dr. Ghayneym that her multiple complaints do not appear to be related to her original injury . When I first evaluated her in 2015, I was leery that surgery would provide a benefit. Her myriad complaints are not likely related to a work related injury. When I first seen her in 2015, I always give the patient the benefit of the doubt. If she had no symptoms prior to the reported injury, and developed the symptoms after the injury, then I would opine that the injury was work related. Based on my examination in 2021, and the evaluation of Dr. Ghanayem, I currently do not feel that she has a work-related injury. I cannot provide specific diagnosis as her current complaints do not seem to fit with the original injury. Her complaints are not consistent with me original evaluation, I do not have a medical diagnosis at this point at this time. I do not feel that any of the findings in this women are work-related. I currently do not feel that she has a diagnosis of CRPS." (Rx. 16)

On 03/01/22, Dr. Pinzur completed another IME addendum. Dr. Pinzur wrote, “The multiple complaints that Ms. Floyd made to me in her visit of December 2021 are not consistent with her current findings. I am not certain of the etiology of her current complaints. It is clear that her current condition of ill-being is not related to the original injury in question. I do not feel that the swelling in both of her legs in related to the alleged original work-related injury. I see no reason that she is not able to handle her job responsibilities.” (Rx.17)

After the hearing, Petitioner testified that on the day of the accident, she was hit by a car on the right ride of her leg and she stated that she twisted her body but she did not fall down (Tr. 7). She complaints of pain in her neck , back, bilateral shoulders and bilateral legs . She testified that she start worked a s post office starting in Thanksgiving 2021 (Tr. 37). She had received Social security Disability benefit from approximately from 2015 or 2016 to Thanksgiving 2021 (Tr. 39) She is currently working at the Post office making $19.00 per hour and she works 20-30 hours per week (Tr. 38). Petitioner testified that she was working as Help at Home while she was working as a Traffic Aide for the City and she stated that she notified Respondent and she fille a concurrent employment form. Petitioner testified that she had started working for Responded in May 2012 , which is approximately 4 months before the 09/23/12 work injury (Tr. 49).

On cross-examination, Petitioner testified that she did not have any prior injury to neck, right, leg, right foot and left leg (Tr. 59). Although Petitioner stated that she did not fall and injured her knees on 3/20/12 (Tr. 60), she later acknowledged that she actually feel and injured on right leg and back on 4/16/12. This is approximately 5 months before the 9/23/12 work injury (Tr.61-62, 78-79). She testified that she was working

approximately $18 to $19 working as a Traffic Aide for Respondent (Tr. 63). She testified that on the day of the work accident she only underwent x-ray for the right foot and she did not undergo any x-rays for the back, left leg (Tr. 66). Petitioner testified that the she alleging that all the bills from Illinois Medical Center in the amount of $65,516.04 are for treatment of the work injury . (69). She stated all of her current complaints such as of asthma, shortness of breath, panic attack are due to the work injury (Tr. 70-73). She also claims that all the charges for services that were rendered for her Women's wellness exam, pap smear, colonoscopy, mammogram, sore throat, and other gynecological issues are due to the 9/23/12 work injury (74-77). She testified she is currently working as a Mail Processing Clerk (Tr. 84). She testified that she does not have any future appointment for the neck, back, legs. She did not undergo surgery for the neck , back ,and left leg. The last time she saw her orthopedic specialists for the back, neck and legs and ankles was in 2017.

CONCLUSIONS OF LAW

In regards to (F), "Is the Petitioner's current condition of ill-being related to the injury?", the Arbitrator finds:

An injury is compensable under the Illinois Workers' Compensation Act only if it arises out of and in the course of employment. *Panagos v. Industrial Commission, 177 Ill.App.3d 12, 524 N.E.2d 1018 (1988)* The burden is upon the party seeking an award to prove by the preponderance of the credible evidence the elements of this claim. *Peoria County Nursing Home v. Industrial Commission, 115 Ill.2d 524, 505 N.E.2d 1026 (1987)* The burden is also upon the employee to prove that his injuries are

causally related to the employment. *New Guard v. Industrial Commission, 58 Ill.2d 164, 317 N.E.2d 524 (1974)*

Decisions of an arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. *820 ILCS 305/1.1(e)*. Credibility is the quality of a witness which renders his evidence worthy of belief. The Arbitrator, whose province it is to evaluate witness credibility, evaluates the demeanor of the witness and any external inconsistencies with his/her testimony. Where a claimant's testimony is inconsistent with his/her actual behavior and conduct, the Commission has held that an award cannot stand. *McDonald v.Industrial Commission, 39 Ill. 2d 396 (1968); Swift v. Industrial Commission, 52 Ill. 2d 490(1972).*It is the function of the Commission to judge the credibility of the witnesses and to resolve conflicts in the medical evidence and assign weight to witness testimony. *O'Dette v. IndustrialCommission, 79 Ill.2d 249, 253, 403 N.E.2d 221, 223 (1980); Hosteny v. Workers' Compensation Commission, 397 Ill. App. 3d 665, 674 (2009).* Internal inconsistencies in a claimant's testimony, as well as conflicts between the claimant's testimony and medical records, may be taken to indicate unreliability. *Gilbert v. Martin & Bayley/Hucks, 08 ILWC 004187 (2010).*

Critical to the determination of the aforementioned is the petitioner's credibility. When determining the issues at hand the Arbitrator must carefully weigh all of the evidence presented. This includes the credibility and testimony of Petitioner, who was the only witness in the case at hand. In this case, Petitioner is devoid of credibility.

Benefits have been denied in instances when the petitioner's credibility was in suspect and the contemporaneous histories conflicted with and/or failed to corroborate the petitioner's testimony.

Petitioner's testimony was riddled with statements that directly contradict one another as well the accounts that she, personally, gave to her treating doctors and the Section 12 medical examiners. It must be noted that Petitioner's testimony contradicts treatment notes that Petitioner submitted into evidence. Petitioner possessed a demeanor that lacked candor throughout her testimony. Petitioner was argumentative and evasive when answering questions. The aforementioned cannot be ignored when weighting the physical evidence submitted against Petitioner's testimony.

The Arbitrator finds that Petitioner's testimony is not credible when compared to the contemporaneous medical records created immediately as events unfolded and occurred. It was clear that not only Petitioner was not truthful in her testimony but that she did not remember events.

For example, although Petitioner testified that she did not injure her lower back and right leg prior to the 9/23/12 work injury, she acknowledged that she previously injured her lower back and right leg in April 2012, which is approximately 5 months prior to the work injury. Initial treatment records only showed Petitioner's complaints of pain in the right lower extremity. Subsequently, Petitioner started to report all kind of health problems such as pain in the cervical spine, lumbar spine, pain in the upper extremities, pain in the left lower extremity. Petitioner even reported to her treating doctors that she start to develop anxiety, shortness of

breath, post-traumatic stress (“PTSD”) symptoms. Petitioner even testified that her other health issues such as asthma and other gynecological issues are due to her the work injury. Petitioner testified that she believes she has developed asthma after work injury. However, treatment records from her PCP show otherwise. All the health conditions that she claims she is having are clearly not work related.

The medical records that were created as Petitioner’s treatment occurred and the records were also created in a timely matter as events materialized were given more weight than Petitioner’s testimony. The Arbitrator finds Petitioner’s testimony was inconsistent, exaggerated and self-serving.

The Arbitrator has considered the opinions provided by the treating and examining doctors. In evaluating medical opinions, the Arbitrator granted weight according to the appropriate factors, which included the following: the type of relationship (e.g., treating, non-treating, and non-examining) between the claimant and an acceptable medical source; the degree to which an opinion was supported by an explanation and relevant evidence, particularly medical signs and laboratory findings; the consistency of the opinion with the record as a whole; how long the source has known and how frequently the source has seen the claimant; whether the source has a specialty or area of expertise related to the medical issues involved; and the extent to which the source is familiar with the medical and other evidence in the case record.

In this case, greatest weight has been given to the examining opinion of Dr. Ghanaynem. Dr. Ghaynem is an orthopedic specialist with a specialty in spine surgery. As a specialist, Dr. Ghanayem has a unique understanding of spine injury. He reviewed the medical record and provided thorough,

thoughtful evaluations of the evidence, including opinion evidence, in reaching his conclusions. His opinion is consistent with the record when viewed in its entirety and is therefore given great weight. The Arbitrator gives great weight to Dr. Pinzur's opinion and Dr. Weber's opinion because their opinions are consistent with the record in this case.

The Arbitrator also gives great weight to the treating opinion of Dr. Garapati because his opinion is also consistent with the record on this case.

With regard to Dr. Silver's opinion, the Arbitrator only gives some weight to his opinion because his recommendation regarding the second surgery for the right knee is questionable. In addition, Dr. Silver's recommendation for treatment of the left knee is totally not supported by the record in this case since there is no evidence that Petitioner injured her left knee/leg on the day the work accident occurred on 9/23/12.

Furthermore, the Arbitrator has considered and given less weight to the treating opinion of Dr. Bergin for the following reasons. First, although Dr. Bergin has a treating relationship with Petitioner, he noted his reports that he was relying on reports from Petitioner's regarding her work injury in forming his opinion regarding the diagnosis of Petitioner's cervical and spine. As noted above, Petitioner is not a credible witness. Second, Dr. Bergin's assessment is inconsistent with the medical records in this case. Finally, the possibility always exists that a doctor may express an opinion in an effort to assist a patient with whom he sympathizes for one reason or another. Another reality which should be mentioned is that patients can be quite insistent and demanding in seeking supportive notes or reports from their physicians, who might provide such a note in order to satisfy their patient's requests and avoid unnecessary doctor/patient

tension. While it is difficult to confirm the presence of such motives, they are more likely in situations where the opinion in question departs substantially from the rest of the evidence of record, as in the current case.

Based on the medical evidence provided and findings Petitioner's testimony is not credible, the Arbitrator finds that Petitioner's right leg and right ankle/foot are causally related to the 9/23/12 work accident and the she had reached MMI for these conditions and able to return to work full duty pursuant to the IME reports completed by Dr. Weber and Dr. Pinzur. The Arbitrator finds that Petitioner's current conditions if ill-being (back, neck, joint pain with the upper extremities and left lower extremity, asthma, anxiety, PTSD, and other gynecological issues) are not causally related to the 9/23/12 work injury.

In regards to (G), "What were Petitioner's earnings?", the Arbitrator finds:

The parties agree that the Average Weekly Wage (AWW) Petitioner earned in her position working as a Traffic Aide for Respondent was $362.21. Petitioner argues the wages she earned from her employment at the Help at Home must also be considered in calculating her AWW. Section 10 of the Illinois Workers Compensation Act provides, in pertinent part:

> "When the employee is working concurrently with two or more employers *and the respondent employer has knowledge of such employment prior to the injury*, his wages from all such employers shall be considered as if earned from the employer liable for compensation" (emphasis added).

In the instant case, Petitioner testified that she notified Respondent regarding her outside employment prior to the 9/23/12 work accident. Petitioner also testified that she completed the form "City of Chicago Department of Human Resources Dual Employment Form" (Px. 3; Rx. 11).

Petitioner also submitted into evidence copies of the payroll information from Help at Home dated 3/19/13. The Arbitrator noted that Respondent has raised a hearsay objection to this document. On the Dual Employment Form that Petitioner submitted into evidence, it shows that she reported she worked at Help at Home as a Homemaker and she claimed that she worked 20 hours per week at this job. The date that Petitioner alleged she completed form is 11/5/12. At the bottom of the form, there is no indication that this form was approved by the City. Along with this form, there is another form noted as Wage Loss Verification completed from the HR representative from Help at Home dated 2/28/13.

In this case, There is no evidence in record that supports Petitioner's allegation that Respondent is aware of Petitioner's employment prior to the date of the 9/23/12 work injury.

First, with regard to Petitioner's allegation that she had informed Respondent about her outside employment with Help at Home, Petitioner could not provide a name of an individual or supervisor who works for Respondent and who has knowledge of her outside employment. Second, The Dual Employment Form that was completed by Petitioner is dated 11/5/12. The accident occurred on 9/23/12, which approximately 3 months after the accident occurred that Petitioner allegedly tried to give notice to Respondent regarding her outside employment. More importantly, there is no evidence that that form was approved from anyone from the City. Third, the payroll information and the wage loss verification form from Help at

Home was completed on 2/28/13, which is approximately 5 months after the work accident. Lastly, there is no evidence that Petitioner had notified Respondent regarding her dispute with regard the AWW calculation. Petitioner had received TTD benefits from 9/24/12 through 8/19/16. There is no documentation of Petitioner's dispute with regard the AWW calculation. Clearly, there is no evidence that Respondent is aware of Petitioner's outside employment prior to the date of the injury.

Based on Petitioner's failure to produce any corroborating evidence regarding the notice she allegedly provided, the Arbitrator finds that Petitioner failed to meet her burden in proving that Respondent had knowledge of her dual employment prior to 9/23/12 work accident.

Therefore, the additional wages Petitioner earned at the Help at Home have no bearing on the Average Weekly Wage calculations made for purposes of her claim. Accordingly, the Arbitrator finds that Petitioner's AWW under the Act is $362.21.

In regards to (K), "Is the Petitioner entitled to temporary total disability benefits from 8/20/16 through 11/25/21?" the Arbitrator finds:

Temporary total disability compensation is to be awarded for the period of time between the injury and the date that the petitioner's condition has stabilized. *Caterpillar Tractor Co. v. Industrial Commission, 97 Ill.2d 35, 454 N.E.2d 252 (1983)* To prove a claim of temporary total disability, the petitioner shall show not only that he did not work, but also that he was unable to work. *Palmer House v. Industrial Commission, 358 N.E.2d 285 (1990)*

In this case, Petitioner is alleging that she is entitled to TTD benefits from the period from 9/24/12 through 11/25/21, which is the date that she went back to work as a Mail Processing Clerk. Respondent disputed and claimed that Petitioner is only entitled to TTD benefit from 9/24/12 through 8/19/16 (203 5/7). The disputed TTD period is from 8/20/16 through 11/25/21

As discussed above, the Arbitrator only finds Petitioner's right leg and right ankle/foot are causally related to the 9/23/12 work injury. With regard to Petitioner's right leg, pursuant to the IME report dated 10/5/15, Dr. Weber opined that Petitioner had reached MMI with regard to her right leg and able to return to work full duty. With regard to Petitioner's right foot, the Arbitrator finds that
Petitioner was at MMI and able to return to work full duty pursuant to the IME report completed by Dr. Pinzur dated 10/27/15.

Furthermore, in order to Petitioner to prove she is entitled to TTD from 8/20/16 through 11/25/21, she has to show that she was unable to work. Here, based on the treatment records that Petitioner submitted into evidence. She was last seen by Dr. Garapati on 4/18/16. She was last seen by Dr. Bergin on 5/31/16. She was last seen by Dr. Silver on 7/12/16. There are no additional treatment notes or off-work status notes from these doctors showing that she was being kept off work. In addition, the last visit that she was seen by a doctor was at the Northwestern emergency room on 1/14/17 for her back pain. At that time, Dr. Terry opined that she had no work restrictions. The doctor noted that he would hold her out from returning to work at that time and would release her back to work at the next follow-up visit. Petitioner was recommended following up with Dr. Terry in 4-6 weeks for a repeat clinical examination. Petitioner did not

return to see Dr. Terry after that visit. Petitioner also testified that she has not seen any doctor since 2017. Although Petitioner stated that she continued to see her primary care physician ("PCP") regarding treatment for the work injury. Records from her PCP from University of Illinois show that she was last seen in 2016. There no other additional treatment records from this provider since 2016.

The record, as outlined above, reflects that there is no reason why Petitioner would not be able to return to work in August 2016. Although Petitioner testified she was unable to work due to her work injuries, there are no treatment records and work status notes from any doctor to support the she was unable to work from 8/20/16 through 11/25/21.

Based upon the foregoing facts, the Arbitrator finds that Petitioner is not entitled to TTD benefits after 8/19/16. Accordingly, Petitioner's request for TTD payments from 8/20/16 through 11/25/21 is hereby denied.

In regards to (J), "Has the Respondent paid all appropriate charges for all reasonable and necessary medical expenses?", the Arbitrator finds:

Petitioner is alleging that there remains an outstanding balance to several providers. Petitioner submitted into evidence a list of medical bills from several providers. Respondent submitted into evidence UR completed by Dr. Avrom Simon dated 6/30/16 (Rx. 8). Respondent also submitted into evidence the payment ledger (Rx 12). The payment ledgers show that several payments have been made for the medical bills (Rx. 12). The Arbitrator further noted that Respondent raised a hearsay objection to all the bills. Respondent denied liability for the unpaid medical bills and claimed that charges from these providers are medically unnecessary and

unreasonable, and they are for treatment for Petitioner's non-work-related conditions.

After carefully reviewing the medical records and listening to Petitioner's testimony, the Arbitrator makes the findings for these bills as follows:

1) With regard to the bills from Gold Cost Orthopedic in the amount of $1,975 (Px. 11), Dr. Silver in the amount of $564 (Px. 5), Dr. Garapati in the amount of $928 (Px. 10), and City of Chicago EMS bill in the amount of $848 (Px. 23), the Arbitrator finds the treatment provided by these providers to be reasonable and necessary for the care and treatment of Petitioner. As such, Respondent shall pay any outstanding balances directly to Gold Coast Orthopedics, Dr. Silver, Dr. Garapati, and City of Chicago EMS pursuant to the fee schedule and Section 8(a) and 8.2 of the Act.

2) With regard to the bill from Streeterville Open MRI in the amount of $6,000 (Px. 18), the Arbitrator only awards $1,500 for charges of the MRI for the right knee. The Arbitrator finds the other bills from this provider for the cervical spine and thoracic spine are non-work-related body parts . Therefore, except the amount noted in this decision, all the other bills from this provide are hereby denied. It should be noted that Section 8.2(e) states that a provider shall not bill of otherwise attempt to recover from the employee the difference between the provider's charge and the amount paid by the employer or the insurer on a compensable injury, or for medical services or treatment determined by the Commission to be excessive or unnecessary.

3) Other unpaid bills:

- Dr. Bergin ($3,005) (Px. 4)

- University of Illinois Medical Center (“UIC”) ($65,516.04) (Px. 6)
- Northwestern Memorial Hospital ($12,698.70) (Px. 7)
- Advanced Occupation Medicine Specialist ($2,319.00) (Px. 8)
- Northwestern Medicine ($12,698.70) (px. 9)
- Advanced Physical Medicine ($21,474.00) (Px. 12)
- Network Durable Equipment ($30,550.00) (Px. 13)
- RX Development ($45,592.75)
- Windy City Medical Specialists ($3,500) (Px. 16)
- Infinity Strategic Innovation ($1,125.33) (Px. 19)
- Doctors Medical Bills ($912.50) (Px. 20)
- M&R Newlife Medical ($18,355) (Px. 21)
- Advanced Imaging Center ($1,587) (Px. 22)

The Arbitrator notes that the majority of bills are changes for treatment of Petitioner’s non-work-related conditions. For instances, there are several bills from UIC for charges of Petitioner’s women wellness exam, colonoscopy, annual check-up, asthma, shortness of breath, mammogram, gynecological visits. These conditions are clearly not work related. There are several bills for charges for the body parts and conditions that are found to be non-work-related as discussed above. The Arbitrator further notes that there are bills that were submitted into evidence without treatment records to corroborate the charges. For example, Petitioner’s exhibit # 20 is titled Doctor’s Medical Bill. There are no records attached to the bills. It is unclear what the charges for these bills are for. Another example is the bills from Windy City Medical Specialist (Px. 16), the charges noted on the bills are for “UNUSAL TRAVEL.” Again, there are no records to support the charges. The Arbitrator finds that all the bills from these providers are for charges that are medically unnecessary and

unreasonable. Therefore, all the bills from these providers are hereby denied. It should be noted that Section 8.2(e) states that a provider shall not bill of otherwise attempt to recover from the employee the difference between the provider's charge and the amount paid by the employer or the insurer on a compensable injury, or for medical services or treatment determined by the Commission to be excessive or unnecessary.

The total amount of medical bills that are awarded is **$5,815.00**. The Arbitrator notes that Respondent shall pay any outstanding balances directly to the providers pursuant to the fee schedule and Section 8(a) and 8.2 of the Act.

The Arbitrator further notes that Respondent is entitled to credit for all related medical expenses that were paid prior to trial pursuant Sections 8(a), 8.2, and 8(j) of the Act, and shall hold Petitioner harmless with regard to any expenses for which Respondent is taking such credit.

In regards to (L), "What is the nature and extent of Petitioner's injury?", the Arbitrator finds:

An AMA impairment rating was not done in this matter; however, Section 8.1(b) of the Act requires consideration of five factors in determining permanent partial disability:

1. The reported level of impairment;
2. Petitioner's occupation;
3. Petitioner's age at the time of the injury;
4. Petitioner's future earning capacity; and

5. Petitioner's evidence of disability corroborated by treating medical records.

Section 8.1(b) also states, "No single factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by a physician must be examined." The term "impairment" in relation to the AMA Guides to the Evaluation of Permanent Impairment 6th Edition is not synonymous with the term "disability" as it relates to the ultimate permanent partial disability award.

1. The reported level of impairment

An AMA impairment rating was not done in this case. This does not preclude an award for partial permanent disability.

2. Petitioner's Occupation

On the date of the accident, Petitioner was a Traffic Aid for City of Chicago. Following the accident, Petitioner has returned to work as a Mail Processing Clerk. She testified that she is currently working for 20 to 30 hours per week earring $19.00 per hour. Some weight has been given to this factor.

3. Petitioner's age at the time of injury

Petitioner was 51 years old at the time of injury, and she is 61 years old at the time of the hearing. Accordingly, Petitioner is near the end of her work life. This is relevant and should receive some weight.

4. Petitioner's future earning capacity

Petitioner has no loss of earnings. Nothing in the record, including her testimony, suggests that her future earning capacity has been affected by

the injury sustained. Petitioner testified that when she was working as a Traffic Aid for Respondent, she was earning $18 to $19 per hour and she worked 20 hours per week. She is currently working as a Mail Processing Clerk for 20 to 30 hours per week and she is currently earning $19 per hour.

5. Evidence of disability corroborated by medical records

In evaluating the above factors, the Arbitrator finds that Petitioner is entitled to an award of permanency. However, the extent of the injury and Petitioner's current claims of disability are not corroborated by the evidence. As stated above, the Arbitrator finds Petitioner lacks credibility. The Arbitrator further finds Petitioner's current conditions if ill-being (back, neck, joint pain with the upper extremities and left lower extremity, asthma, anxiety, PTSD, shortness of breath, and other gynecological issues) are not causally related to the 9/23/12 work injury.

In addition, a review of the record reflects that the claimant's complaints of right knee and right ankle pain generally appear to be disproportionate to the objective medical findings.

With regard to Petitioner's right foot/ankle, the record also reflects significant gaps in the Petitioner's history of treatment. It was noted although Petitioner was seen initially by Dr. Garapati regarding her right foot/ankle in 2012. The claimant had gone three years without seeing him until 10/9/12.

With regard to Petitioner's right leg pain, her complaints are referenced off and on in the treating progress notes of her treating physicians but with little objective evidence to support them. Petitioner's physical examination findings generally do not show any significant neurological deficits. Note, in particular, the examinations showed normal gait and station, normal strength, and normal sensation and reflexes. Other examinations

referenced pain with right lower extremity. None of these examinations reflects sensory or reflex deficits. It should be noted that Dr. Weber, Dr. Ghanayem and Dr. Pinzur all noted in their reports that Petitioner exhibited symptom magnification. She informed all the doctors that she did not have any prior injury to right leg; however, medical records show that she previously injured her right leg 5 months prior to the work accident. Petitioner was not truthful when she testified that she believes other health issues such as back pain, neck pain asthma, shortness of breath, gynecological issues are due to the 9/23/12 work injury. There is nothing in the record that support these allegations. Again, like Dr. Ghanayem mentioned in his deposition and IME reports, it does not make sense that Petitioner has these issues when the only body part that was injured on 9/23/12 was her right lower extremity. There is no evidence that the Petitioner has followed up with any of her treating specialists since 2016. Petitioner had gone 5 years without see any doctor for her work injuries.

Petitioner testified that he still experiences back pain, joint pain in upper extremities and lower extremities, and she had to take prescribed pain medication in the past. However, the medical evidence simply does not provide an apparent reason for the extent of the Petitioner's allegedly difficulties with activities of daily living. Petitioner also acknowledged that she went back to work on 11/25/21 as a Mail Processing Clerk.

Based on the record, it appears that her allegations are not consistent with the record, and the nature and extent of his injury are not as severe as he has alleged.

Therefore, an award in the amount of 15% loss of use of the right leg and 5% loss of use of the right foot best represents the injury suffered by Petitioner.

As a result of the injuries sustained, Petitioner is entitled to have and receive from Respondent 40.6 weeks at a rate of $220.00 per week because she sustained an 15% loss of use of the right leg (32.25 weeks) and 5% loss of use of the right foot (8.35 weeks).

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC014942
Case Name	Rolando Espino v. Mike Pineda, Wheaton Tree Service and the Illinois State Treasurer as ex officio custodian of the IWBF
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0343
Number of Pages of Decision	21
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	John Serkland
Respondent Attorney	Drew Dierkes

DATE FILED: 8/9/2023

/s/ Deborah Simpson, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF DuPAGE)

☐ 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

ROLANDO ESPINO,

Petitioner,

vs. NO: 16 WC 14942

MIKE PENEDA, WEHATON TREE SERVICE, AND THE ILLINOIS STATE TREASURER AS *EX OFFICIO* CUSTODIAN OF THE ILLINOIS INJURED WORKERS' BENEFIT FUND

Respondents.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by both the Respondent, Injured Workers' Benefit Fund ("IWBF"), and Petitioner herein and notice given to all parties, the Commission, after considering the issues of average weekly wage/benefit rate and the nature and extent of Petitioner's permanent partial disability and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below, and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Petitioner testified through an interpreter that he was born in Mexico and his highest level of education is elementary school. He never attended high school. He came to the US in 1996 at the age of 17. He was a legal resident of the US but understood very little English.

He worked for Wheaton Tree Service cutting down trees. On December 15, 2015, he was cutting a tree when the branch he was on broke and he fell striking the tree on the way down. Petitioner was taken to an Emergency Room. Records of the National Council of Compensation Insurers indicate that Wheaton Tree Service did not have Workers' Compensation insurance at the time of the accident, which evoked liability of the IWBF.

At the Emergency Room, CTs showed a comminuted, nondisplaced, compression fracture at T12 with about 40-50% height loss with retropulsion of a 6 mm posterior superior fragment. Thoracic/lumbar MRIs showed acute T12 compression deformity with mild loss height and retropulsion of bony fragments, associated ligamentous/paravertebral edema, complex epidural hematoma most prominently at T12 causing central canal stenosis, nondisplaced vertebral body compression fracture at L2, and multilevel spondylotic changes in the lumbar spine. The diagnoses were spinal stenosis of thoracic region and closed T-12 compression fracture. The next day, Dr. Lee performed open treatment of T-12 vertebral body fracture, T11-12 laminectomies and resection of left T-12 inferior facet for decompression of spinal cord. T-10-L2 posterior spinal fusion, and T-10-L2 posterior segmental instrumentation with instrumentality. He was discharged from hospital in about a week.

On August 2, 2016, Petitioner had a Functional Capabilities Evaluation ("FCE") which was considered valid. He continued to complain of pain/stiffness in his lower back. He was able to function at the lower limits of medium physical demand level with maximum occasional lifting of 40 pounds and two-hand frequent lifting of 25 pounds. That capability was not in compliance with his work which required lifting/carrying 70 pounds occasionally and 50 pounds frequently. Petitioner could return to work at a modified position. He exhibited weakness on the left side and only about 20% of normal range of motion. However, due to the significant "consistent, objective deficits he exhibited, the therapist deferred to his doctor about whether Petitioner "would be able to tolerate return to work an any capacity at this time." A week later, Dr. Lee released Petitioner to work with restrictions consistent with the FCE.

Petitioner testified that currently he felt "fine" but when weather changed he got tired and his lower back hurt a lot. It also hurts when he stands for a long time or after sitting for a long time. He cannot run fast or jump when playing with his children. He can no play basketball/soccer or camp with his children; they like camping a lot. He can no longer take care of his garden or repair cars.

Petitioner testified he started working in 2019 helping his wife looking after children. He worked part-time, like 20 hours a week, and earned $1,000.00 a month. In that job he never lifted anything over 25 pounds. He also has a job cutting grass for a company he formed, Rolando Landscaping. In that job he also never lifted anything over 25 pounds. He and his son cut the grass for 10 houses. He worked at that job one day a week. He plants bushes, but his son does anything difficult or that required lifting over 25 pounds.

Petitioner testified that on the date of the accident he earned $25.00 an hour and worked five days and 45 to 50 hours a week. However, previously, he testified that he did not exactly remember what he earned but it was $13 or $14 an hour and totaled $700 to $800 per week. He received checks for $500 and the rest in cash. At that time he testified he worked five or six days a week and 10 to 11 hours a day.

The Arbitrator found Petitioner sustained his burden of proving he suffered a compensable accident which caused a condition of ill-being of his spine. He awarded Petitioner outstanding medical expenses submitted into evidence ($101,775.04), 61&2/7 weeks of temporary total disability benefits, and 200 weeks of permanent partial disability benefits representing loss of the use of 40% of the person-as-a-whole. Based on the permanent impairment Petitioner sustained in the work accident, his permanent work restrictions, his loss of occupation, his lack of English skills, and his lack of education, the Commission agrees with the Arbitrator's award of 200 weeks representing loss of the use of 40% of the person-as-a-whole.

The Arbitrator also found that Petitioner's average weekly wage was $1,250.00. In so doing he noted that Petitioner showed that in 2015 he received W-2 income or $17,000 and 1099 income of $16,000, he testified he earned $25.00 an hour, his work week was 50 hours a week, and overtime was mandatory. Respondent, IWBF, argues the Arbitrator erred in finding an average weekly wage of $1,250.00 because Petitioner only documented annual income amounting to $33,000 which would translate to an average weekly wage of $634.62. Respondent also argues that even if Petitioner's "self-serving" testimony about income should be accepted despite lack of evidence, his average weekly wage must be capped at $1,000.00 because Petitioner specified $1,000.00 as his average weekly wage on the stip sheet. Petitioner argues that the Arbitrator's calculation was correct because Petitioner's testimony was "unrebutted."

The Commission disagrees with Petitioner's assertion that his testimony was unrebutted. He rebutted it himself. Initially, Petitioner testified he did not know exactly what he made, but estimated it was $13 or $14 an hour. He later testified he earned $25 an hour, which was elicited only after the Arbitrator went off the record after Petitioner had rested. We also agree with the IWBF that Petitioner is bound by its pleading in the Petition for Hearing (stip sheet) in which he asserted that his average weekly wage was $1,000.00. See, *City of Springfield v. The Illinois Workers' Compensation Commission* 2022 IL App (4th) 210338WC-U. Therefore, the Commission modifies the Decision of the Arbitrator to reflect an average weekly wage of $1,000.00. In this regard, the Commission notes that in the "FINDINGS" section of the Decision of the Arbitrator, she indicated that Petitioner earned $65,000.00 in the year preceding the injury. The Commission changes the prior annual earnings from $65,000.00 to $52,000.00 to conform with the Commission's determination of Petitioner's average weekly wage.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator dated August 26, 2022 is modified as specified above and is otherwise affirmed and adopted.

IT ISFURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $666.67 per week for a period of 61&2/7 weeks, that being the period of temporary total incapacity for work under §8(b).

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the sum of $101,775.04 for reasonable and necessary medical expenses under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay Petitioner the sum of $600.00 per week for a period of 200 weeks because the injuries sustained caused the loss of the use of 40% of the person-as-a-whole under §8(d)2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the Illinois State Treasurer, *ex-officio* custodian of the Injured Workers' Benefit Fund, was named as a co-respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under Section 4(d) of this Act. In the event the Respondent/Employer/Owner/Officer fails to pay the benefits, the Injured Workers' Benefit Fund has the right to recover the benefits paid due and owing the Petitioner pursuant to Section 5(b) and 4(d) of this Act. Respondent/Employer/Owner/Officer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent/Employer/Owner/Officer that are paid to the Petitioner from the Injured Workers' Benefit Fund.

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

AUGUST 9, 2023

/s/*Deborah L. Simpson*
Deborah L. Simpson

/s/*Stephen J. Mathis*
Stephen J. Mathis

DLS/dw
O-6/14/23
46

/s/*Deborah J. Baker*
Deborah J. Baker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC014942
Case Name	Rolando Espino v. Mike Pineda, individually and d/b/a Wheaton Tree Service and Landscaping and the Injured Workers' Benefit Fund/Illinois State Treasurer
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	16
Decision Issued By	Frank Soto, Arbitrator

Petitioner Attorney	John Serkland
Respondent Attorney	Drew Dierkes

DATE FILED: 8/26/2022

THE INTEREST RATE FOR THE WEEK OF AUGUST 23, 2022 3.11%

/s/Frank Soto, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
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

Rolando Espino
Employee/Petitioner

v.

Case # **16** WC **014942**

Consolidated cases: _____

Mike Pineda, individually and d/b/a Wheaton Tree Service and Landscaping and the Injured Workers' Benefit Fund/Illinois State Treasurer
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Frank Soto**, Arbitrator of the Commission, in the city of **Geneva**, on **June 27, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **December 15, 2015**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**65,000.00**; the average weekly wage was $**1,250.00**.

On the date of accident, Petitioner was **36** years of age, ***married*** with **3** dependent children.

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

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

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

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $833.33/week for 61 2/7 weeks, commencing 12/16/15 through 2/21/17, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $750.00/week for 200 weeks, because the injuries sustained caused the 40% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

Respondent shall pay to Petitioner reasonable and necessary medical services of $101,775.04, as provided in Section 8(a) of the Act.

The Illinois State Treasurer, ex-officio custodian of the Injured Workers' Benefit Fund, was named as a co-respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under Section 4(d) of this Act. In the event the Respondent/Employer/Owner/Officer fails to pay the benefits, the Injured Workers' Benefit Fund has the right to recover the benefits paid due and owing the Petitioner pursuant to Section 5(b) and 4(d) of this Act. Respondent/Employer/Owner/Officer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent/Employer/Owner/Officer that are paid to the Petitioner from the Injured Workers' Benefit Fund.

Respondent shall pay Petitioner compensation that has accrued from 12/15/2015 through 6/27/2022, and shall pay the remainder of the award, if any, in weekly payments.

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.

AUGUST 26, 2022

By: /o/ *Frank J. Soto*
Arbitrator

Finding of Facts

Rolando Espino (hereafter referred to as "Petitioner") is a 36-year-old male who was employed by Wheaton Tree Service (hereinafter referred to as "Respondent") from 2013 through December 15, 2015. He is married with three children (T.13). His highest level of education is elementary school which he attended in Mexico (T. 13). He never attended High School (T. 13).

Mr. Espino moved to Illinois at the age of 17. He is a legal resident of the United States. He came to the United States because his father had died and he wanted to help his mother support the family (T.14).

The owner of Respondent is Michael Pineda. (T. 15). Petitioner's job was to "knock down trees" and use machines that have sharp edges powered by gasoline including chippers and grinders and saws. (T.16). Petitioner is required to lift and carry wood from trees, weighing as much as 200 pounds. (T.17). While working, he wore a shirt with Respondent's name on it to identify Petitioner was an employee of Respondent. (T.41). Petitioner was also required to push and pull carts loaded with wood. (T. 18). Petitioner did not use his own tool and he had no other employment. (T.41). Petitioner worked ten hours per day five days per week earning $25.00 per hour and his wages were paid with check and cash. (T. 23, 39).

On December 15, 2015, Petitioner was standing on a tree branch 50 feet up when the branch gave way causing him to fall and hit his back against the trunk of the tree. (T. 18-19). The accident was witnessed by Mike Pineda and a co-worker named "Ritchie" (T. 21). Mike Pineda took Petitioner to the Hospital (T.19).

Prior to December 15, 2015, Petitioner had never injured, sought treatment for, or missed work due to any back or spine problems. (T.22). Since December 15, 2015, Petitioner has not re-injured his back or spine. (T. 22).

On December 15, 2015, Petitioner was taken to Central DuPage Hospital (CDH) by Mike Pineda. (T.21). The CDH admission notes states Petitioner is a 36-year-old landscaper with back pain who was suspended from a tree in a harness falling 15 feet before swinging into the trunk of the tree. (PX10 p. 313). A CT and MRI were performed which showed a three column T12 fracture with a bone fragment in the T12 spinal canal causing severe stenosis. (PX10, p. 405). Petitioner was admitted into the Neuro Intensive Care unit. (PX10, p.290). Dr. Peter Lee performed an open T11-T12 laminectomy with resection of the T12 facet for decompression. Dr. Lee also performed

a T10-L2 spinal fusion with instrumentation (PX10, p.405). After inpatient post-operative physical therapy, Petitioner was discharged from CDH on December 22, 2015 (PX10).

Petitioner followed up with Dr. Lee on January 7, 2016, and, at that time, a course of Physical Therapy was recommended which Petitioner attended at CDH through March 24, 2016 (PX10). On March 22, 2016, Dr. Lee recommended work conditioning and a functional capacity evaluation (FCE). (PX12). The work conditioning and FCE were completed at RNS on August 2, 2016 and the FCE demonstrated functional deficits with respect to standing, walking, squatting, bending twisting and carrying. (PX11).

On August 9, 2016, Dr. Lee issued permanent restrictions of no bending, twisting, or lifting over 25 pounds with respect to his occupational activities. (PX12). Petitioner's final visit with Dr. Lee occurred on s February 21, 2017 and, at that time, Petitioner indicated he wished to attempt to return to work so Dr. Lee ordered a repeat FCE. (PX12). The second FCE was not completed due to lack of authorization. (T. 30).

Petitioner never discussed his restrictions or work status with Mr. Pineda who would not respondent to Petitioner who attempted to contact Mr. Pineda 50-60 times. (T. 27-28). Respondent never offered Petitioner modified duty. (T.29). Petitioner testified he was never paid TTD benefits or received any other benefits from Respondent from December 15, 2015, through February 21, 2017 (T.38, 42).

Petitioner testified continues to experience occasional back pain due to changes in the weather and his back hurts with prolonged standing or sitting or with increase with activity (T.34). Petitioner testified his back is sore every morning when he wakes. (T.35). Petitioner also testified he is unable to drive long distances (T.36). Petitioner testified he can no longer run fast or jump because it hurts his back and, prior to his accident, he enjoyed playing basketball and soccer but since the accident he has been unable to play basketball or soccer with his children (T.34-35). Petitioner testified prior to this accident, he enjoyed camping with his family but he no longer goes camping because sleeping on the ground hurts his back. (p.35). Prior to the accident Petitioner enjoyed working on cars and gardening but he is unable to do those activities anymore because of his back pain. (T.36-37).

Petitioner testified he is currently employed at his spouse's childcare business, "My World to Learn," and he also cuts grass using a riding lawn mower for "Rolando's landscaping". Petitioner testified that he works 20 hours per week for My World to Learn and he also cuts 10

lawns per week while for Rolando's landscaping. (T.31-32). Petitioner testified neither job requires him to lift more than 25 pounds. (T. 32). Petitioner testified he performs the landscaping with his son who does the lifting of things weighing more than 25 pounds. (T.33).

At the time of the accident, Respondent did not have workers' compensation insurance which was confirmed by the National Council of Compensation insurance (NCCI). (PX21,22,23).

Conclusions of Law

A. Was Respondent operating and subject to the Illinois Workers' Compensation Act?

Regarding the issue of whether Petitioner and Respondent were operating under the Illinois Workers' Compensation Act, the Arbitrator finds that Respondent was operating and subject to the Illinois Workers' Compensation Act.

Petitioner testified that on December 15, 2015, he was employed by Respondent as a "climber" since 2013. His supervisor was the owner, Mike Pineda (p.15-16). Petitioner also offered into evidence wage records demonstrating W-2 and 1099 income from Wheaton tree Service in 2015 (PX8).

In the course of his duties as an employee for Respondent, Petitioner was required to utilize cutting equipment as well as gas powered machinery. Pursuant to 820 ILCS 305/3(8) and (15) respectively, Respondent was engaged in extra hazardous activity and is automatically subject to the provisions of the Illinois Workers' Compensation Act.

B. Was there an employee-employer relationship?

Petitioner testified that Mike Pineda was the owner of Wheaton Tree Service (T. 15). He was employed since 2013 by and remained employed with Respondent as of December 15, 2015 (T 15). The medical records indicate that the CDH Physical Therapy Department called Mike Pineda several times for authorization indicating that they "Spoke to mike Pineda (owner of [patients] company), Mike approved treatment and wanted to know when [patient] could return to work." (PX10 p. 186).

Based on the facts above, the Arbitrator finds that an employee-employer relationship did exists between Petitioner and Respondent.

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

Petitioner testified on December 15, 2015, he was employed by Respondent to "knock down trees" (T. 15-16) and, while standing on a tree branch, the branch gave way and he fell, swinging into the trunk of the tree and hitting his back (T. 18-19). These undisputed facts indicate that Petitioner was engaged about his employer's business at the time of the accident, and the necessities of the employer's business required that he be at the place of the accident at the time the accident occurred.

Based on the act above, the Arbitrator finds that Petitioner sustained an accident that arose out of and in the course of his employment with the Respondent.

D. What was the date of the accident?

Petitioner testified on December 15, 2015, he was cutting a tree when the branch he was standing on broke causing him to fall, swinging into the trunk of the tree. (T 18-20). He was taken to CDH by Mike Pineda (T.24). The admission notes at CDH on December 15, 2015, indicate Petitioner was a 36-year-old landscaper with back pain who was suspended from a tree in a harness falling 15 feet before swinging into the trunk of the tree (PX10 p. 313).

Based on the above facts the Arbitrator finds that Petitioner's date of accident is December 15, 2015.

E. Was timely notice of the accident given to Respondent?

Petitioner testified that he was working for Respondent and Mike Pineda at the time of this work accident. (T. 19). Mr. Pineda took Petitioner to the Hospital (T. 19, 21). The medical records indicate that the CDH Physical Therapy department called Mike Pineda several times for authorization indicating that they "Spoke to mike Pineda (owner of [patients] company) Mike approved treatment and wanted to know when [patient] could return to work." (PX10 p. 186). Petitioner further testified that Mr. Pineda delivered some medication to his home after the accident (T. 28).

Based on the above facts, the Arbitrator finds that Respondent did receive timely notice of the accident.

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

Prior to December 15, 2015, Petitioner did not have any spine problems, never sought any treatment for his spine and never missed any time from work due to back or spine problems (T. 22). Since that time, Petitioner has not re-injured his spine (T. 22).

Petitioner was taken to CDH by Mike Pineda (T. 21). The CDH admission notes indicate Petitioner was a 36-year-old landscaper with back pain who was suspended from a tree in a harness falling 15 feet before swinging into the trunk of the tree. (PX 10, p. 313). The CT and MRI imaging showed that Petitioner sustained a three column T12 fracture with a bone fragment in the T12 spinal canal causing severe stenosis. (PX 10, p405) Petitioner was admitted into the Neuro Intensive Care unit. (PX 10, p.290). Dr. Peter Lee performed an open T11-T12 laminectomy with resection of T12 facet for decompression. Dr. Lee also performed a T10-L2 spinal fusion with instrumentation (PX 10, p.405). After inpatient post-operative physical therapy, Petitioner was discharged from Central DuPage Hospital on December 22, 2015 (PX 10).

Petitioner followed up with Dr. Lee on January 7, 2016, and was recommended a course of Physical Therapy, which he attended at CDH through March 24, 2016. (PX 10). On March 22, 2016, Dr. Lee recommended work conditioning with a Functional Capacity Evaluation (FCE) upon completion. (PX 12). Work Conditioning with an FCE was completed at RNS Physical Therapy on August 2, 2016. The FCE demonstrated functional deficits with respect to standing, walking, squatting, bending twisting and carrying. (PX 11). On August 9, 2016, Dr. Lee placed permanent restrictions on Petitioner of no bending, twisting, or lifting over 25 pounds. (PX 12).

Petitioner testified that he currently has occasional back pain secondary to changes in the weather. (T.34). His back hurts with prolonged standing or sitting and this pain will increase with activity. (T.34). He wakes up in the morning with a sore back. (T.35). He is unable to drive long distances. (T.36). Petitioner is currently employed at his spouse's childcare business, and he also cuts grass using a riding lawn mower. Neither of these jobs require he lift more than 25 pounds. (T32).

Based on the above, the Arbitrator finds that Petitioner's current condition of ill being is causally related to his occupational accident on December 15, 2015.

G. What were Petitioner's earnings?

Petitioner testified that he was paid $500.00 per week with a check and additional money in cash. (T.22). He worked five days per week, ten hours per day (T.23). Petitioner submitted wage records demonstrating W-2 earnings of $17,000.00 and 1099 earnings of $16,000.00 in 2015 (PX5). Petitioner testified he earned $25.00 per hour and worked five, ten-hour days (T.39). If he had a job to do, he was required to stay at work until the job was done. He could not leave after eight hours (T.23).

The Arbitrator finds that Petitioner's work week was 50 hours and that overtime was mandatory. In addition, the Arbitrator finds the Petitioner's average weekly wage to be $1,250.00 per week.

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

Petitioner testified his birthdate is February 3, 1979. (T. 11). He is married to Sylvia Espino and has three children whose dates of birth are August 29, 2002, March 20, 2005, and August 12, 2009 respectively. (T.12-13).

The Arbitrator finds that Petitioner was 36 years old at the time of his occupational accident.

I. *What was Petitioner's marital status at the time of the accident.*

Petitioner testified his birthdate is February 3, 1979. (T 11). He is married to Sylvia Espino and has three children whose dates of birth are August 29, 2002, March 20, 2005, and August 12, 2009, respectively (T.12-13).

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

J. Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

The Arbitrator having found that Petitioner sustained an accident that arose out of and in the course of employment and that his condition is causally related to the accident, in turn, finds that treatment provided by CDH, CDH ER Physicians, Rehabilitation Medicine Clinic, Dr. Lee, Cadence Physicians, RNS Physical Therapy and Winfield Radiology was reasonable and necessary to cure or relieve the effects of his occupational injury. The Arbitrator finds Respondent has not paid all appropriate charges and is liable for the bills described below.

Central DuPage Hospital in the amount of $61,096.03. CDH applied a Workers' Compensation "Contractual Write Off" in the amount of $336,335.44 leaving a balance of $61,096.03 (PX 20) which is less than the Illinois Workers' Compensation Fee schedule allowance. Codes C1762 and C1713 were billed at $203,971.00 and should be reimbursed at 53.3% which exceeds $61,096.03. Therefore, the Arbitrator awards Petitioner the lesser of these two amounts, which is **$61,096.03** for payment of these charges.

Central DuPage ER Physicians charges of $925.00 (PX16) for date of service December 15, 2015, are reimbursable at the Illinois Workers' Compensation Fee Schedule rate in the amount of $405.21 (code 99285) Therefore, the Arbitrator awards Petitioner **$405.21** for the payment of this charge.

Cadence Physician's Group charges of $35,376.00 (PX13) are reimbursable at Illinois Workers' Compensation Fee Schedule rates as follows:

Date of Service	Actual Charge	Code	Fee Schedule amount
12/19/15	$145.00	99232	$98.18
12/21/15	$145.00	99232	$98.18
12/22/15	$147.00	99238	$116.66
12/16/15	$595.00	99291	$364.59
12/17/15	$205.00	99233	$145.26
12/18/15	$145.00	99232	$98.18
12/15/15	$389.00	99254	$238.80
12/20/15	$145.00	99232	$98.18
12/15/15	$247.00	99219	$193.02
12/15/15	$595.00	99291	$364.59
12/16/15	$4,845.00	22327	$4,845.00 (billed below FS)
12/16/15	$6,127.00	22842	$5,826.19
12/16/15	$6,301.00	22610	$6,301.00 (billed below FS)
12/16/15	$3,689.00	63046	$3,689.00 (billed below FS)
12/16/15	$7,392.00	22614(X3)	$6,654.54
12/16/15	$807.00	61783	$807.00 (billed below FS)
12/16/15	$711.00	63048	$711.00 (billed below FS)
12/16/15	$636.00	20930	$636.00 (billed below FS)
12/16/15	$102.00	99231	$73.47
Fee Schedule Totals			$31,358.34

Total Reimbursable and IL Workers' Compensation Fee Schedule is **$31,358.84**. Therefore, the Arbitrator awards Petitioner **$31,358.84** for the payment of these charges.

The arbitrator finds that all Charges listed on Winfield Radiology Consultants (PX15) were for services that were reasonable and necessary to cure or relieve the effects of Petitioner's occupational injury. Therefore, the Arbitrator awards Petitioner **$3,435.64** for the payment of these charges, calculated according to the Illinois Workers' Compensation Fee Schedule as follows:

Date of Service	Actual Charge	Code	Fee Schedule Amount
12/15/15	$252.00	70450-26	$161.14
12/15/15	$49.00	71010-26	$49.00 (billed below FS)
12/15/15	$308.00	72125-26	$214.87
12/15/15	$302.00	72132-26	$171.19
12/15/15	$269.00	72128-26	$205.98
12/15/15	$364.00	71260-26	$243.17
12/15/15	$417.00	72148-26	$275.57
12/15/15	$396.00	72146-26	$258.68
12/16/15	$396.00	72146-26	$258.68
12/16/15	$417.00	72148-26	$275.57
12/17/15	$289.00	72128-26	$205.98
12/17/15	$288.00	72131-26	$203.88
12/22/15	$66.00	72090-26	$34.98
3/15/16	$61.00	72082-26	$46.99
6/21/16	$61.00	72082-26	$46.99
7/25/16	$77.00	72084-26	$59.25
6/30/16	$302.00	72131-26	$164.74
8/30/16	$282.00	72128-26	$199.50
8/30/16 $	$438.00	72148-26	$275.57
11/9/15	$81.00	72082-26	$46.99
11/9/16	$57.00	72100	$36.92
Fee schedule Totals			$3,435.64

RNS Physical Therapy performed physical therapy, work conditioning and an FCE pursuant to dr. Lee's orders. Their charges of $13,500.00 (PX14) are reimbursable at $5,225.06 calculated as follows:

Code 97001 X 1 @ $117.00	$117.00
Code 97110 X 19 @ 46.64	$886.16
Code 97010 X 21 @ $21.68	$455.28
Code 97014 X 20 @ $29.21	$586.20
Code 97750 X 2 @ $54.28	$108.90
Code 97545 X 16 @ $134.07	$2,145.12
Code 97456 X 16 @ $57.98	$926.40
Fee Schedule Totals	$5,225.06

Therefore, the Arbitrator awards Petitioner **$5,225.06** for the payment of these charges.

The Arbitrator awards Petitioner **$254.26** (Code 95860) for payment of the EMG conducted by Rehabilitation Medicine Clinic on September 23, 2016 (PX18).

The Arbitrator finds that Respondent has not paid all appropriate charges for reasonable and necessary medical care and awards Petitioner **$101,775.04** for payment of all reasonable and necessary medical treatment.

K. Petitioner is entitled to TTD from period December 16, 2015, through February 21, 2017, representing 61&2/7 weeks.

Petitioner testified that he was hired to "knock down trees" and required to lift up to 200 pounds with a co-worker in the course of his duties (T. 18). He was admitted to CDH on December 15,2015 and discharged to home on December 22, 2015 (T. 25). He was seen by Dr. Lee on January 7, 2016 and March 22, 2016 and was not returned to work (T. 25). On June 22, 2016, Dr. Lee ordered work conditioning with an FCE. (PX 12).

Work Conditioning with an FCE was completed at RNS Physical Therapy on August 2, 2016. The FCE demonstrated functional deficits with respect to standing, walking, squatting, bending twisting and carrying. (PX 11). On August 9, 2016, Dr. Lee placed permanent restrictions on Petitioner of no bending, twisting, or lifting over 25 pounds. (PX 12).

Petitioner testified that he attempted to contact Respondent 50 to 60 times. (T.28). He did not perform work for any employer from December 16, 2015 through February 20, 2017 (T.28-29). Mike Pineda never offered Petitioner any light duty work (T.29).

Petitioner's final visit with Dr. Lee was February 21, 2017. Petitioner indicated he wanted to attempt to return to work. (T30).

The Arbitrator awards Petitioner TTD benefits from December 16, 2015 through February 21, 2017. (61&2/7 weeks). Having found that Petitioner's average weekly wage is $1,250.00 the corresponding TTD rate is $833.33. The Arbitrator awards Petitioner $51,066.46 for the payment of TTD benefits.

L. *What is the nature and extent of the injury?*

Section 8.lb of the Illinois Workers' Compensation Act ("Act") addresses the factors that must be considered in determining the extent of permanent partial disability for accidents occurring on or after September 1, 2011. 820 ILCS 305/8.1b (LEXIS 2011). Specifically, Section 8.1b states:

For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the following criteria:

(a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.

In determining the level of permanent partial disability, the Commission shall base its determination on the following factors:

(i) The reported level of impairment pursuant to subsection (a);
(ii) The occupation of the injured employee;
(iii) The age of the employee at the time of the injury;
(iv) The employee's future earning capacity; and
(v) Evidence of disability corroborated by the treating medical records.

No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order. *Id.* Considering these factors in light of the evidence submitted at trial, the Arbitrator addresses the factors delineated in the Act for determining permanent partial disability.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes neither party submitted an AMA rating. As such, the Arbitrator gives this factor no weight in evaluating permanent partial disability.

With regard to subsection (ii) of §8.1b(b), Petitioner's occupation. Petitioner worked as a tree cutter which is a heavy-duty and dangerous job. Petitioner testified he was unable to return to

his former occupation due to his injuries. As such, the Arbitrator gives some weight to this factor in evaluating permanent partial disability.

With regard to subsection (iii) of §8.1b(b), Petitioner's age at the time of his injury. Petitioner was 36 years of age at the time of his injury. Petitioner is a younger individual who must live and work with his disability for the remainder of his work life. As such, the Arbitrator gives this factor some weight in evaluating permanent partial disability. See *Jones v. Southwest Airlines*, 16 I.W.C.C. 0137 (2016) (wherein the Commission concluded that greater weight should have been given to the fact that Petitioner was younger [46 years of age] and would have to work with his disability for an extended period of time).

With regard to subsection (iv) of §8.1b(b), the future earnings capacity. Petitioner testified he was unable to return to his prior occupation. Petitioner works parttime at a day care center and cuts grass to make additional money. Petitioner future earnings are greatly reduced due to his work restrictions. As such, the Arbitrator gives this factor greater weight in evaluating permanent partial disability.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the medical records. As a result of this injury, Petitioner underwent a T10-L2 spinal fusion with instrumentation (PX10, p.405). After inpatient post-operative physical therapy, Petitioner was discharged from Central DuPage Hospital on December 22, 2015. (PX 10). The FCE demonstrated functional deficits with respect to standing, walking, squatting, bending twisting and carrying. (PX11). On August 9, 2016, Dr. Lee placed permanent restrictions on Petitioner of no bending, twisting, or lifting over 25 pounds. (PX12). Petitioner testified that he currently has occasional back pain secondary to changes in the weather. (T.34). His back hurts with prolonged standing or sitting and this pain will increase with activity. (T.34). He wakes up in the morning with a sore back. (T.35). He is unable to drive long distances. (T.36). Prior to the accident Petitioner enjoyed working on cars and gardening. Both are activities he no longer engages in due to back pain. Since the accident he has not worked on cars because he is unable to bend forward. (T.36-37). As such, the Arbitrator gives this factor greater weight in evaluating permanent partial disability.

Based upon the foregoing evidence and factors, the Arbitrator finds that Petitioner sustained serious and permanent injuries that resulted in the 40% loss of Petitioner's body as a whole and a loss of trade or occupation.

M. Should Penalties be imposed on Respondent?

Petitioner is seeking his recovery from the Illinois Workers' Benefit Fund so no penalties are awarded.

N. *Is the respondent due any credit*?

The record does not reflect that Wheaton Tree Service, Mike Pineda, or the IWBF have made any payments of medical charges, TTD or PPD so the Respondent shall receive no credits.

O. Other - Liability of Injured Workers' Benefit Fund (IWBF)

The Arbitrator, having found that Petitioner has proven issues A through N listed on the ILLLINOIS WORKERS' COMPSNATION COMMISSION ARBITRATION DECISION, finds that liability rests with the Illinois Workers' Compensation Benefit Fund.

Petitioner filed an Application for Adjustment of Claim on May 12, 2016. (PX1). Petitioner then filed an Amended Application naming the State Treasurer and the Illinois Workers' Compensation Benefit Fund. (PX2, PX3).

Petitioner received a subpoena response from the National Council on Compensation Insurance (NCCI) certifying that there is no workers' compensation insurance policy for Michael Pineda or Wheaton Tree Service located with a registered address of 815 River Drive, Carol Stream, Illinois 60188 on December 15, 2015. (PX21)

Petitioner received a subpoena response from NCCI certifying that there is no workers' compensation insurance policy for Michael Pineda or Wheaton Tree Service with a registered address of PO Box 366, West Chicago, Illinois 60186 on December 15, 2015. (PX22)

Petitioner received a subpoena response from NCCI certifying that there is no workers' compensation insurance policy for Michael Pineda or Wheaton tree Service with a registered address of 139 Pomeroy St., West Chicago, IL 60185. (PX23).

Petitioner received a subpoena response from Cumberland Green Cooperative demonstrating that Mike Pineda d/b/a Wheaton Tree Service presented them with an insurance certificate that does not list any workers' compensation insurance. This subpoena response also shows a down payment of $4,500.00 on August 31, 2015, with a final payment of $4,500.00 on December 17, 2015. (PX7).

CDH authorizations department attempted to obtain authorization on February 11,2016, for treatment and notes "I CALLED AGENT/NO COVERAGE, ONLY LIABILITY – EMPLOYER IS NOT REGISTERED BY THE IWCC W/WC INS. – EMPLOYER GETS BILLS." (PX10 p.146). On February 19, 2016, CDH spoke with Mike Pineda who documented the phone call stating, "spoke to Mike Pineda (the owner of [patients] company, who is paying for treatment)" and Mr. Pineda approved "whatever treatment the therapist suggests." (PX10 p.146).

Based on the above, the Arbitrator finds that Michael Pineda and Wheaton Tree Service did not have workers' compensation insurance on the date of accident and renders a finding that, should Michael Pineda d/b/a Wheaton Tree Service fail to pay this award, liability for the benefits listed in this decision rests with the IWBF.

By: /o/ Frank J. Soto
Arbitrator

August 25, 2022
Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC002661
Case Name	Gonzalo Tenorio v. XPO Logistics, Inc.
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0344
Number of Pages of Decision	12
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Peter Schlax
Respondent Attorney	Glenn Blackmon

DATE FILED: 8/10/2023

/s/ Deborah Baker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

GONZALO TENORIO,

Petitioner,

vs. NO: 19 WC 02661

XPO LOGISTICS, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

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

CONCLUSIONS OF LAW

The Arbitrator's permanent partial disability analysis is predicated on Petitioner having undergone a two-level fusion, L4-S1, as a result of the December 3, 2018 accident. The Commission's review of the evidence yields a different result. For the reasons detailed in our §8.1b(b) analysis, the Commission finds Petitioner's permanent partial disability is to be assessed based on a one-level fusion with hardware extension.

Section 8.1b(b)(i) – impairment rating

Respondent submitted an impairment rating prepared by Dr. Babak Lami. Resp.'s Ex. 1. Dr. Lami indicated Petitioner's L4-5 extension fusion and residual radiculopathy had an initial default impairment of 12%; however, after application of the functional adjustment and physical examination modifiers, Petitioner's impairment was downgraded to 10% whole body impairment. The Commission finds this factor weighs in favor of decreased permanent disability.

Section 8.1b(b)(ii) – occupation of the injured employee

Petitioner was employed as a truck driver on the date of his accidental injury. Following surgery by Dr. Edward Goldberg, Petitioner was discharged from care with no permanent restrictions and he resumed his pre-accident occupation of truck driving. The record reflects Petitioner experiences difficulties with certain physical aspects of his job, such as lifting heavier boxes, climbing into the tractor/trailer, and opening trailer doors, but there has been no decline in his job performance, which his manager described as "outstanding." T. 20-21, 14. The Commission finds this factor weighs in favor of decreased permanent disability.

Section 8.1b(b)(iii) – age at the time of the injury

Petitioner was 49 years old on the date of his accidental injury. The Commission notes that due to his age, Petitioner will experience his residual complaints for an extended period. This factor weighs in favor of increased permanent disability.

Section 8.1b(b)(iv) – future earning capacity

Petitioner continues to earn the full wages of his pre-accident occupation. As Petitioner's work injury had no adverse impact on his future earning capacity, the Commission finds this factor weighs in favor of decreased permanent disability.

Section 8.1b(b)(v) – evidence of disability corroborated by treating medical records

The record reflects Petitioner had a pre-existing healed fusion at L5-S1 and his undisputed December 3, 2018 accident resulted in an adjacent level injury at L4-5 that required surgical intervention. On January 14, 2021, Dr. Goldberg performed a "transforaminal interbody posterolateral fusion at L4-L5." Pet.'s Ex. D. The operative report indicates Dr. Goldberg did not revise or disturb the prior healed fusion at L5-S1 but rather only replaced the original rods with longer ones so the new L4-5 hardware could be connected to the L5-S1 pedicle screws/cage:

> With the appropriate instrumentation, the 2 rods and 4 locking screws were removed from the pedicle screw at L5 and S1. The screws had outstanding purchase. In view of the fact they were maintained, they would be used to attach the rod to the new screws to be placed at L4 bilaterally…Two titanium rods of appropriate length were now selected. The first was placed in left L4, L5 and S1 pedicle screws and secured with the appropriate locking nuts. The second was placed in the right L4, L5 and S1 pedicle screws and secured with the appropriate locking nuts. Pet.'s Ex. B (Emphasis added).

Petitioner thereafter underwent an extensive post-operative recuperative course. On October 1, 2021, Dr. Goldberg noted Petitioner had occasional leg pain but was otherwise doing very well and discharged Petitioner from care. Pet.'s Ex. D.

Petitioner testified he continues to have residual complaints. He wakes up feeling fatigue in his low back and left leg and must perform a 15-minute stretching routine before starting his day. T. 17-18. He has difficulty sleeping at least twice a week. T. 18. He can only stand for brief periods before he needs to sit, and sitting for more than an hour causes discomfort. T. 23. When he performs heavy lifting

at work, he gets pain in his back and left leg as well as fatigue. T. 22. The Commission finds this factor is indicative of increased permanent disability.

Based on the above, the Commission finds Petitioner sustained 27.5% loss of use of the person as a whole.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 8, 2022, as modified above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $813.87 per week for a period of 137.5 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 27.5% loss of use of the person as a whole. Respondent shall have a credit of $5,276.51 for the stipluated permanent partial disability advance.

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

AUGUST 10, 2023

/s/ *Deborah J. Baker*

DJB/mck

D: 7/12/23

/s/ *Stephen J. Mathis*

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/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC002661
Case Name	Gonzalo Tenorio v. XPO Logistics, Inc.
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	8
Decision Issued By	Paul Seal, Arbitrator

Petitioner Attorney	Peter Schlax
Respondent Attorney	Glenn Blackmon

DATE FILED: 8/8/2022

THE INTEREST RATE FOR THE WEEK OF AUGUST 2, 2022 2.85%

/s/ Paul Seal, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF LAKE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Gonzalo Tenorio
Employee/Petitioner

v.

XPO Logistics, Inc.
Employer/Respondent

Case # **19** WC **02661**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Paul Seal**, Arbitrator of the Commission, in the city of **Rockford**, on **June 16, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **12/3/2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**75,814.96**; the average weekly wage was $**1,457.98**.

On the date of accident, Petitioner was **49** years of age, ***married*** with **2** dependent children.

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

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

Respondent shall be given a credit of $**5,276.51** for PPD advance for a total credit of $**5,276.51**.

ORDER

Credits

Respondent shall be given credit for $5,276.51 for PPD advance benefits paid under Section 8(d)(2) of the Act.

Permanent Partial Disability with 8.1b language (For injuries after 9/1/11)

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that the record contains an impairment rating of 10% of man as a whole as determined by Dr. Lami, pursuant to the most current edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment. (Exhibit #). The Arbitrator notes that this level of impairment does not necessarily equate to permanent partial disability under the Workers' Compensation Act, but instead is a factor to be considered in making such a disability evaluation. The doctor noted Petitioner's prior fusion and apparently lowered his impairment rating as a result. Because Respondent is not entitled under 8(d)(2) to any credit whether it be for a prior award, prior injury or prior treatment, the Arbitrator therefore gives *lesser* weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a truck driver at the time of the accident and that he *is* able to return to work in his prior capacity as a result of said injury. The Arbitrator notes Petitioner is performing well in his job but does credibly describe residual symptoms making it more difficult to climb in and out of the trailer, move cargo and open the trailer door. The Arbitrator therefore gives *greater* weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 49 years old at the time of the accident. Because of Petitioner's substantial remaining work life, the Arbitrator therefore gives same weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes . Because of Petitioner's ability to earn his full wages, the Arbitrator therefore gives *lesser* weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner credibly complained or residual symptoms at trial. Those residual complaints are noted both in the Petitioner's final office visit with his surgeon as well as with

Respondent's examining physician. The Arbitrator notes the Petitioner underwent a two-level fusion with instrumentation including rods, screws, and a one-level intersegmental cage placement. Because of the physical nature of Petitioner's job, his expected long work life, the extent of the surgery and retained hardware as well as the impact of the injury on both Petitioner's work and out of work activities including as a parent, the Arbitrator therefore gives *greater* weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 35% loss of use of a man as whole pursuant to §8 (d)(2) of the Act.

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

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

AUGUST 8, 2022

_____
Signature of Arbitrator

Petitioner, a truck driver, suffered a back injury moving a pallet of freight inside the back of his semi-trailer on December 3, 2018. After the previous Arbitrator's February 5, 2020, 19(b) Decision in favor of Petitioner regarding causal connection and the need for perspective medical care in the form of surgery was unanimously affirmed by the Commission in its decision on December 11, 2020, Petitioner ultimately underwent surgery on January 14, 2021. (Pet. Group Ex. A). Petitioner's surgery consisted of a left L4-L5 hemi laminotomy, partial facetectomy, transforaminal interbody and posterolateral spinal fusion at L4-5 with posterior segmental pedical screw instrumentation at L4-5 and L5-S1 and insertion of intervertebral cage device at L4-5 with local bone graft and cancellous allograft. (Pet. Group Ex. B).

Petitioner underwent post-surgical rehabilitation and work conditioning reaching 81% of his job demands. His surgeon exceeded to his request to resume full duty work as of October 1, 2021, despite residual occasional leg pain. (Pet. Group Ex. D).

At trial on June 16, 2022, Petitioner testified that he has, in fact, been successfully back to work full duty since September 1, 2021. He testified that upon awakening he has back stiffness and tiredness requiring him to perform stretching exercises. He testified he has difficulty sleeping on a weekly basis. (Trans. Pp. 8-19). He has more difficulty climbing up into his tractor and trailer than previously. He has difficulty opening certain trailer overhead doors. (Trans. Pp. 20-21). He feels pain in his back when moving heavy pallets of cargo with his pallet jack and lifting any parcels over 50 pounds. He feels fatigue and tiredness at the end of a day of heavy lifting on a weekly basis. (Trans. Pp. 22-23). He notes difficulty sitting or standing for long periods and difficulty getting up from a crouched position. (Trans. Pp. 23-24).

Compared to his successful return to work in 2006 following a previous back surgery, he feels more fatigue currently. (Trans. Pp. 24-25). Also, in contrast to his previous recovery in 2006, he is no longer able to tolerate running. (Trans. P. 25). He has a 9-year-old son whom he can no longer

lift or engage in physical play as before. (Trans. P. 25). He testified to a desire to obtain a follow-up appointment with his surgeon as well as prescription pain medication but was unable to obtain either. His family physician does prescribe Cyclobenzaprine. (Tran. P. 27).

Petitioner was evaluated at Respondent's request by Dr. Lami on April 29, 2022. Dr. Lami documents Petitioner reported residual symptoms of three to four out of ten involving his back with occasional symptoms down his left leg. He documented Petitioner taking Tylenol as needed. Dr. Lami gave an impairment rating of 10% stating that although his current diagnosis is L4-S1 fusion only the L4-5 was related to this claim. (Resp. Ex. 1).

Respondent's service center manager, Michael Wisniewski, testified that he has known Petitioner for 8 years and that he is a good, dependable employee and a credible person. (Trans. P. 12). He has been able to increase his hourly wage from $29.45 at the time of the accident to $33.48 currently. He testifies that his work performance and work ethic remain outstanding. (Trans. P. 14).

The parties have stipulated that TTD benefits have been appropriately paid by the Respondent and that a PPD advance in the amount of $5,276.51 was paid and received.

IN SUPPORT OF THE ARBITRATOR'S DECISION REGARDING "F" CASUAL CONNECTION AND "L" (NATURE & EXTENT OF THE INJURY"), THE ARBITRATOR FINDS THE FOLLOWING FACTS:

Petitioner, following a significant fusion surgery, has been able to successfully return to work at his pre-accident job and is performing well and earning an increase in his wage rate. Respondent's witness testified that he has an excellent work performance and work ethic, and that Petitioner is a hardworking, credible person. Petitioner testified that notwithstanding his successful return to work, he does experience pain and stiffness which affects his ability to perform his job requiring him more time to climb up into the truck and resulting in end of day fatigue and difficulty sleeping on a weekly basis. He testified to impacts in his personal life, no longer being able to run or engage in physical

play with his 9-year-old child. Respondent's examining physician documents Petitioner's own assessment that he has reached a 3 to 4 out of 10 level of residual back and left leg symptoms.

Dr. Goldberg's final office note also documents Petitioner's residual complaints of left leg pain together with his motivation to get back to work to his job full duty. The Arbitrator notes the recommended surgery was delayed by Respondent's persistent denial for two years. The Arbitrator finds Petitioner to be a credible witness. The operative report that details a two-level fusion with hardware and pedical screws spanning two segments with intervertebral cage being placed at the L4-5 level. The Arbitrator notes Dr. Lami's AMA rating of 10% but questions Dr. Lami's assessment given his apparent reduction based upon Petitioner's previous back surgery and fusion. The fact remans that Petitioner's surgery, following the accident at issue, did involve clearly a two-level fusion with instrumentation and pedicle screws together with the cage placement at L4-5.

At the hearing of this matter, Respondent's attorney conceded that Respondent is not entitled to any offset as a result of Petitioner's previous back injury, treatment or settlement. Nonetheless, Respondent urges the Arbitrator to consider that prior injury via Dr. Lami's reduced AMA rating and submission of medical records and prior settlement documentation as it pertains to Petitioner's previous 2004 work injury. It is axiomatic that Respondent takes Petitioner as he finds him as of the date of **this** injury, December 3, 2018. The Arbitrator notes that the issue of casual connection was previously determined in favor or the Petitioner by the Arbitrator who heard the previous 19(b) hearing of which decision was unanimously affirmed by the Commission.

In all, given the Petitioner's substantial remaining work life, the physical nature of his job, his credible residual symptoms impacting both his ability to comfortably due his job as well as lead his normal non-work activities including parenting, and given the extent of surgery performed with retained hardware both by way of rods, screws and intervertebral body cage, the Arbitrator deems

Petitioner's December, 2018 injury resulted in a loss of use of 35% man as a whole under Section 8(d)(2) of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC004622
Case Name	Kathleen Collins v. J-H Alliance Inc., D/B/A The UPS Store
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Commission Decision
Commission Decision Number	23IWCC0345
Number of Pages of Decision	29
Decision Issued By	Kathryn Doerries, Commissioner, Amylee Simonovich, Commissioner

Petitioner Attorney	Raymond Asher
Respondent Attorney	Courtney Schoch

DATE FILED: 8/11/2023

/s/Kathryn Doerries, Commissioner
Signature

DISSENT

/s/Amylee Simonovich, Commissioner
Signature

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC004622
Case Name	KATHLEEN COLLINS v. J-H ALLIANCE, INC., D/B/A THE UPS STORE
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	24
Decision Issued By	Charles Watts, Arbitrator

Petitioner Attorney	Raymond Asher
Respondent Attorney	Courtney Schoch

DATE FILED: 9/2/2022

THE INTEREST RATE FOR THE WEEK OF AUGUST 30, 2022 3.23%

/s/Charles Watts, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF **Cook**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Kathleen Collins
Employee/Petitioner

v.

J-H Alliance Inc., d/b/a The UPS Store
Employer/Respondent

Case # **21** WC **4622 (Chicago)**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Watts**, Arbitrator of the Commission, in the city of **Chicago**, on **March 21, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **10/22/20**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**17,810.65**; the average weekly wage was $**372.14**.

On the date of accident, Petitioner was **68** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**18,781.19** for TTD, $**392.40** for TPD, $**0** for maintenance, and $**9,115.65** for other benefits, for a total credit of $**28,289.24**.

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

ORDER

Temporary Partial Disability
Respondent shall pay Petitioner temporary partial disability benefits of $161.57/week for 2 3/7 weeks, commencing 11/22/2021-12/9/2021, as provided in Section 8(a) of the Act. Respondent shall be provided a credit for temporary total disability benefits that have been paid.

Temporary Total Disability
Respondent shall pay Petitioner temporary total disability benefits of $266.67/week for 70 weeks, commencing 10/23/2020-11/19/2021 and 12/9/2021-03/21/2022, date of trial, as provided in Section 8(b) of the Act. Respondent shall be provided a credit for temporary total disability benefits that have been paid.

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

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

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

SEPTEMBER 2, 2022

Signature of Arbitrator

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

KATHLEEN COLLINS,	)	
	)	
Employee/Petitioner,	)	
	)	Case Number 21 WC 4622
v.	)	Arbitrator Watts
	)	
J-H ALLIANCE INC., d/b/a THE UPS STORE	)	
	)	
Employer/Respondent.	)	

RIDER TO MEMORANDUM OF DECISION OF ARBITRATOR

STATEMENT OF FACTS

Petitioner worked for respondent employer, J-H Alliance, Inc., d/b/a The UPS Store at the time of injury on October 22, 2020. (T. 7). Accident is not in dispute. On the date of accident, Petitioner worked at The UPS Store. While she was carrying a box to the back of the store, she tripped on a rug, fell on the concrete floor, and the box she carried landed on her right wrist. (T. 20-21). Petitioner's continued treatment is undisputed at the time of trial.

The main issue is concurrent employment at the time of injury, with all other disputed issues stemming from the issue of concurrent employment. Petitioner maintains that she was employed by both J-H Alliance, Inc., d/b/a The UPS Store, and maintains that she was also employed by Sunline Services at the time of injury on October 22, 2020, although she was furloughed by Sunline Services in March of 2020. (T. 7-9, 12-13).

The crux of the concurrent employment dispute hinges on Petitioner's furlough by Sunline Services in March of 2020 and what respondent employer J-H Alliance, d/b/a The UPS

Store knew about Petitioner's other employment with Sunline Services at the time of the injury on October 22, 2020. (T. 55-57).

Testimony of Kathleen Collins, Petitioner:

Petitioner managed a UPS Store in Chicago prior to June 2019, a completely different employer than J-H Alliance, Inc., d/b/a The UPS Store of Oak Park. (T. 7-8, 11). Petitioner identified the current employer J-H Alliance, Inc. d/b/a The UPS Store in her testimony as The UPS Store or The UPS Store of Oak Park.

Petitioner testified that she began working for Sunline Services in April 2019, a contract company providing gate and ticket employees to Lufthansa airline. (T. 7-9). She identified her Application for Employment with Sunline Services within Respondent's Exhibit 1, pages 26-28. (T. 37). Petitioner sought full or part-time work with open availability any day of the week, any shift. (T. 37-38). Petitioner considered Sunline Services her primary employer, working between 32 and 40 hours per week. (T.10).

Petitioner testified that she began work at The UPS Store in Oak Park two months after she began working with Sunline Services. (T.7). She applied to work at The UPS Store in Oak Park in person with C.J. Quist. (T. 10-11). Petitioner testified she made C.J. Quist aware of her employment at Sunline Services (T. 11). Petitioner testified she made Sunline Services aware of her employment at The UPS Store in Oak Park. (T. 12).

She worked seven days per week between the two jobs with Sunline Services and The UPS Store in Oak Park, until she was furloughed from Sunline Services in March of 2020 due to the pandemic. (T. 12-13). The last date that she physically worked at Sunline Services was in March of 2020. (T. 31). Approximately five months after the initial furlough, Petitioner was offered part time work at Sunline Services, yet she declined the offer of part time employment.

(T. 15-16). She turned in her badge at Sunline Services during the conversation with her supervisor regarding return to work. (T. 31). Declining the offer to return to work did not affect her furloughed status. (T. 16).

After the March 2020 furlough, she has not received compensation from Sunline Services. (T. 31). She has not physically returned to work at Sunline Services. (T. 32). She did not have a work schedule with Sunline Services in October 2020. (T. 32).

On the date of accident, October 22, 2020, she was carrying a box to the back of the store when she tripped on a rug, fell on the concrete floor, and the box she carried landed on her right wrist. (T. 20-21). Petitioner testified that she remained under medical care. (T. 21). She had surgery to her right wrist and three surgeries on her right hand. (T. 21).

Petitioner applied for unemployment with the Illinois Department of Unemployment, indicating that she had been furloughed from Sunline Services. (T. 17). She indicated to the Illinois Department of Employment Security that she also worked at The UPS Store in Oak Park. (T. 17-18). She received unemployment in April 2020 through July 15, 2020, receiving approximately $290.00 per week. (T. 18-19). Petitioner initially testified that she received unemployment until July 2020, and then upon gentle correction by her attorney, clarified that she received unemployment until July 2021. (T. 19). Unemployment terminated when she was called back to work at Sunline Services but could not work. (T. 19).

Petitioner receives Social Security compensation. (T. 24). Petitioner received unemployment insurance compensation from April 2020 through July 2021. (T. 18-19). Petitioner received compensation via indemnity from Travelers' adjusters. (T. 22-24, 33). Petitioner also received compensation weekly from C.J. Quist, respondent employer. (T. 24, 33).

The Travelers indemnity payments were separate payments from the compensation issued directly from C.J. Quist, respondent employer. (T. 33-34).

Petitioner returned to work at The UPS Store in Oak Park on November 20, 2021 for about two and a half weeks. (T. 25-26).

Testimony of C.J. Quist, Owner and Franchisee of J-H Alliance, d/b/a The UPS Store:

C.J. Quist is the owner and franchisee of J-H Alliance, d/b/at The UPS Store. (T. 50). The business is a small family business with between five and ten employees. (T. 50).

Petitioner proposed in a social conversation with C.J. Quist that Petitioner needed a little extra money, and Petitioner offered to come help C.J. Quist at The UPS Store. (T. 53). C.J. Quist testified that Petitioner worked at the airport and needed additional income. (T. 51). C.J. Quist hired Petitioner in May 2019 for a customer service/cashier part-time position because she was short staffed and needed the extra help. (T. 51-52).

At the time of hire, C.J. Quist had to work around Petitioner's schedule at her other job. (T. 53). At the time of hire, Petitioner's hours at The UPS Store varied dependent on the season. (T. 52). The UPS Store's busy season was the airline's slow season. (T. 52). C.J. Quist did not need Petitioner to work as much in the summer, she needed Petitioner more in the winter as the winter was The UPS Store's busy season. (T. 52). Petitioner would normally work four to twelve hours per week in the summer at The UPS Store. (T. 52). In the peak season in December, Petitioner would work around forty hours per week at The UPS Store. (T. 52).

C.J. Quist recalled a conversation with Petitioner in March 2020 that her airline busy season was about to begin, and Petitioner would have to reduce her hours at The UPS Store. (T. 54). After St. Patrick's Day in 2020, Covid began in earnest. Shortly after that Petitioner's hours

had gone to full time for a week or two at the airline. (T. 54-55). Petitioner's hours then reduced at Sunline Services due to restriction on foreign travel. (T. 54-55).

To C.J. Quist's knowledge, Petitioner did not return to work with her job at Sunline after the furlough. (T. 55). To C.J. Quist's knowledge, Petitioner did not work for pay at her other job after the furlough. (T. 55). C.J. Quist testified that to her knowledge, the other job asked a few times if Petitioner was available for a call back to work. (T. 44). C.J. Quist testified that her understanding was the Petitioner was no longer an employee for Sunline Services, however, she qualified that she did not understand the definition of furlough. (T. 44). To her, furlough was somewhere between "you're still an employee" and "we hope to call you back." (T. 44).

To C.J. Quist's knowledge, she did not have to consider the impact of a second job when scheduling Petitioner for work at The UPS Store after Petitioner's furlough. (T. 56). C.J. Quist did not have any limitations in scheduling Petitioner for work at The UPS Store after March 2020. (T. 56). C.J. Quist did not have limitations in scheduling Petitioner in July 2020. (T. 56). She did not have limitations in scheduling Petitioner for work at The UPS Store in October 2020.

On the date of accident, October 22, 2020, to C.J. Quist's knowledge, Petitioner was not performing work for compensation for another employer besides The UPS Store. (T. 57). It was C.J. Quist's understanding that as of last year, Petitioner lost her job at Sunline Services. (T. 77). If Petitioner's status at Sunline Services had changed in the last few months, they had not discussed it. (T. 77). C.J. Quist did not know Petitioner's current furlough status. (T. 78).

C.J. Quist identified Respondent's Exhibit 2 as the form she filled out regarding Petitioner's earnings prior to the date of accident. (T. 58-60).

C.J. Quist testified that she continued to pay Petitioner every pay period after the date of injury. (T. 47). C.J. Quist identified Respondent's Exhibit 3 as a report of all Petitioner's wages since her date of hire per year, from 2019 through year-to-date 2022. (T. 60).

C.J. Quist testified that Respondent's Exhibit 3 showed all the hours Petitioner has worked, in addition to the payments C.J. Quist has been giving her since the date of accident. (T. 61). She has been paying Petitioner one-third of her average weekly wage at the time of the accident. (T. 61). She paid the extra third while Travelers paid two-thirds. (T. 61). She felt a moral obligation that as Petitioner had an accident at the store, that if she had not been injured, she would have made her full paycheck. (T. 62). She did not understand the two-thirds rule under workers' compensation, and felt it was the right thing to do to make up the difference. She anticipated at the time that Petitioner would be back to work by Christmas. (T. 62). C.J. Quist had budgeted to pay Petitioner the extra third, so she did so. (T. 62-63). C.J. Quist did not replace Petitioner at work as she expected Petitioner to come back to work quickly. (T. 63). She paid Petitioner a bonus for hours worked in the pandemic. At the time of trial, the last payment was made on March 18, 2022. (T. 65). C.J. Quist testified that to her knowledge, Petitioner received both payments from Travelers as indemnity and from C.J. Quist. (T. 65).

C.J. Quist identified an example of how she calculated the additional payments of one-third the average weekly wage in Respondent's Exhibit 4. She confirmed that Petitioner was not working during those periods. (T. 68). C.J. Quist identified Respondent's Exhibit 5 as schedules posted on the bulletin board in the employee area, including hiring a new employee. (T. 69). Petitioner is identified initially as "KC Jr" and later as either "Katie," or "Kate." (T. 70).

C.J. Quist identified Respondent's Exhibit 8 as the download from a mobile app used for time sheet program since July 2021. This document illustrated that Petitioner worked November 22, 2021, November 23, 2021, November 29, 2021, November 30, 2021, and December 6, 2021.

Testimony of Ingrid Perrino, Sunline Services:

Ingrid Perrino testified that she is the president of Sunline Services (T. 79). Sunline Services is an airline handling company that provides manpower to international airlines in Chicago. (T. 79). Ms. Perrino hired Petitioner. (T. 80). Petitioner worked for Sunline Services in 2019 and 2020. (T. 81). Petitioner was furloughed in March 2020. (T. 81-82). Petitioner remains on furloughed status. (T. 82).

Sunline Services offered Petitioner part-time work in July 2020. (T. 85). Specifically, Ms. Perrino identified her statement within Respondent's Exhibit 1, that "[w]hen our flights started coming back in July 2020, Kate was unable to return to work, as we only had part time to offer." (T. 93). Ms. Perrino testified that Petitioner did not accept the part-time position in July 2020 because she needed more money to pay her bills. (T. 93). Ms. Perrino indicated that Petitioner said, "I can't do part time, but if you have full time, let me know." (T. 93).

Ms. Perrino indicated that flights came in two or three times per week, indicating between four and twenty hours could have been offered. (T. 86). She also testified that with three flights, it would been between twelve to fifteen hours, perhaps twenty hours at most. (T. 94). She testified that if Petitioner worked a double shift, she could have twenty-four hours. (T. 94). Petitioner declined part-time work in July 2020, but the declination of the part-time work did not adversely affect furlough status. (T. 86).

Ms. Perrino identified Respondent's Exhibit 1 as a copy of Petitioner's personnel record. (T. 89). Ms. Perrino pulled Petitioner's file. (T. 89). Ms. Perrino identified her signature on

Respondent's Exhibit 1. (T. 89). Ms. Perrino identified Petitioner's Application for Employment on page 26. Ms. Perrino identified that Petitioner indicated full or part-time employment on her Application. (T. 90). Ms. Perrino testified that page 61 was a printout of Petitioner's Payroll. (T. 90-91). Petitioner's last date worked was March 22, 2020. (T. 91). This was Petitioner's last date worked, as far as Ms. Perrino knew. (T. 91). To Ms. Perrino's knowledge, Petitioner had not physically returned to work following the March 22, 2020 date. (T. 91-92).

(O) CONCURRENT EMPLOYMENT:

The Arbitrator chooses to discuss the issue of concurrent employment first, as all other disputed issues hinge on the findings related to the issue of concurrent employment. Petitioner argues that she was concurrently employed with both J-H Alliance, Inc. d/b/a The UPS Store as well as Sunline Services at the time of her injury on October 22, 2020 and therefore argues in favor of an average weekly wage reflective of Petitioner's earnings at both The UPS Store as well as Sunline Services. Respondent argues against concurrent employment and argues in favor of an average weekly wage reflective solely based upon Petitioner's earnings at The UPS Store. Respondent argues in favor of the plain and ordinary meaning of Section 10 of the Workers' Compensation Act ("Act").

The primary goal of statutory construction is to ascertain and effectuate the legislature's intent. Modern Drop Forge Corp. v. Industrial Comm'n, 284 Ill.App.3d 259, 219 Ill.Dec. 586, 671 N.E.2d 753 (1996). The best indicator of legislative intent is the plain and ordinary meaning of the statutory language. Illinois Graphics Co. v. Nickum, 159 Ill.2d 469, 203 Ill.Dec. 463, 639 N.E.2d 1282 (1994). We will not resort to extrinsic aids for construction in lieu of applying such meaning. See Bogseth v. Emanuel, 166 Ill.2d 507, 211 Ill.Dec. 505, 655 N.E.2d 888 (1995). We may only go beyond the words of the statute itself if we cannot discern the intent

of the legislature from the statutory language. See Dodaro v. Illinois Workers' Compensation Comm'n, 403 Ill. App. 3d 538, 545, (2010); City of Chicago v. Indus. Comm'n, 331 Ill. App. 3d 402, 403, 770 N.E.2d 1208, 1209 (1st Dist. 2002).

Section 10 of the Workers' Compensation Act ("Act") provides that:

> The compensation shall be computed on the basis of "Average Weekly Wage" which shall mean the **actual earnings** of the employee in the employment **in which he was working at the time of the injury** during the period of 52 weeks ending with the last day of the employee's last full pay period immediately preceding the date of injury . . . When the employee is working concurrently with two or more employers and the respondent employer has knowledge of such employment prior to the injury, his wages from all such employers shall be considered as if earned from the employer liable for compensation. 820 ILCS 305/10 (Last amended June 28, 2013) (emphasis not in the original).

Respondent argues that under the plain meaning of Section 10 of the Workers' Compensation Act, Petitioner did not have actual earnings in which she was working at the time of injury from Sunline Services and therefore concurrent employment is not appropriate. Under City of Chicago, "the **plain meaning** of the term "earnings" warrants an affirmative answer. 331 Ill. App. 3d 402, 404 (1st Dist. 2002).

Petitioner attempts to bypass the assessment of "actual earnings" at the time of accident with her argument focusing on Petitioner's employment status with Sunline Services at the time of injury. Respondent argues there is no real dispute that Petitioner did not have actual earnings from Sunline Services at the time of injury on October 22, 2020, and that under the plain meaning of the Act, concurrent employment is not appropriate in the present case.

Petitioner relies heavily on Jacobs v. Industrial Commission, 269 Ill. App. 3d 444 (2d Dist. 1995). In Jacobs, the claimant's sole argument on appeal was concurrent employment, impacting the calculation of average weekly wage. In Jacobs, the court acknowledged the Act does not define the term "concurrently," and assessed that the term "concurrently" must be

assessed in context. In Jacobs, the claimant worked for Village Apartments as a maintenance man. He also worked as a union journeyman sheet metal worker. The claimant testified that he had been laid off from his sheet metal job for two or three weeks at the time of the accident. The court in Jacobs assessed that (1) the claimant was employed as a sheet metal worker for *most* of the 52 weeks prior to his injury except for *two short layoff periods* that are common in the industry, (2) his part-time job at Village Apartments was a supplement to the claimant's regular work and primary source of income as a sheet metal worker, (3) Village Apartments was aware of claimant's concurrent employment as a sheet metal worker, and (4) claimant was readily available and subject to recall for work as a sheet metal worker even though at the time of injury he had been *temporarily laid off for two or three weeks*. Jacobs, 269 Ill. App. 3d at 448.

The Arbitrator recognizes that the court in Jacobs relied heavily on the factual context of the underlying claim. The court in Jacobs referenced multiple times that the claimant worked both jobs for the majority of the 52 weeks prior to accident, with only a temporary and short layoff period in the two or three weeks prior to the date of accident. The court in Jacobs further considered the claimant's future return to work date.

The fact pattern in the present claim is dramatically different from the fact pattern in Jacobs. Here, Petitioner's nearly **seven-month** long furlough at the time of injury is a significantly longer period than the "short layoff" of a temporary nature, a **period of weeks**, considered in Jacobs. The Arbitrator turns to additional caselaw that may provide additional guidance.

The Supreme Court of Illinois considered the issue of concurrent employment in 2004 in Flynn v. Industrial Commission, 211 Ill. 2d 546, 549 (2004). In Flynn, the Supreme Court considered the phrase "working concurrently with two or more employers," in context of

workers in seasonal industries. The claimant in Flynn drove asphalt trucks, was a member of a Teamsters union, and had employment dependent on the weather. During the winter off-season, Petitioner remained on call with asphalt companies, and was *sometimes* called to work in the off-season. The Supreme Court recognized that in Jacobs, a claimant may be concurrently employed by two employers even during *temporary* layoff from one of his jobs. The claimant in Jacobs was primarily employed as a sheet-metal worker and injured while clearing snow. He had been laid off from his sheet-metal work for **two-three weeks**. The Flynn court assessed that each of the claimants in Jacobs and Flynn were performing part time work during a layoff period from the main employment. However, each claimant remained available and subject to recall for work when it was available. The Flynn court assessed that the part time job was a supplement to the primary source of income, not a replacement for it.

The Flynn court further assessed that the factors in Jacobs were not an exhaustive or exclusive list in considering concurrent employment. Flynn, 211 Ill. 2d at 558. The Flynn court further considered whether the claimant was ready and willing to be recalled at any time, and whether the claimant intended to return to work as soon as the opportunity presented itself. Id. The Flynn court, much as the Jacobs court, further relied on the *temporary* nature of the layoff, as evidenced by the recurrent nature of the profession with return to work from temporary layoffs routinely over two decades prior to accident. Id. at 561. The Flynn court concluded:

> It is undisputed that claimant was laid off from one of his jobs at the time that he suffered the injury in his other job. But claimant's long and consistent history of rehire after layoff, in the seasonal business in which he was employed, in addition to the facts that he was subject to rehire at any time during the layoff and that he did return to that employment after the layoff, lead to the conclusion that his employment relationship was not wholly severed such that his earnings from that employment became irrelevant to prediction of his lost future earnings.

The Arbitrator considers that while Jacobs and Flynn involved temporary layoffs of a routine if not seasonal nature, both claimants in those cases had in past actually returned to work following temporary layoff.

Here, Petitioner's open-ended layoff with no expectation of a firm return to work date, seasonally or otherwise, in the **seven months** prior to the alleged work accident is not directly comparable to *temporary*, *seasonal*, and *short-term* **weeks**-long layoffs considered in Jacobs and Flynn.

The Flynn court also relied upon the claimant's *intention* to return to work as soon as an opportunity presented itself. Here, Petitioner and Sunline Services both testified that Petitioner had an opportunity to return to work in July 2020, approximately five months prior to the October 2020 date of accident, and declined the return to work. The Arbitrator turns to additional caselaw that may provide additional guidance.

The Illinois Workers' Compensation Commission further considered the issue of concurrent employment in Tucker v. Rush University Medical Center, 11 IL. W.C. 08197 (Ill. Indus. Com'n June 19, 2015). Specifically, the Commission in Tucker considered the knowledge of the respondent employer at the time of injury:

> The Appellate Court in Village of Winnetka v. Industrial Commission, 250 Ill.App.3d 240, 621 N.E.2d 150, 190 Ill. Dec. 281 (1993), found that when calculating average weekly wage with concurrent employment . . . the manner of calculation is to "fairly represent the claimant's earning power at the time of his injury." 621 N.E.2d at 153. Jacobs v. Industrial Comm'n, 269 Ill. App. 3d 444 (2nd Dist. 1995) goes further into the Court's analysis of concurrent employment. In Jacobs, the Petitioner was injured working for an apartment complex while on scheduled layoff as a sheet metal worker. The Court noted that the Act doesn't define "concurrently" and therefore, the decision then turns to what the Court determines the word to mean in the context of the case. It noted that the underlying purpose of the Act is to provide financial protection for workers whose earning power is interrupted or terminated due to injuries arising out of their employment. Id, at 447. In Jacobs, the Petitioner worked at the apartment complex even when he was not laid off from sheet metal work, and his sheet

> metal work regularly was subject to short layoff periods which did not sever his employment relationship. The Commission also notes the finding of the Court in Zanger v. Industrial Comm'n, 306 Ill. App. 3d 887, 240 Ill. Dec. 80, 715 N.E. 2d 767 (4th Dist. 1999). In Zanger, the Court found that although average weekly wage is calculated over a 52 week period, the earnings considered are those from the employment in which claimant ***was working when injured***; thus, the claimant's earnings from a prior employer over the prior 52 weeks, **for which he did not work after he was laid off and was not working at the time of the injury, could not be considered in determining his average weekly wage.** (emphasis added). *Id.* at 892. Section 10 of the Act defines the computation of a Petitioner's average weekly wage as "the actual earnings of the employee in the employment in which he was working *at the time of the injury* during the period of 52 weeks...divided by 52. 820 ILCS 305/10 (emphasis added). Petitioner worked concurrently at Norwegian and Respondent Rush for a period of four weeks from October 23, 2010 to November 20, 2010. Petitioner terminated her employment with Norwegian approximately nine weeks prior to the accident date and there is no evidence in the record that it was a temporary layoff or that she intended to resume employment at Norwegian. The Commission finds no evidence in the record to support Petitioner's claim for concurrent employment wages to be included in the calculation of her benefit rates.

Tucker considers the distinction of concurrent employment when working both positions at the time of accident. Tucker also considers "temporary layoff" in context of the intent to resume employment. Tucker relies heavily on the analysis in Zanger, where the claimant did not work after his layoff with the alleged concurrent employer. Zanger considered relevant the fact that claimant did not work for the alleged concurrent employer and the respondent employer concurrently *at the time of injury*. The Zanger court also declined to consider claimant a seasonal employee when there was no evidence in the record that the layoff was temporary or that Petitioner in fact intended to resume employment.

In the present case, there is similarly no evidence that Petitioner's furlough or layoff at Sunline Services is temporary. While Petitioner maintains she is yet an employee with a furloughed status at Sunline Services, the record also reflects that Petitioner declined to return to work at Sunline Services in July 2020, prior to the alleged date of accident. She declined to

return to work with Sunline Services prior to the October 2020 work accident at The UPS Store. The Arbitrator turns to additional caselaw that may provide additional guidance.

The Commission has also denied concurrent employment where a claimant initially had concurrent employment but left the concurrent job for increased hours at the respondent employer. In Kelly Claypool v. Medstar Ambulance, 17 IL.W.C. 00211 (Ill. Indus. Com'n May 22, 2019), the Commission relied on the fact that claimant testified that she had no intention of returning to her prior concurrent employer. The Commission distinguished the truly seasonal nature of the work in Jacobs from Claypool and stated the relationship in Claypool was terminated and "wholly severed." This was also evidenced by Petitioner cashing out paid time off. Here, Petitioner testified that when she declined to return to work in July 2020, she also returned her work badge during that same conversation with Sunline Services. Petitioner testified that she has not been scheduled to return physically to work since March of 2020. As in Claypool, the record thus supports the premise that even prior to October 2020 work accident, Petitioner neither intended nor in fact availed herself of the opportunity to return to work at Sunline Services.

The Arbitrator considers Bagwell v. Illinois Workers' Compensation Commission (Nestle USA, Inc.), 2017 IL App (4th) 160407WC, ¶ 28, 84 N.E.3d 1149, 1155. In Bagwell, the claimant worked for Nestle and alleged concurrent employment from his pastoral duties at a church. The Appellate Court considered what constituted "knowledge of employment." It considered what defined employment. In Bagwell, employment is defined as *paid work*. In Bagwell, "employment" is considered to be payment for work or services rendered. The Bagwell court determined the claimant's wages as a pastor should only be included as wages earned pursuant to Section 10 *only if the employer knew the claimant received payment for his work as a pastor.*

The court assessed that even though the employer knew the claimant was a pastor during the relevant period, *there was no evidence the employer knew he was compensated for that service.* The claimant argued the employer would not have known about his payment for his ministry because it was "none of their business." The Bagwell court found:

> In the alternative, the claimant argues that it is irrelevant whether the employer knew that he was paid for his religious services because section 10 merely requires the employer to have knowledge of the claimant's other "employment," not the wages he earned from such employment. **We do not find this argument persuasive. As noted above, the word "employment" means "paid work" or "work for hire." Thus, the legislature clearly intended section 10's concurrent wage requirements to apply only if the employer knew that the claimant had other paid work at the time of his work injury.** (Bold emphasis not in the original.) Bagwell, 2017 IL App (4th) 160407WC at ¶ 30.

The Arbitrator finds the Bagwell analysis to be compelling regarding the language and terminology used when considering the issue of concurrent employment. The Commission has found the legislature intended concurrent wage requirements to apply if the employer knew that the claimant had other paid work at the time of work injury.

Here, the respondent employer, C.J. Quist as owner/franchisee of J-H Alliance d/b/a The UPS Store, testified that on the date of accident, October 22, 2020, to C.J. Quist's knowledge, Petitioner was not performing work for compensation for another employer besides The UPS Store. (T. 57). To C.J. Quist's knowledge, Petitioner did not return to work with her job at Sunline after the furlough. (T. 55). To C.J. Quist's knowledge, Petitioner did not work for pay at her other job after the furlough. (T. 55). C.J. Quist did not have any limitations in scheduling Petitioner for work at The UPS Store after March 2020. (T. 56). C.J. Quist did not have limitations in scheduling Petitioner in July 2020. (T. 56). C.J. Quist did not have limitations in scheduling Petitioner for work at The UPS Store in October 2020.

The Arbitrator finds that the present case is different than either Jacobs or Flynn. The Arbitrator finds persuasive analysis in the cases of Tucker and Bagwell. Based on the analysis described above, the Arbitrator finds Petitioner failed to prove that respondent knew Petitioner was being compensated for her position at Sunline Services at the time of accident. The record does not support that Petitioner was in fact paid for her position of Sunline Services at the time of accident, nor had she been paid for said position in the seven months prior to the alleged date of accident.

(G) WHAT WERE PETITIONER'S EARNINGS:

As the Arbitrator found Petitioner failed to prove that Respondent knew Petitioner was being compensated for her position at Sunline Services at the time of accident and thereby denied concurrent employment, the Arbitrator now finds that Petitioner's earnings are correctly calculated based solely on her earnings from J-H Alliance d/b/a The UPS Store.

Petitioner earned gross wages of $17,810.65 in the 47.86 weeks preceding the date of accident. The Arbitrator finds an average weekly wage of $372.14, corresponding to the minimum benefit rate of $266.67.

The Arbitrator notes that while Petitioner testified that she received compensation from unemployment, that unemployment benefits are not considered in the calculation of earnings or average weekly wage. The Arbitrator considers the following. In Zanger, the court considered that unemployment compensation was neither earnings nor wages. The court found that unemployment benefits are excluded from the calculation of average weekly wage as the purpose of the Unemployment Insurance Act is to provide security for and alleviate burdens of involuntarily unemployed workers and their families. Zanger, 306 Ill. App. 3d at 892.

(J) HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR REASONABLE AND NECESSARY SERVICES:

Petitioner testified that on the date of accident she tripped on a rug, fell on the concrete floor, and a box landed on her right wrist. Petitioner testified that she has had surgery to her right wrist and three surgeries to her right hand. She is still under medical care.

On the Request for Hearing Stipulation Sheet, line 7, Petitioner did not enumerate that any specific medical bills remain unpaid. The Arbitrator notes that Petitioner did not allege in her testimony that any bills remained unpaid. She did not testify that any of her care is denied. Petitioner's 19(b), Petitioner's Exhibit 9, listed that whether any medical bills were in dispute was unknown. Petitioner's Exhibit 5, Midwest Orthopaedics at Rush records as well as Petitioner's Exhibit 6, Dr. Fernandez's progress notes, confirms that Petitioner's treatment has been authorized, and appear to have been admitted onto the record for the purpose of identifying what temporary benefits are in dispute, discussed in subsequent section. Respondent's Exhibit 7 indicates that $198,315.23 has been paid by Respondent for medical at the time of trial.

Based upon this information, the Arbitrator determines that no dispute or controversy exists regarding whether Respondent has paid all appropriate charges for reasonable and necessary services. Respondent shall receive credit for amounts paid.

(K) TEMPORARY BENEFITS IN DISPUTE:

The Arbitrator recognizes that the parties largely agree regarding the period of disability, not to characterization of disability. Petitioner alleges entitlement to temporary total disability from October 23, 2020 through the date of trial, at approximately 73 and 3/7 weeks. Respondent alleges approximately the same period but differs in the categorization of that period. Respondent alleges 70 weeks of temporary total disability from October 23, 2020 through November 19, 2021 and again from December 9, 2021 through the date of trial. Respondent

alleges 2 3/7 weeks of temporary partial disability from November 22, 2021 through December 9, 2021.

The November 22, 2021 through December 9, 2021 is the period at issue. Respondent identifies this period as temporary partial disability, whereas Petitioner alleges this is more appropriately temporary partial disability under Mechanical Devices v. Industrial Commission, 344 Ill. App. 3d 752, 760 (2003) (A claimant's earnings of occasional wages does not *necessarily* preclude a finding of temporary total disability).

The Arbitrator notes that Mechanical Devices involved a situation of the payment of TTD benefits versus the wholesale termination of benefits. The Illinois Workers' Compensation Commission clarified the application of Mechanical Devices in Kuzmar v. Hinckley Springs, where the Commission assessed that Mechanical Devices included concurrent employment, and where the claimant had returned to work at the concurrent employer with a job that was within his restrictions but did not return to work with the Respondent employer as that job was outside his restrictions. In Kuzmar, the Commission analyzed that temporary total disability was awarded in Mechanical Devices because the claimant had not returned to his job with his respondent employer. 04 I.I.C. 0741 (Ill. Indus. Com'n November 17, 2004).

This case is distinguishable from Mechanical Devices based upon the analysis in Kuzmar. Respondent's Exhibit 8 details the period at issue in the present case as a period Petitioner had temporarily **returned to work** for The UPS Store, the respondent employer. Petitioner worked 17.13 hours between November 22, 2021 and December 8, 2021, working two to three times per week.

Further, respondent employer, testified that Petitioner's hours prior to injury ranged between four to twelve hours per week, and in peak season, possibly up to forty hours. (T. 52).

Respondent's Exhibit 5 detailed the work schedule from May 2019 through October 2020. Between May 16, 2019 through August 2019, Petitioner worked on average once a week, primarily 4-5 hours per week. From October 5, 2020 through October 10, 2020, Petitioner was scheduled to work twice, or for about 16 hours. The week prior to the accident, the week of October 12, 2020 through October 17, 2020, Petitioner was scheduled for approximately three days a week, or about 20 hours.

The Arbitrator awards Petitioner temporary total disability benefits from October 23, 2020 through November 19, 2021 and again from December 9, 2021 through the date of trial, 70 weeks. Respondent shall receive credit for benefits paid.

The Arbitrator awards Petitioner temporary partial disability from November 22, 2021 through December 9, 2021, 2 3/7 weeks. Respondent shall receive credit for benefits paid.

(M) SHOULD PENALTIES OR FEES BE IMPOSED UPON RESPONDENT:

The Arbitrator declines to impose penalties and fees against Respondent since Respondent had a reasonable basis to dispute the issues of concurrent employment as well as the issues stemming from concurrent employment, including average weekly wage, temporary total disability, and temporary partial disability. Further the Arbitrator notes that the Petitioner received additional payments from C.J. Quist beyond what she was entitled to under the Act.

(N) IS RESPONDENT DUE ANY CREDIT:

The Arbitrator orders that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injuries.

The Arbitrator takes notice that Respondent shall receive credit for $18,781.19 for TTD, $392.40 in TPD, as noted in Respondent's Exhibit 6. The Arbitrator takes notice that Respondent shall receive credit for the $198,315.23 paid in medical expenses.

The Arbitrator takes notice that Respondent employer paid additional compensation on a weekly basis following the date of accident through the date of trial that were not required under the Act, per C.J. Quist's testimony, confirmed by Petitioner's testimony, and detailed in Respondent's Exhibit 3. Respondent employer paid Petitioner additional compensation due to her own compulsion of a moral obligation with the anticipation that Petitioner would eventually return to work. Respondent paid the following additional compensation beyond what the Act requires under Respondent employer's payroll system, in addition to the indemnity paid by Travelers Insurance. Respondent shall receive a credit for the additional compensation in the amount of $9,115.65.

Check Date:	**Check Amount:**	**Check Date:**	**Check Amount:**
11/3/2020	$ 654.64	7/16/2021	$ 232.66
11/18/2020	$ 276.12	8/3/2021	$ 269.77
12/3/2020	$ 308.89	8/16/2021	$ 232.66
12/18/2020	$ 271.79	9/3/2021	$ 269.77
12/31/2020	$ 379.30	9/18/2021	$ 269.75
1/18/2021	$ 193.13	10/3/2021	$ 232.67
2/3/2021	$ 232.67	10/18/2021	$ 269.76
2/18/2021	$ 232.66	11/3/2021	$ 232.67
3/3/2021	$ 232.66	11/18/2021	$ 232.66
3/18/2021	$ 232.66	12/3/2021	$ 394.45
4/3/2021	$ 306.88	12/17/2021	$ 294.80
4/18/2021	$ 232.66	1/3/2022	$ 243.75
5/3/2021	$ 269.76	1/18/2022	$ 232.87
5/18/2021	$ 232.66	2/3/2022	$ 269.98
6/3/2021	$ 232.66	2/18/2022	$ 269.97
6/18/2021	$ 399.76	3/3/2022	$ 195.78
7/3/2021	$ 269.77	3/18/2022	$ 269.96
Total:			**$9,372.60**

The Arbitrator notes that Respondent's Exhibit 8 details the period at issue in the present case as a period Petitioner had temporarily **returned to work** for The UPS Store, the respondent employer. Petitioner worked 17.13 hours between November 22, 2021 and December 8, 2021, working two to three times per week. Respondent's Exhibit 3 details that Petitioner received compensation for hours worked at $15.00 per hour, amounting to approximately $256.95 across two pay periods. Respondent shall receive the credit for additional compensation paid in excess of what is owed under the act by subtracting the $256.95 from the payments of $9,372.60, for a total credit of $9,115.65

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 up	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KATHLEEN COLLINS,

Petitioner,

vs. NO: 21WC 004622

J-H ALLIANCE, INC., D/B/A THE UPS STORE,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of benefit rates, penalties pursuant to §19(k) and §19(l), fees pursuant to §16, and Respondent credit, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission affirms and adopts the Arbitrator's Decision in its entirety except with respect to the Petitioner's average weekly wage rate (AWW). To that end, the Commission modifies the Arbitrator's Conclusions of Law in Section (G) What Were Petitioner's Earnings by striking the second paragraph and substituting the following: Petitioner earned gross wages of $17,810.65 in the 44 weeks/22 pay periods preceding the date of accident. The Commission finds Petitioner earned an average weekly wage of $404.79, corresponding to the TTD rate of $269.87.

The Commission further modifies the Arbitrator's Order with respect to the TTD and TPD awards to reflect the modification in the AWW rate.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision filed on September 2, 2022, is hereby modified for the reasons stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner temporary partial disability benefits of $164.00/week for 2 3/7 weeks, commencing November 22, 2021, through December 9, 2021, as provided in Section 8(a) of the Act. Respondent shall be provided a credit for temporary partial disability benefits that have been paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $269.87 per week for a period of 70 weeks, commencing October 23, 2020, through November 19, 2021, and December 9, 2021, through March 21, 2022, the date of the arbitration hearing, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any. Respondent shall be provided a credit for temporary total disability benefits that have been paid.

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

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

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

The bond requirement in Section 19(f)(2) is applicable only when "the Commission shall have entered an award for the payment of money." *820 ILCS 305/19(f)(2)*. As there are no monies due and owing, there is no bond set by the Commission for the removal of this cause to the Circuit Court by Respondent. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

AUGUST 11, 2023
KAD/bsd
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/s/*Kathryn A. Doerries*
Kathryn A. Doerries

/s/*Maria E. Portela*
Marie E. Portela

DISSENT

I respectfully dissent from the opinion of the majority and would reverse the Decision of the Arbitrator. After carefully considering the totality of the evidence, I believe Petitioner met her burden of proving that she had concurrent employment.

Petitioner began working for Sunline Services in April 2019, two months prior to beginning her employment with Respondent. T. 7-9. Petitioner worked at least 32 to 40 hours per week at Sunline Services. T. 10. There is no dispute that at the time she was hired by Respondent, she made the owner aware of her employment with Sunline Services. T. 7, 12. Petitioner was furloughed by Sunline Services on March 22, 2020, due to the global coronavirus pandemic. T. 12-13.

Petitioner remained employed by Sunline Services on furlough status at the time of her undisputed accident on October 22, 2020. Respondent testified that she understood furlough to mean "You're still an employee. We hope to call you back." T. 44.

While there was a discussion between Petitioner and her supervisor at Sunline Services in July 2020 about returning to part-time work, Petitioner declined these limited hours with no change in her furlough status. A return to part-time work would have led to less income for Petitioner. Petitioner was receiving $290 per week in unemployment benefits due to her status at Sunline Services. T. 19. Petitioner remained on furlough and subject to recall. She was formally recalled by Sunline to full-duty in writing on July 1, 2021. As Petitioner was on work restrictions at the time of the recall, Sunline Services put her on "Med. LOA." PX2.

The inability to return to work at the time of recall was considered to be a decline to the full-duty offer and as a result Petitioner's unemployment benefits were terminated. T. 19. Respondent's testimony at the time of hearing in March 2022 was clear that it was at this moment in 2021 that she believed Petitioner was no longer employed by Sunline. Specifically, Respondent testified, "It is my understanding that as of last year, she lost her job at Sunline Services." T. 77.

Therefore, at the time of the injury, Respondent considered Petitioner to be employed with Sunline Services. Thus, this matter is distinguishable from *Bagwell v. Ill. Workers' Comp. Comm'n*, 2017 IL App (4th) 160407WC, ¶ 28 (Employer was not aware Petitioner was compensated for his services as a minister or pastor). In the instant matter, Respondent had an actual belief Petitioner was employed.

The Arbitrator relied on the "*temporary, seasonal,* and *short-term* **weeks**-long layoffs in *Jacobs* and *Flynn"* to distinguish Petitioner's furlough in this matter. However, the Supreme Court in *Flynn* states, "We also note that the factors noted in *Jacobs* do not purport to represent an exhaustive or exclusive list of what may be considered when determining whether a claimant is employed 'concurrently' by two or more employers…" *Flynn v. Indus. Comm'n*, 211 Ill. 2d 546, 558 (2004).

The Supreme Court in *Flynn* indicated that "the primary consideration in determining whether a severed employment should factor in to an employee's wage calculation" is whether "the relationship 'remains sufficiently intact such that the claimant's past earning experience remains a valid predictor of future earnings loss.'" *Flynn*, quoting *Triangle Building Center v. Workers' Comp. Appeal Board,* 560 Pa. 540, 549 (2000).

"The aim of the system of workers' compensation is to make an employee whole for the interference with his future earnings occasioned by an injury. [citation omitted] To fulfill this function, it is imperative to determine as accurately as possible what in fact his future earnings would be. [citation omitted] When an employment relationship has been severed, but the circumstances of the case indicate with sufficient clarity that the relationship would have played a part in the claimant's future earnings but for the injury, the future earnings must be factored into the employee's award for the injury he suffered." *Flynn*, at 561.

Although Petitioner was furloughed from her primary job as a ticketing agent for Sunline Services, this furlough was customary to the entire airline industry due to the global coronavirus pandemic. The unusual circumstances which gave rise to the furlough were not likely to be repeated on a consistent basis so as to impact Petitioner's future earnings.

Petitioner testified as to her intent to return to Sunline Services. This is evinced by her yearly renewal of her Access Control and Photo ID Badge with the Chicago Department of Aviation on September 14, 2020. RX1. She was issued badges on September 18, 2020 and September 18, 2021. *Id*.

It was also Sunline Services intent to bring Petitioner back to work full-time. On December 20, 2021, President Ingrid W. Perrino wrote: "Our flights are coming back heavier now and we expect to be hiring FT again in the spring or summer of 2022. I am keeping in touch with Kate, so I know when I can offer her FT again, and she advised that she is still dealing with this other injury. Sunline Services, Inc. is hoping she will be ready to return to full duty next year." PX1.

For the foregoing reasons, I would reverse the Decision of the Arbitrator and find concurrent employment.

o: 06/13/2023
AHS
51

/s/*Amylee H. Simonovich*
Amylee H. Simonovich

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	11WC013172
Case Name	Mary Mastalski v. Chicago Board of Education
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Commission Decision
Commission Decision Number	23IWCC0346
Number of Pages of Decision	21
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	James Marszalek
Respondent Attorney	George Klauke

DATE FILED: 8/14/2023

DISSENT

/s/ Deborah Simpson, Commissioner

Signature

/s/ Deborah Simpson, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Mary Mastalski,

Petitioner,

vs. NO: 11 WC 13172

Chicago Board of Education,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 29, 2022, is hereby affirmed and adopted.

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

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.

There is no bond for the removal of this cause to the Circuit Court by Respondent pursuant to §19(f)(2) of the Act. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

AUGUST 14,2023
o7/12/23
DLS/rm 046

/s/*Stephen J. Mathis*
Stephen J. Mathis

/s/*Deborah J. Baker*
Deborah J. Baker

DISSENT

I respectfully dissent from the Decision of the majority. I would have found that Petitioner lacked credibility, and as a result, failed to prove that she sustained a compensable accident that arose out of and in the course of her employment on January 25, 2011.

Petitioner's pre-accident medical records document a longstanding history of severe left-sided radiating symptoms in Petitioner's upper and lower extremities stemming from a stroke, as well as a history of cervical radiculopathy. Prior to the accident, Petitioner received extensive treatment for such diagnoses as hyperesthesia of the left side of the body, left hemisensory body pain/hypersensitivity, Dejerine-Roussy Syndrome, left arm and leg burning, cervical radiculopathy, neck pain, and degenerative disc disease with bulging discs of the cervical spine. These conditions were so severe that Petitioner sought ADA accommodations and FMLA leave related to them. On February 25, 2009, Dr. Julita Sadowski filled out ADA paperwork stating that Petitioner's diagnoses included two cerebrovascular accidents (strokes), hyperesthesia of the left side of the body, Dejerine-Roussy Syndrome, and cervical degenerative disc disease and bulging discs. Dr. Sadowski noted that Petitioner's impairments included pain on the left side of her body, including her arm and leg. She then characterized Petitioner's prognosis as poor, noting that Petitioner's symptoms had not improved since her stroke in August of 2007.

Despite this significant pre-accident history of left-sided radiating symptoms in her upper and lower extremities as well as cervical radiculopathy, Petitioner repeatedly denied having any relevant prior medical history to several of her doctors while seeking treatment for post-accident symptoms involving the same body parts, specifically the left side of her body (arm and leg) and cervical spine.

When Petitioner first saw Dr. David Shapiro on February 1, 2011, she complained of neck and low back pain, as well as numbness and tingling radiating down her left arm and legs. Despite such complaints being similar to her pre-accident complaints involving her cervical spine and the left side of her body, Petitioner denied having any pre-accident symptoms to Dr. Shapiro. Subsequently, when Petitioner presented to Dr. Neema Bayran on January 11, 2012, she complained of low back pain, neck pain, and radiating symptoms in her left upper and lower extremities. Again, despite the similarity to her pe-accident symptoms, Petitioner told Dr. Bayran that her pain started on January 25, 2011 and denied any history of similar pre-accident pain. Likewise, when Petitioner presented to Dr. Mark Sokolowski on May 30, 2012, she reported developing left arm pain and numbness, neck pain, low back pain, and lower extremity pain immediately after the January 25, 2011 accident and otherwise indicated that her prior medical history was negative. Then, when presenting for an EMG on July 15, 2013, Petitioner informed Dr. Scott Lipson that she had no prior history of neck or back pain, numbness, tingling, or weakness until she tripped on a mat at work on January 25, 2011. Dr. Lipson noted that Petitioner's immediate onset of neck and back pain had never occurred before.

Petitioner's denial of any pre-accident symptoms to her treating doctors conflicts with her extensive and significant history of prior cervical, left upper extremity, and left lower extremity symptoms documented in her treatment records. In addition to her treating doctors, Petitioner also told Dr. Andrew Zelby, Respondent's Section 12 examiner, that she had no prior history of similar symptoms that she could recall, although she admitted to having a right cerebral stroke in 2007. Dr. Zelby testified that even though Petitioner said she could not recall any prior symptoms, the multiple diagnostic studies obtained prior to January 2011 that had the same appearance as the studies obtained after clearly suggested that Petitioner's pre-accident symptoms were present and persistent enough to engender repeat prior diagnostic studies. Petitioner also told Dr. Bayran that she had undergone no previous cervical MRIs, which the pre-accident records show to be false.

In addition to her lack of candor to these doctors regarding her prior symptoms, Petitioner also instructed Dr. Sadowski's office to not send any of her medical records to Sedgwick in response to their subpoena or to anybody else without her permission. Dr. Sadowski treated Petitioner prior to the accident, and as such, her records disclose details of her pre-accident conditions. At the hearing, Petitioner also expressed a hesitancy to discuss her pre-accident diagnoses and symptoms. In reference to her prior stroke and Dejerine-Roussy Syndrome, Petitioner stated, "…I don't know if I legally have to answer these questions because those are private." Tr. at 62. This hesitancy to discuss her prior symptoms and release her prior treatment records to Sedgwick's subpoena, when taken in conjunction with Petitioner's denial of pre-accident symptoms to the doctors, suggests an attempt to conceal her prior symptoms.

Petitioner's "removal with pay" status and pending discharge at the time of the accident presents a further hurdle to her credibility. Larry Irvin, the principal of Foreman High School where Petitioner worked, testified that he had hand-delivered the "removal with pay" letter dated January 19, 2011 to Petitioner before the accident date. The letter said that Petitioner was removed from duty with pay effective immediately and required to relinquish any and all property belonging

to Respondent, including her keys to the school building. Mr. Irvin testified that the letter prohibited Petitioner from being on school property and indicated that it would be trespassing if she was present on the grounds. Mr. Irvin testified that he did not know why Petitioner was in the building on January 25, 2011, because someone on a "removal with pay" status would not be authorized to go in and check their mail. Petitioner denied ever receiving the letter from Mr. Irvin and emphasized that she did not sign the letter indicating its receipt. Mr. Irvin, however, explained that Petitioner did not sign the notice of receipt, because she was upset and promptly left after he handed the letter to her.

Additionally, Petitioner had a discharge hearing that was originally scheduled for January 25, 2011, the accident date, but was moved at the request of Petitioner's Union representative to the next day, January 26, 2011. Mr. Irvin testified that he found Petitioner's workers' compensation claim to be highly suspicious, because of the termination process that was underway. The timing of Petitioner's alleged accident is questionable given that it occurred on the same date of Petitioner's originally scheduled discharge hearing and while she was under a "removal with pay" order that prohibited her from even being on the premises. When this timing is considered alongside Petitioner's denial of pre-accident symptoms to the medical providers, the record establishes Mr. Irvin as a more credible witness than Petitioner.

In consideration of the above, I would have found that Petitioner lacked credibility, and as a result, failed to prove that she sustained an accident that arose out of and in the course of her employment on January 25, 2011. Accordingly, I would have reversed the Decision of the Arbitrator to deny all benefits under the Illinois Workers' Compensation Act.

DLS/met
46

/s/*Deborah L. Simpson*
Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	11WC013172
Case Name	Mary Mastalski v. Chicago Board of Education
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	16
Decision Issued By	Rachael Sinnen, Arbitrator

Petitioner Attorney	James Marszalek
Respondent Attorney	George Klauke

DATE FILED: 9/29/2022

THE INTEREST RATE FOR THE WEEK OF SEPTEMBER 27, 2022 3.85%

/s/ Rachael Sinnen, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF **Cook**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Mary Mastalski
Employee/Petitioner

v.

Chicago Board of Education
Employer/Respondent

Case # **11** WC **13172**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Rachael Sinnen**, Arbitrator of the Commission, in the city of **Chicago**, on **March 22, 2022 and June 27, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Hearsay objections to RX #6a and #6b**

FINDINGS

On the date of accident, **1/25/11**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**47,063.64**; the average weekly wage was $**905.07**.

On the date of accident, Petitioner was **44** years of age, ***single*** with **1** dependent children.

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

Respondent shall be given a credit of $**2,413.52** for TTD, $**0** for TPD, $**0** for maintenance, and $ **5,430.40 (PPD advancement)** for other benefits, for a total credit of **$7,843.92.**

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $603.38/week for 55 4/7 weeks, commencing 1.25.11 through 2.17.12, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner directly for the following outstanding medical services, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act: City of Chicago EMS - $755.00 (See PX # 12); Addison Emergency Physicians - $337.00 (See PX # 13); Addison Radiology Associates - $1,877.00 (See PX # 14); Illinois Bone & Joint Institute - $552.00 (See PX # 15); The Pain Center of Illinois - $593.00 (See PX # 16, DOS 1.11.12 & 2.15.12); Lakeshore Open MRI - $5,000.00 (See PX # 17); and Dr. Sadowski for DOS 1.25.11 – 2.17.12 only (See PX # 19).

As the Arbitrator finds that Petitioner sustained posttraumatic cervical and lumbar strains that resolved on February 17, 2012, no prospective medical is awarded.

Petitioner's hearsay objections to Respondent's Exhibits 6a and 6b are sustained.

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

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

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

SEPTEMBER 29, 2022

Signature of Arbitrator

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

Mary Mastalski,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	Case No. 11WC13172
Chicago Board of Education,	)	
	)	
	)	
Respondent.	)	

FINDINGS OF FACT

This matter proceeded to hearing on March 22, 2022, in Chicago, Illinois before Arbitrator Rachael Sinnen on Petitioner's Petition under Sections 8a and 19b of the Workers' Compensation Act "Act." Issues in dispute include accident, causation, medical bills, temporary total disability ("TTD") benefits, and prospective medical. Arbitrator's Exhibit "Ax" 1.

Petitioner's job duties and prior medical history

The Petitioner, Mary Mastalski, testified before the Arbitrator on March 22, 2022, and June 27, 2022. She stated that she began working for the Chicago Board of Education in August of 1993 as a School Clerk. At the time of the alleged accident, she was working at Foreman High School as the Attendance Clerk recording tardy and absent students. She also sold uniforms and placed boxed uniforms in a cabinet. The boxes weighed approximately 20 pounds. (Transcript from 3.22.22 "T #1", pp. 7 – 12).

Petitioner's alleged injury on January 25, 2011

Petitioner stated that she felt fine when she arrived at work on January 25, 2011. Her scheduled shift was 7:30 am to 3:15 pm. At approximately 2:15 pm she started towards the main office to check her mail. As she walked through a hallway corridor by a set of stairs towards the main office, she stepped on a floor mat and, "it moved, and it caused me to fall forward." She fell forward onto her abdomen with her left arm up and her face turned. She did not strike either knee and does not remember trying to catch herself with her arms and hands. She did not remember if she was carrying anything. (T #1. pp. 11 - 13).

After the fall she noticed numbness and tingling on the left side of her body, a headache, nausea, low back pain and stomach pain. A security guard named Julian Vega was about 15 feet away when she fell. He instructed her not to move. The school nurse came and asked that an ambulance

be called. She was then taken by ambulance to Our Lady of the Resurrection Medical Center. January 25, 2011 was the last day that she ever worked. (T #1. pp. 13 – 16).

Deposition testimony of Mr. Larry Irvin

Respondent offered the deposition testimony of Mr. Larry Irvin, who was the principal of Foreman High School, on January 25, 2011. Mr. Irvin testified that the Petitioner was an attendance clerk at the school. He was in the building on January 25, 2011 and came to the scene of her fall and observed her lying on a floor mat. He did not observe any defects on the floor mat. He interviewed witnesses afterwards and prepared a written summary of what they told him which is Deposition Exhibit 1 of Respondent's Exhibit 6 (aka RX #6a). [1] He also identified documents relating to the Petitioner's discharge as an employee. She was discharged on February 25, 2011 for excessive tardiness. A discharge hearing was held on January 26, 2011 that was continued at Petitioner's request on January 25, 2011. At some point after January 19, 2011, he testified he handed the Petitioner a letter dated January 19, 2011 informing her that she was discharged from her duties that she was not to be on the school premises and to return all school property. (RX 6).

Petitioner testifying again on June 27, 2022 on rebuttal. She stated that she did not receive a letter dated January 19th, 2011 relieving her of her duties with the Chicago Board of Education and directing her not to enter the school building. She also testified that she worked her regular shift at the school between January 19, 2011 and January 25, 2011. She noted that the January 19, 2011 letter identified by the principal of Foreman High School, Larry Irvin, had an incorrect address for her. On cross-examination, the Petitioner stated that she is not sure whether or not she ever received the January 19, 2011 letter. (Transcript from 6.27.22 "T #2").

Petitioner's prior medical history

Petitioner has treated with her primary care physician, Dr Julita Sadowski since 1994. During this time the Petitioner was seen for a variety of conditions including a 2007 stroke, hyperesthesia of the left side, degenerative disc disease, and bulging discs to the cervical spine.

Petitioner was seen by Dr. Misra from Diagnostic Neurology on April 28, 2008 complaining of hyperesthesia involving the left side of her body and physical examination noted hyperesthesia to light touch involving the left upper and lower extremities. (RX #1, p. 108). Petitioner has also been seen by Dr. Slavin and on February 18, 2008 it was noted that Petitioner had weakness and numbness in the left side of the body. (RX # 1, p. 124). On November 12, 2008, Petitioner was seen by Dr. Khalaf at the Cleveland Clinic Center for Spine Health complaining of left sided neck pain with left upper extremity pain and weakness, particularly in the left forearm with a constant burning sensation. (Respondent's Exhibit "RX" #1, p. 136).

Petitioner's last visit with the doctor before her work accident was on December 7, 2010. Petitioner was noted not to be in distress but complained of twitching on the left side of her body and a skin issue with her fingers. (RX # 1).

[1] Petitioner raised hearsay objections to Respondent's Exhibit 6a (witness statements) and 6b (discharge documentation) which the Arbitrator sustains and details her ruling further under Issue O in Conclusions of Law.

Petitioner admitted she had a stroke which caused pain sensations producing hot and cold temperatures. She confirmed that Dr. Sadowski was her primary care physician from 1994 through the present time. She also admitted that she has been diagnosed with Dejerine-Roussy Syndrome, which is pain caused by a stroke. She confirmed seeing Dr. Slavin for post stroke pain for the left side of her body. She recalls complaints of twitching in December, 2010. She also recalls seeing the Cleveland Clinic in 2008 for the Dejerine-Roussy symptoms. (T #1. pp. 76).

Petitioner explained that the pain after the work accident was radiating, but the pain after the stroke did not radiate down. Petitioner further explained that she has described both pains the same way because she does not know how to express the pain. She further described the pain following the accident as muscle related whereas the pain after the stroke comes from her brain. (T # 1, pp. 71-73).

Petitioner's medical treatment in 2011

Immediately following the accident, Petitioner was taken by paramedics and seen in the emergency room at Our Lady of Resurrection Medical Center. Resurrection Hospital records indicate that she slipped but denied hitting her head. She had no abrasions or bruising to her face. She complained of neck pain and back pain. She had tenderness to her cervical spine. She had an MRI of her cervical spine, lumbar spine, and brain. The findings included a moderate broad based central disc protrusion effacing the ventral aspect the subarachnoid space. It was noted that this protrusion was not described on a previous MRI study. The radiologist's impression of the cervical spine films was that Petitioner had multi-level small disc herniations with progression of disc herniations since the previous examination. An MRI of the lumbar spine demonstrated at L5-S1, a small broad based ventral disc protrusion without compressing the dural sac and thickening of the posterior longitudinal ligament posterior to the L5 vertebrae. She was discharged from the hospital the same day with a diagnosis of head contusion, neck contusion, and low back contusion. The records also show a release to work full duty as of 1/28/2011. (PX #1, p. 13).

On January 27, 2011, she saw her primary care physician, Dr. Julita Sadowski. The record from that visit shows that Petitioner was complaining of a right (sic) arm/shoulder as well as low back pain. Dr. Sadowski diagnosed multiple contusions involving the right (sic) shoulder, right (sic) arm, abdomen, and low back. Petitioner was also referred to Dr. Alexandra Stobnicki, a neurologist. Dr. Stobnicki ran several tests, recommended physical therapy, and provided a prescription for pain. The diagnosis was whiplash, low back injury and probable concussion.
(T # 1. pp. 16 – 18; PX #1, p. 6; PX #3, p. 46).

Dr. Sadowski also referred Petitioner to Dr. David Shapiro of Illinois Bone and Joint and Dr. Neema Bayran at the Pain Center of Illinois. She saw Dr. Shapiro on February 1, 2011 and reported a history of falling at work and landing forward directly on front of her body. Since then, she was complaining of severe neck pain and severe low back pain. She described numbness and tingling radiating down the left arm into the forearm and from the low back down both legs to just above the knee. She denied any previous symptoms prior to the fall. She had a history of a stroke 3 years earlier. Dr. Shapiro noted that the MRI of the cervical spine confirmed a minor disc bulge at C6-7 however no nerve compression. The lumbar MRI showed no evidence of herniation. Dr. Shapiro diagnosed all soft tissue symptoms with a possibility of spinal cord contusion or brachial

plexopathy given the numbness and tingling into the left arm. He provided an off work note until the next visit of February 10, 2011. (PX #4, pp. 4-5).

Petitioner returned to Dr. Stobnicki again on February 7, 2011 reporting a sensation of left upper extremity and left lower extremity "being foreign," and low back pain radiating to the left lower extremity. Dr. Stobnicki provided medications and recommended PT and, if not better in two weeks, recommended an EMG. (PX #3, p. 42).

Petitioner returned to her primary Dr. Sadowski on February 21, 2011 who continued to document pain to the low back and right (sic) elbow. (PX #2, p. 7).

Petitioner saw Dr. Stobnicki on April 18, 2011 and continued to complain of left upper and lower limb sensitivity to touch with sensation of the left body side "being not part of her." She complained of cervical pain, posterior occipital headache and low back pain radiating to the lower left limb. Exam revealed preserved range of motion, no spasm, no weakness of the upper or lower limbs, sensation to pinprick and light touch diminished with astereognosis on the left side. Dr. Stobnicki sought to rule out cerebral concussion, cervical/lumbar radiculopathy. Recommendation was to start gabapentin, repeat the MRI of the head, undergo an EMG, PT as tolerated, and off work. (PX #3, p. 31).

Petitioner next saw Dr. Stobnicki on July 19, 2011. She was not taking Lyrica or gabapentin and only used Vicodin. She had the same symptoms. The MRI was benign. Diagnosis was left upper and lower limb pain following trauma of January 25, 2011. (PX #3, p. 21).

Petitioner saw Dr. Stobnicki September 8, 2011 and October 27, 2011 with similar complaints and Dr. Stobnicki recommended a psychiatric exam and antidepressants which were refused. (PX #3, pp. 17 – 20).

Respondent's IME with Dr. Frank

On November 16, 2011, Petitioner was examined by Dr. H.G. Frank, a neurologist, pursuant to Section 12 of the Act. Petitioner described a burning sensation since the accident of January 25, 2011 in the left arm and leg. Examination of the neck and back per Dr. Frank was unremarkable. Dr. Frank diagnosed Petitioner with closed head injury with possible mild cerebral concussion that has resolved. Dr. Frank further indicated that Petitioner had posttraumatic distal left upper extremity sensory symptomatology that he was unable to quantify due to no evidence of any reflect sympathetic dystrophy. Dr. Frank further diagnosed Petitioner with posttraumatic cervical and lumbar strains with no evidence of disc herniation. Dr. Frank opined that Petitioner is at MMI as there were no findings of ongoing neurologic or orthopaedic issues. He further opined that no further treatment is necessary except maybe an EMG to clear the air of any remote possibility of neuropathy, plexopathy or radiculopathy. (RX # 2, p. 75).

Dr. Frank authored an addendum report on February 17, 2012 after reviewing the EMG/NCV by Dr. Tuttle (performed February 14, 2012) noting confirmation of no neuropathy, plexopathy or radiculopathy thus confirming his prior diagnosis of no ongoing neurologic or orthopedic issues and maximal medical improvement with no further treatment necessary. (PX # 2, p. 69, C1).

Petitioner's medical treatment in 2012

On January 11, 2012, Petitioner saw Dr. Bayran per Dr. Sadowski's referral approximately one year ago. She complained of left sided neck pain and left sided cervical radiculopathy as well as left sided low back pain and lumbar radiculopathy. The description of pain was burning, numbness, freezing left hand radiating up to the upper arm. Low back left side worse than right radiating into her left buttock and left big toe radiating into the lateral aspect of the left calf and thigh. She stated that her pain started on January 25, 2011 after an injury at work. She also stated that she was seen at ER at Resurrection where an MRI and EMG were recommended but never performed. Patient denied history of similar back pain prior to this incident. She claims that she has had no MRI of the cervical spine nor has had cervical MRI in the past. Dr. Bayran recommended a cervical and lumbar MRI. (PX #5, pp. 9-11).

On January 31, 2012 Petitioner had an MRI at Lakeshore MRI which revealed lumbar minimal diffuse disc bulge L5-S1 less than 3 mm, mild degenerative changes L4-S1, no evidence for acute abnormality of the lumbar spine. Cervical MRI revealed multiple osteophytes C2-C5, no central canal or neural foraminal stenosis C2-C5, no cord signal abnormality and no evidence of acute fracture. Both of these studies state there was no earlier comparison study. (PX # 7. p. 46).

On February 14, 2012 Dr. Richard Tuttle performed an EMG and NCV of the left upper and lower extremities. Dr. Tuttle notes all nerve conduction studies are normal in the upper and lower extremities on the left. There is no evidence for mononeuropathy, plexopathy or polyneuropathy. EMG examination of all tested muscles in the left upper extremity, left lower extremity, and corresponding paraspinal muscles is normal. There is no evidence for cervical or lumbosacral radiculopathy on the left. Dr. Tuttle concluded that there was no electrical evidence of neuromuscular disease. (PX # 7, pp. 29-31).

On February 15, 2012, Dr. Bayran reviewed the MRI and diagnosed 1) neck pain and left sided radiculopathy secondary to multilevel disc/osteophyte complex; 2) low back pain and left sided radiculopathy with MRI evidence of facet joint arthritis at L4-5 and L5-1 and mild diffuse disc bulge. Dr. Bayran offered pain medication which Petitioner refused. He also ordered PT and advised her to remain off work. There was no mention of the EMG/NCV by Dr. Tuttle. (PX # 5, p. 13).

On April 17, 2012, Petitioner returned to Dr. Stobnicki with ongoing left sided pain sensation of pricking unchanged since the injury fall at work. He recommended an MRI of the head and EMG of the left upper and lower limbs. Dr. Stobnicki did not mention the February 2012 EMG from Dr. Tuttle. Dr. Stobnicki further advised Petitioner to return to light duty, and to undergo an FCE and a psychiatric evaluation. (PX # 3, pp. 7-8). This was the last visit to Dr. Stobnicki.

On April 25, 2012, Petitioner returned to Dr. Bayran with the same left sided pain complaints. Dr. Bayran stated, "I do not have a good anatomical explanation for her left upper and lumbar radiculopathy based in her cervical and lumbar spine MRI." Dr. Bayran wanted to review the EMG to determine if an explanation can be formulated. He also recommended she see a spine surgeon. (PX #5, p. 16).

On May 30, 2012, Petitioner sought treatment with Dr. Sokolowski, an orthopedic surgeon, with complaints of neck pain, left arm pain, lumbar pain, left lower extremity pain, associated numbness, tingling and burning. The history further noted that the symptoms are subsequent to a work-related injury. Petitioner stated that she was in her usual state of health and working on January 25, 2011 when she tripped and fell over a mat landing face first on the tile. Petitioner reported that she immediately developed left arm pain and numbness as well as neck pain, low back pain and left lower extremity pain. Past medical history was reported as otherwise negative. Dr. Sokolowski reviewed the January 25, 2011 and January 31, 2012 MRI's and diagnosed cervical pain, left cubital tunnel syndrome, lumbar pain and lumbar radiculopathy. The EMG was not mentioned. Dr. Sokolowski recommended diagnostic injections for the lumbar and cervical spine. (PX # 7, p. 13).

On June 6, 2012, Dr. Bayran concurred with Dr. Sokolowski plan for injections. (PX # 5).

Petitioner's medical treatment from 2013 to present

On January 30, 2013, Dr. Bayran recommended Mobic, but Petitioner discontinued use on her own accord. Dr, Bayran noted on March 6, 2013 the importance of continuing to take Mobic and also prescribed Topamax. However, on April 3, 2013, Petitioner told Dr. Bayran that she stopped taking Topamax. (PX # 5).

On July 3, 2013, Dr. Bayran recommended another EMG that was performed by Dr. Lipson on July 15, 2013. On 7/3/13 Dr. Bayran recommended another EMG. Dr. Lipson noted: "She had no prior history of neck or back pain, numbness, tingling or weakness until she was at work on 1/25/11 and tripped on a mat. She had immediate onset of severe neck and back pain, neither of which occurred before and both have presided ever since, waxing, and waning but never going away." Nerve conduction studies were normal. Dr. Lipson interpreted the EMG findings to show C7 radiculopathy and S1 radiculopathy. He recommended epidural steroid injections and causally related the radiculopathy to the January 25, 2011 incident. Dr. Bayran documented his agreement with Dr. Lipson and recommended injections on July 15, 2013, November 20, 2013, and January 15, 2014. (PX # 5).

On February 4, 2014, Dr. Sokolowski recorded the same left sided complaints and noted his review of Dr. Lipson's EMG. (PX # 7, p. 14).

On September 20, 2014, Petitioner testified that she seen at the Lutheran General Hospital Emergency room after her back and leg went out while walking. She fell and broke her left foot. She received follow-up care for the left foot injury with Dr. Todd Simmons at Orthopedic Surgery Specialists. He prescribed a boot and pain medications. (T #1. pp. 21 – 22).

On October 4, 2014, Dr. Sokolowski diagnosed Petitioner with cervical pain and radiculopathy, lumbar pain and radiculopathy and foot fracture as a consequence of untreated radiculopathy. He ordered new MRIs as well as injections. (PX # 7; p. 16).

The remainder of 2014, 2015, 2016, to September 2017 have no treatment records. Petitioner admitted that she did not treat for the remainder of 2014 until September 2017 due to a lack of insurance.

Dr. Sokolowski examined Petitioner on September 18, 2017; January 9, 2018; October 1, 2018; and April 8, 2019 with no material changes in Petitioner's complaints, his diagnosis, and his treatment recommendations. (PX # 7, pp. 18-22).

On April 23, 2020, Dr. Sokolowski had a telephone consultation and stated that the EMG suggested mild left C6-7 irritation. (PX # 7).

Respondent's IME with Dr. Zelby

On September 18, 2019 Petitioner was seen by Dr. Andrew Zelby, neurosurgeon, for an IME. Dr. Zelby reviewed a neurology evaluation with Dr. Frank from November 2011, and a visit note from Dr. Sokolowski in October 2018. Petitioner complained of constant pain in the back of the neck that runs down to the left shoulder, then hurts along the outside of the arm just above the elbow and then back of the left hand. Dr. Zelby opined that Petitioner has quasi-radicular distribution but no radicular findings on exam. It was unclear to Dr. Zelby the basis for Petitioner pain and why she had been off work. Dr. Zelby requested review of the previous diagnostic studies to better understand her condition and potential need for future treatment. (RX # 2, Exh 2).

On August 24, 2020, Dr. Zelby issued an addendum after review of CT scan of the head from August 2007, CT scan of the head from January 2008, MRI of the brain with MRA from March 2009, MRI of the brain from January 2011, MRI of the cervical spine from January 2008, MRI of the cervical spine from March 2009, MRI of the cervical spine from January 2017, and an MRI of the lumbar spine from July 2017. Dr. Zelby did not review any additional medical records. Dr. Zelby noted that it was unclear what symptoms Petitioner had between 2007 – 2011 but stated that her symptoms were persistent enough to have various imaging studies performed. Comparing Petitioner's pre- and post-accident image studies, Dr. Zelby opined that there were no interval changes beyond natural changes that normally occur through the passage of time. (RX # 2, Exh 3).

Dr. Zelby opined that Petitioner's fall at work on January 25, 2011 did not exacerbate aggravate, accelerate, or alter in any way her prior cervical or lumbar condition He stated that Petitioner's subjective complaints cannot be corroborated with any objective medical findings. Dr. Zelby opined that Petitioner required no more than 4-6 weeks of directed physical therapy to treat "any condition of infirmity in the nervous system and spine related to the incident at work." Per Dr. Zelby, Petitioner had reached MMI by the end of May 2011 at the latest and required no additional medical treatment. (RX # 2, Exh 3).

Dr. Zelby testified by deposition on September 30, 2020 and his testimony was consistent with his reports. (RX #2)

Petitioner's current condition

She currently notices constant nagging pain on her left side radiating from the left side of her neck into the shoulder, arm, and hand. She also has low back pain going down from the left buttock into her foot. All of these symptoms started on January 25, 2011. (T #1. pp. 25 – 26).

Petitioner testified that she has not undergone the recommended epidural steroid injections due to lack of insurance authorization. She wishes to undergo the steroid injections prescribed by Dr. Sokolowski. (T #1. pp. 22 – 26).

She further testified that Dr. Sokolowski is presently prescribing Hydrocodone, but it does not relieve her pain. She has not worked anywhere since January 25, 2011. She is unaware of her employment status with the Chicago Board of Education, but she is no longer on their group insurance. (T #1. pp. 24 – 25).

She has not looked for work since January 25, 2011. She cannot drive because her pain is distracting. She grocery shops with her daughters and she has good days and bad days. She can't do simple everyday movements, she can sit, walk, and reach. Occasionally she will cook. She cannot type, but she uses the Internet on a limited basis. (T #1. pp. 60 to 82).

CONCLUSIONS OF LAW

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

Issue C, whether the accident arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds as follows:

The phrase "in the course of employment" refers to the time, place, and circumstances of the injury. McAllister v. Illinois Workers' Compensation Comm'n, 2020 IL 124848, ¶ 34. A compensable injury occurs 'in the course of' employment when it is sustained while he performs reasonable activities in conjunction with his employment. Id.

"The 'arising out of' component is primarily concerned with causal connection. To satisfy this requirement it must be shown that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." Id. at ¶ 36. To determine whether a claimant's injury arose out of his employment, the risks to which the claimant was exposed must be categorized. Id. The three categories of risks are "(1) risks distinctly associated with the employment; (2) risks personal to the employee; and (3) neutral risks which have no particular employment or personal characteristics." Id. at ¶ 38.

An injury resulting from a neutral risk, that is one to which the general public is equally exposed, does not arise out of the employment. Caterpillar Tractor Co. v. Industrial Com, 129 Ill. 2d 52, 58, 541 N.E.2d 665, 667 (1989). By itself, the act of walking across a floor at the employer's place of business does not establish a risk greater than that faced by the general public. First Cash

Financial Services v. Industrial Comm'n (Rios), 367 Ill. App. 3d 102, 105, 853 N.E.2d 799, 804 (1st Dist. 2006). If employment conditions create a risk to which the general public is not exposed, the injury may arise out of employment. The increased risk may be qualitative, such as the dangerous nature of the stairs in the instant case, or quantitative, such as where the employee is exposed to a common risk more frequently than the general public. Illinois Consolidated Telephone Co. v. Industrial Comm'n, 314 Ill. App. 3d 347, 353, 732 N.E.2d 49, 54 (5th Dist. 2000).

Petitioner credibly testified that the floor mat **moved** when she stepped on it resulting in her fall. Petitioner testified that the mat was on a tile floor. (See T #1, p. 12, 84).

Petitioner did not fall in an area exposed to the general public. Respondent's witness, Mr. Irvin, testified that Petitioner fell near a main entrance that "mainly staff use during the morning coming in from the main parking lot" and that Petitioner came in through a door that "rarely gets used..." (RX #6, p. 13, lines 6-25).

Petitioner did not slip on a normal, household mat. Mr. Irvin described the mat as a large industrial sized, weighted mat with the school's logo. (See RX # 6, p. 18).

Respondent disputes that there was any defect on the mat or that it could have been moved as Petitioner described. Mr. Irvin testified that the mat on the date of accident was dry and flat with no upturned corners or edges. He further testified that the mat is so heavy that two people are needed to lift the mat. (See RX # 6, pp. 16-18). Additionally, Respondent contends that Petitioner is not credible given the suspect timeline between Petitioner's work accident and notice of her eventual termination. While the Arbitrator takes such evidence into consideration, the Arbitrator finds Petitioner credible when it comes to her testimony regarding accident. Petitioner was taken to the ER via ambulance. ER records document a slip at work. Medical records consistently document a work history consistent with Petitioner's testimony.

Finding Petitioner's testimony credible with regards to accident, the Arbitrator finds that the nature of the mat moving on a title floor is a qualitative increased risk to which the general public is not exposed. **As a result, the Arbitrator finds that Petitioner's accident arose out of and in the course of her employment by Respondent.**

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

To obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. A work-related injury need not be the sole or principal causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. Even if the claimant had a preexisting degenerative condition which made him more vulnerable to injury, recovery for an accidental injury will not be denied as long as he can show that his employment was also a causative factor. Thus, a claimant may establish a causal connection in such cases if he can show that a work-related injury played a role in aggravating his preexisting condition. Sisbro, Inc. v. Industrial Comm'n, 207 Ill. 2d 193, 205, 797 N.E.2d 665, 278 Ill. Dec. 70 (2003).

Although medical testimony as to causation is not necessarily required, an aggravation of a preexisting condition primarily concern medical questions and not legal questions. Nunn v. Industrial Com., 157 Ill. App. 3d 470, 478, 510 N.E.2d 502, 506 (4th Dist. 1987).

Petitioner has a substantial medical history of pain to the left side of the body. While Petitioner admitted that she has described her pre- and post-accident pains the same way, she explained that the pain after the work accident was radiating, whereas the pain after the stroke did not radiate down. (See T # 1, pp. 71- 73). However, her prior medical records clearly document radiating pain to her upper and lower extremities.

In 2010, Petitioner was still reporting a burning sensation in her left lower leg and left arm with headaches and neck pain. (See RX # 1, p. 43-45). On August 3, 2010, Petitioner reported to Dr. Goldstein, "occasional pins in her left arm, left foot as well as a burning sensation in those same extremities." (RX #1, p. 64). Her last known visit prior to her work accident was on December 7, 2010 with Dr. Sadowski who instructed her to see a neurologist for left side body twitching. (See RX #1, p. 46).

The Arbitrator takes into consideration the medical opinions rendered by Petitioner's treating physicians. Dr. Neema Bayran, pain management, wrote on June 4, 2014, "I do believe that her symptoms are causally related to the work injury on January 25, 2011." However, Dr. Bayran did not document any past medical history. (See PX #5). The same is true for Dr. Lipson as well as Petitioner's current orthopedic surgeon, Dr. Sokolowski, who rendered causation opinions in their treatment notes. (See PX # 7, 9).

Petitioner's past medical history is significant in this case especially given the similarities in Petitioner's pain complaints pre-and post-accident. The Arbitrator cannot assume that Petitioner' treating physicians were aware of her complex past medical history. Moreover, without medical testimony saying otherwise, the Arbitrator cannot assume that Petitioner's treating physicians took her medical history into account when forming their opinions. As a result, the Arbitrator disregards their causation opinions.

Respondent's Section 12 examiners, Dr. Zelby and Dr. Frank, had a better understanding of Petitioner's prior medical history. Dr. Zelby, who reviewed prior imaging studies, testified that Petitioner may have had a cervical and lumbar strain that resolved after April 2011. (RX # 2, pp. 23-24). Dr. Frank relied on the initial EMG/NCV study (finding no evidence for mononeuropathy, plexopathy or polyneuropathy) and on February 17, 2012 stated that Petitioner was at MMI and required no further treatment as there were no ongoing neurologic or orthopedic issues. (See PX # 2, p. 69, C1; PX # 7, pp. 29-31).

The Arbitrator further relies on Petitioner's initial orthopedic surgeon, Dr. Shapiro, who noted that the MRI of the cervical spine confirmed a minor disc bulge at C6-7 with no nerve compression and the lumbar MRI showed no evidence of herniation. (See PX #4, pp. 4-5). Even Dr. Bayran's April 25, 2012 note states, "I do not have a good anatomical explanation for her left upper and lumbar radiculopathy based in her cervical and lumbar spine MRI." (PX #5, p. 16).

The Arbitrator finds that Petitioner sustained posttraumatic cervical and lumbar strains that resolved on February 17, 2012, and at which point Petitioner had reached MMI and required no further treatment or work restrictions related to the work accident. (See RX # 2, p. 75).

Based on the medical evidence and the record as a whole, the Arbitrator finds that Petitioner has not met her burden of proof and finds that Petitioner's *current* condition of ill-being is not causally related to the injury.

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

Section 8(a) of the Act states a Respondent is responsible "…for all the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter incurred, limited, however, to that which is reasonably required to cure or relieve from the effects of the accidental injury…" A claimant has the burden of proving that the medical services were necessary, and the expenses were reasonable. See Gallentine v. Industrial Comm'n, 201 Ill.App.3d 880, 888 (2nd Dist. 1990).

Having found that Petitioner sustained posttraumatic cervical and lumbar strains that resolved on February 17, 2012, the Arbitrator further finds Petitioner's treatment for the cervical and lumbar spine from dates of service, January 25, 2011 through February 17, 2012 to be reasonable and necessary and finds that Respondent has not paid for said treatment.

As such, the Arbitrator orders Respondent to pay Petitioner directly for the following outstanding medical services, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act:

- **City of Chicago EMS - $755.00 (See PX # 12);**
- **Addison Emergency Physicians - $337.00 (See PX # 13);**
- **Addison Radiology Associates - $1,877.00 (See PX # 14);**
- **Illinois Bone & Joint Institute - $552.00 (See PX # 15);**
- **The Pain Center of Illinois - $593.00 (See PX # 16, DOS 1.11.12 & 2.15.12);**
- **Lakeshore Open MRI - $5,000.00 (See PX # 17); and**
- **Dr. Sadowski for DOS 1.25.11 – 2.17.12 only (See PX # 19)**

Issue K, whether Petitioner is entitled to any prospective medical care, the Arbitrator finds as follows:

As the Arbitrator finds that Petitioner sustained posttraumatic cervical and lumbar strains that resolved on February 17, 2012, no prospective medical is awarded.

Issue L, whether Petitioner is entitled to temporary total disability benefits, the Arbitrator finds as follows:

A claimant is temporarily totally disabled from the time an injury incapacitates him from work until such time as he is as far recovered or restored as the permanent character of his injury will permit. Westin Hotel v. Indus. Comm'n, 372 Ill.App.3d 527, 542 (1st Dist. 2007).

In determining whether a claimant remains entitled to receiving TTD benefits, the primary consideration is whether the claimant's condition has stabilized and whether she is capable of a return to the workforce. Interstate Scaffolding, Inc. v. Illinois Workers' Comp. Comm'n, 236 Ill.2d 132, 148 (2010). Once an injured employee's physical condition stabilizes, she is no longer eligible for TTD benefits. Archer Daniels Midland Co. v. Indus. Comm'n, 138 Ill.2d 107, 118 (1990).

Having found that Petitioner sustained posttraumatic cervical and lumbar strains that resolved on February 17, 2012, the Arbitrator further finds Respondent liable for 55 4/7 weeks of TTD benefits (1.25.11 through 2.17.12) at a weekly rate of $603.38 which corresponds to $33,530.69 to be paid directly to Petitioner. Respondent is entitled to a total credit of $7,843.92 ($2,413.52 in disputed TTD and $5,430.40 as a PPD advancement).

Issue O, whether Respondent's Exhibits 6a and 6b are admissible over Petitioner's hearsay objections, the Arbitrator finds as follows:

The Illinois rules of evidence govern proceedings before the Commission unless the Act provides otherwise. RG Construction Services v. Illinois Workers' Compensation Comm'n, 2014 IL App (1st) 132137WC, ¶ 35, 24 N.E.3d 923. Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ill. R. Evid. 801.

Respondent contends that Respondent's Exhibits 6a and 6b are admissible as Business Records. See Ill. R. Evid. 803; Ill. Sup. Ct. R. 236.

Under Rule 806(6), records of regularly conducted activity are considered an exception to hearsay and may be admitted if (1) the records were made at or near the time by, or from information transmitted by, a person with knowledge; (2) the records were kept in the course of a regularly conducted business activity, **and** (3) it was the regular practice of that business activity to make such records. The opposing party may show that the exception should not apply as the source of information, or the method or circumstances of preparation indicate lack of trustworthiness. Ill. R. Evid. 803; See Ill. Sup. Ct. R. 236 (stating that business records are admissible if made in the regular course of business, **and** if it's the regular course of the business to make such records).

The foundation laid in Larry Irvin's evidence deposition is sparce. With regards to Respondent's Exhibit 6a (witness statements), Mr. Irvin testified that after Petitioner was taken to the ambulance, "and while it was still fresh on people's minds and knowing the context of timing when it was happening, I went around right away and captured statements from everyone who was around her at that time and in that area…" (RX # 6, p. 15, lines 13-21). With regards to Respondent's Exhibit 6b (discharge records), Mr. Irvin testified that such records are kept in the normal course of business in the Chicago Public Schools system. (RX # 6, p. 20, lines 11-16). While Respondent may contend that it's the Chicago Board of Education's regular practice to make such records, no witness provided such testimony, and the Arbitrator cannot make that assumption. Thus, the

Arbitrator finds that Respondent's foundation for Respondent's Exhibits 6a and 6b to qualify as Business Records is incomplete.

Further, even if Respondent's Exhibits 6a and 6b qualified as Business Records, there are inadmissible hearsay statements contained within. Hearsay within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules. Ill. R. Evid. 805.

As a result, Petitioner's hearsay objections to Respondent's Exhibits 6a and 6b are sustained.

It is so ordered:

Arbitrator Rachael Sinnen

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC032100
Case Name	Carmela Smith v. State of Illinois - Illinois State University
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0347
Number of Pages of Decision	26
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	William Trimble
Respondent Attorney	Bradley Defreitas

DATE FILED: 8/14/2023

/s/ Deborah Simpson, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF McLEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Carmela Smith,
Petitioner,

vs. NO: 15 WC 32100

State of Illinois/Illinois State University,
Respondent.

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 28, 2022, 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.

Pursuant to §19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review. Therefore, no appeal bond is set in this case.

AUGUST 14, 2023
o7/26/23
DLS/rm
046

/s/*Deborah L. Simpson*
Deborah L. Simpson

/s/*Stephen J. Mathis*
Stephen J. Mathis

/s/*Deborah J. Baker*
Deborah J. Baker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC032100
Case Name	SMITH, CARMELA v. STATE OF ILLINOIS/ILLINOIS STATE UNIVERSITY
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	24
Decision Issued By	Kurt Carlson, Arbitrator

Petitioner Attorney	William Trimble
Respondent Attorney	Bradley Defreitas

DATE FILED: 5/25/2022

THE INTEREST RATE FOR THE WEEK OF MAY 24, 2022 1.53%

/s/ Kurt Carlson, Arbitrator
Signature

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

May 25, 2022

/s/ Michele Kowalski

Michele Kowalski, Secretary

Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF **McLean**)

☐ 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

Carmela Smith Case # **15** WC **032100**
Employee/Petitioner

State of Illinois/Illinois State University
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Kurt Carlson**, Arbitrator of the Commission, in the city of **Bloomington**, on **02-25-22**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **8/10/2015**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**20,800.00**; the average weekly wage was $**400.00**.

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

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

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

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

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

ORDER

Respondent shall pay to Petitioner temporary total disability benefits of $293.33/week for 302 3/7 weeks, comprised of the period commencing August 25, 2015, through September 21, 2015, for 3 6/7 weeks, together with the period commencing October 10, 2015 through October 23, 2015, for 1 6/7 weeks, and the period from June 27, 2016 through February 25, 2022, for 295 5/7 weeks, all as provided in Section 8(b) of the Act.

In the alternative, Respondent shall pay to Petitioner temporary total disability benefits of $293.33/week for 53 1/7 weeks, comprised of the period commencing August 25, 2015 through September 21, 2015, for 3 6/7 weeks, together with the period commencing October 10, 2015 through October 23, 2015, for 1 6/7 weeks, and the period from June 27, 2016 through May 24, 2017, for 47 3/7 weeks, all as provided in Section 8(b) of the Act, then maintenance from May 25, 2017 through February 25, 2022, for 248 2/7 weeks, as provided in Section 8(a) of the Act.

Respondent shall pay the following medical bills as set forth in Petitioner's Exhibit 22 under the fee schedule.

OSF St. Joseph Medical Center	$42,814.04
Heartland Emergency Specialists	$726.00
Bloomington Radiology	$219.00
Bloomington Medical Laboratories	$844.86
Central Illinois Orthopedic Surgery	$37,476.70
Bloomington Normal Healthcare Surgicenter	$225.00
McLean County Anesthesia	$2,228.59
Medsource	$1,830.50

Respondent has paid no bills and is not entitled to a credit.

Respondent shall pay Petitioner permanent partial disability benefits of $264.00/week for 196.75 weeks, because the injuries caused 50% loss of use to the right leg and 20% loss of the person as a whole, as provided in Section 8(e) and 8(d)2 of the Act.

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

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

Kurt A. Carlson

Kurt A. Carlson

MAY 25, 2022

STATEMENT OF FACTS

Carmela Smith (Petitioner) testified that she was educated through 10th grade at Bloomington High School, then received her GED in 1979 and 1980. (TX 8-9) She had office skills training through a federal job program. (TX 9) Petitioner then worked as a cashier and Midas Muffler from about 1980 to 1982, as an office clerk at Bloomington Glass from 1982 to 1988, as an office clerk at Quest Healthcare from 1988 to 1981, as an office clerk at LNC Imaging for six years, and as a clerk at a bakery for two years, which was a standing job. (TX 9)

Petitioner began work at ISU in 2009 and started as a snack bar attendant at Jamba Juice in the REC Center. She moved around a couple times to different venues. Her duties included: cleaning, stocking, waiting on customers, supervising students, and food preparation. (TX 10)

Approximately two years before injury, she moved to U High School, a high school that was part of ISU, do the same things but with no supervisors and no nonstudent help. For all this, she was on her feet 7.5 to 8 hours per day. (TX 10-11)

Before August 10, 2015, Petitioner's knees had never caused her to miss work. She was able to perform her work duties without hindrance. On August 10, 2015, Petitioner's official job title was Snack Bar Attendant. (TX 11) She was earning $10.63/hour and working approximately 40 hours per week. (TX 10-11) On August 10, 2015, Petitioner was working in the Bone Student Center at ISU because U High was out of session. At the Bone Student Center, Petitioner was working at McAllister's Deli. (TX 12) McAllister's Deli was very busy because ISU students their parents were returning to campus and needed to eat. Petitioner testified that at this time the line of patrons was "usually out the door." (TX 12)

August 15, 2012, Petitioner was assigned to bussing tables and delivering food. She described the rush for this work: "Like I said, the line was out the door because they got really super busy. So I was bussing tables, and, of course, we had to hurry up and clear the tables so the people would have a place to sit down." (TX 12) While clearing a table, Petitioner turned to walk away from the table with dishes in her hand to take back to the kitchen, turned to the right, and "felt something pop in [her] knee." She went back to the kitchen and rubbed her knee and tried to baby it for the rest of the shift. Her supervisor asked her whether she was OK, and she said that she had thought she twisted her right knee. (TX 13) Petitioner testified that she was limping the rest of the day. She went home, sat down, put it up, and put ice on it. (TX 13) She went to work the next day, but her right knee was still sore, and she called Dr. Brett Keller. (TX 14)

Petitioner had previously had treatment with Dr. Brett Keller for her left knee and hip (TX 14; PX 6), so she saw Dr. Keller for the new pain in her right knee on August 14, 2015. (TX 14; PX 6) Petitioner reported to Dr. Keller that her knee had given way on her, and that the pain was aching and sharp in nature. Dr. Keller diagnosed Petitioner with right knee osteoarthritis and possible right knee meniscus tear and scheduled her for right knee MRI. (PX 6). Also on August 14, 2015, Petitioner prepared a written incident report. (PX 15)

August 17, 2015, Petitioner underwent MRI of her right knee. That MRI report reflects a history of a twisting injury, with knee pain anteriorly and medially. The MRI showed moderate degenerative changes,

especially medial compartment, and "tear within the posterior horn and body of the medial meniscus" (PX 4)

August 18, 2015, Petitioner saw Dr. Keller in follow-up. Dr. Keller examined her as well as reviewed the MRI results and diagnosed Petitioner with a right knee medial meniscus tear. After discussing options, Petitioner and Dr. Keller planned on a right knee arthroscopy with medial meniscectomy. (PX 6)

On August 25, 2015, Respondent notified Petitioner that her work injury was not compensable, and that she should look elsewhere for medical coverage for it. (TX 17; PX 7)

August 26, 2015, Dr. Keller performed right knee arthroscopy with abrasion chondroplasty of the patella, partial medial meniscectomy, removal of loose joint body, and arthroscopic debridement/excision of the medial synovial plica. (PX 5) Also that date, Dr. Keller provided FMLA certification to Respondent, indicating that post-surgery, Petitioner could not perform any job functions. (TX 19; PX 6)

August 27, 2015, Petitioner was evaluated for physical therapy. She attended physical therapy from 8/31/15 to 9/23/2015. (PX 6)

On September 10, 2015, Petitioner saw Dr. Keller in follow-up to her right knee arthroscopy. She was progressing well. Dr. Keller noted that Petitioner was to remain off work and avoid strenuous activities at home until follow-up in one week. She was to continue physical therapy, to apply ice three times daily, and to elevate and apply compression to the knee. (TX 19-20; PX 6)

September 17, 2015, Petitioner saw Dr. Keller in further follow up for her right knee arthroscopy. Dr. Keller ordered that Petitioner continue physical therapy for 7 to 14 days and continue home exercise program after that was completed. He ordered Petitioner to return to work with restrictions as of September 21, 2015. (PX 6)

Employee status reports from Dr. Keller were also submitted as part of Petitioner's exhibit six. The stated no work September 10, 2015, through next appointment, September 17th, 2015; restricted work September 17, 2015, through indefinite (limited to 2-4 hours of standing per 10-12 hour workday, with occasional bending, climbing, kneeling, and/or squatting); and as of September 21, 2015, return to work without restrictions. (PX 6)

Petitioner underwent physical therapy from 8/31/15 to 9/21/15 (PX 7) On September 23, 2015, Petitioner returned to physical therapy and reported that she was pleased with our progress and that she planned to return to work September 28, 2015. (PX 7)

Petitioner did not receive TTD while she was off work. (TX 21) She returned to work September 28, 2015. However, Petitioner was in pain when she was working. On October 7, 2015, she woke up and could hardly walk because of knee pain. Petitioner testified that she had to go to work in house shoes because she couldn't bend her knee enough to put her foot in her shoe. Despite her pain, she wanted to go to work because "I had like immaculate attendance, and I didn't like to miss unless I absolutely had to or had a doctor saying it was okay." (TR 22) However, from work she went to the emergency room. (TX 22)

The Arbitrator notes that the emergency room records on October 7, 2015 were not put into evidence by either party.

On October 10, 2015, Petitioner saw Dr. Keller for follow-up evaluation for her right knee. She told him about her October 7 visit to the emergency room. Dr. Keller provided her an injection of Kenalog and Lidocaine and scheduled her for follow-up in one week. (TX 23, PX 7) He took her off work until her next appointment, October 16, 2015. (PX 7)

On October 16, 2015, Petitioner saw Dr. Keller and reported that her right knee felt unstable and that she had pain. She reported this was causing difficulty with her sleeping. She remained off from work at that time. (TX 24) Dr. Keller planned for her to continue Meloxicam or use ibuprofen. Dr. Keller noted that Petitioner had obtained slight improvement from use of cortisone injection. She was to remain off work for one additional week, until October 23, 2015. (TX 24, PX 7)

On November 5, 2015, Petitioner returned to see Dr. Keller for 9 weeks postoperative visit. She reported that she had noticed more pain recently but was doing well. She continued to have sharp shooting pain in the medial and lateral aspect of the knee joint and was using ice and Norco to control the pain. Dr. Keller provided an Effluxa injection. (TX 25, PX 7)

On November 12, 2015, Petitioner return to see Dr. Keller for follow-up and to receive her second Effluxa injection. She reported pain at 4-5/10, with increased pain when at work. (TX 25, PX 7)

On November 24, 2015, Petitioner returned to see Dr. Keller for follow-up and to receive her third Effluxa injection. She reported pain at 4-5/10, with increased pain when at work. (TX 26, PX 7)

On December 18, 2015, Petitioner was once again seen by Dr. Keller. She reported pain in her knee 5/10 while standing and 8/10 with activity. Dr. Keller recommended a medial unloader brace for the right knee and noted that Petitioner and failed all other conservative treatments. (TX 26, PX 7)

Petitioner found the knee brace uncomfortable and did not find that it made her knee feel better. (TX 27) She returned to Dr. Keller March 10, 2016, to follow up on her right knee osteoarthritis. She noted that she had increased pain when she would stand in one place for more than a minute or when she would stand after being seated for a while. Her knee would swell, especially after work, and she used ice mainly for the swelling. (TX 27-28) Dr. Keller noted that she had recent arthroscopic surgery and had not obtained relief from conservative treatment including activity restrictions, anti-inflammatory medications, pain medications, physical therapy/home exercise program, and cortisone/Synvisc injections. Based on this history, Dr. Keller recommended right total knee replacement. (PX 7)

Petitioner did not get her knee replacement right away, because she wanted to wait to have the surgery until the school year got over for U High and wanted to take advantage of a program which would keep her from being without pay for the entire recovery time. (TX 29) On June 23, 2016, Petitioner saw Dr. Keller for a preoperative visit for her right total knee arthroplasty. Since Petitioner had failed all conservative treatment, this was the remaining option. (PX 7)

June 27, 2016, Dr. Keller performed right total knee arthroplasty on Petitioner. (TX 30, PX 23)

Petitioner underwent physical therapy June 23, 2015 to August 15, 2016. (PX 8, 9)

On July 12, 2016, Dr. Keller saw Petitioner two weeks postoperatively. She continued to use her CPM machine and take Norco for pain. He prescribed Petitioner to remain off work and avoid any strenuous

activity at home, as well as to remain off work until follow-up visit or other release from his office. (PX 8)

On August 2, 2016, Dr. Keller saw the Petitioner postoperatively. She was doing well five weeks postoperatively and was progressing well. Dr. Keller prescribed physical therapy. (PX 8)

On August 16, 2016, Dr. Keller saw Petitioner in further follow-up. He noted that she was having some shooting pain down to her lower leg. She was improving her strength and decreasing her pain with physical therapy. He ordered physical therapy, three visits per week for four weeks, and ordered Petitioner to remain off work and to avoid strenuous activities at home. (PX 8)

Petitioner had physical therapy August 17, 19, and 24, 2016. (PX 8)

On September 1, 2016, Petitioner saw IME physician Dr. Nikhil Verma. However, the visit only concerned her left knee. Respondent stipulated that only the wrong knee was examined and discussed. (see TX 31-32)

On September 27, 2016, Petitioner saw Dr. Keller in follow-up of her TKA. She reported that she took Tylenol with codeine and used ice for pain and inflammation management, but that she experienced remaining pain down the posterior aspect of her right leg and had noticeable crepitus. Dr. Keller prescribed Petitioner to remain off work at the time due to continued weakness and instability. (TX 33, PX 8)

On November 8, 2016, Dr. Keller saw Petitioner five months postoperatively. She reported constant shooting and burning pains in her knee that she would rate at 4/10. Dr. Keller ordered physical therapy, three visits per week for four weeks. (PX 10)

Petitioner had further physical therapy on November 14, 2016, November 16, 2016, November 21, 2016, November 30, 2016, December 5, 2013, December 7, 2016, and December 12, 2016. (PX 10)

On December 13, 2016, Dr. Keller saw Petitioner again. She reported improvement, but reported pain 610 with some swelling, some buckling, and weakness. Physical therapy was going okay. Most of her pain was at night. Regarding the buckling, Petitioner testified that "I used to walk a lot, so I tried to get out and walk when the weather was decent. Other times when I took a step with my right foot, it would just kind of give out on me. And I couldn't go down any hills, and I had to grab with both arms to go downstairs because it would buckle. Just walking it would buckle." (PX 34) Dr. Keller noted that Petitioner might need diagnostic arthroscopy if knee the symptoms did not improve in the near future. (PX 10) Petitioner testified that she was unable to return to a job with full time standing at this time. (TX 35)

Petitioner had further physical therapy from December 14, 2016 to January 11, 2017. (PX 10)

On January 12, 2017, Petitioner again saw Dr. Keller. She had continued pain at the lateral joint line near the IT band, consistent with IT band tendinitis. She complained of knee buckling several times a day. She had no signs of loosening of any components but had a slight left knee discrepancy. Dr. Keller planned to continue anti-inflammatories, finish physical therapy, and transition to home exercise. Dr. Keller noted that "it is unlikely that Petitioner will be able to return to her normal job." (TX 35-36, PX 10)

On March 7, 2017, Dr. Keller again saw Petitioner. At this time, she was treated for right knee IT band syndrome. She continued to complain of pain, continued to be sore at times, but was improving. She continued to experience some buckling and swelling. She had pain at night. She continued to be off work. (PX 12)

On April 4, 2017, Petitioner saw Dr. Keller. She continued to have pain, worse with going up and down stairs. Her pain was 3/10. Dr. Keller performed a Kenalog and lidocaine injection in the right distal quadriceps region. (PX 12) Petitioner testified, regarding going up and down stairs, "it's difficult, especially if they're really steep, because I can't bend my leg up that far." (TX 37)

On May 2, 2017, Dr. Keller saw Petitioner in follow up to this injection. Petitioner stated she had received relief for 1 to 2 weeks but still had concerns about her knee giving way. Petitioner was reluctant to receive physical therapy due to concerns about Workers' Compensation paying for it. Petitioner's work restrictions continued at this time. (PX 12)

On May 30, 2017, Dr. Keller again saw Petitioner. His diagnosis at that time was right knee quadriceps tendinitis. Symptoms seemed to be worse with physical therapy. Dr. Keller discontinued physical therapy and continued home exercise. Petitioner still had instability and buckling in her knee. Dr. Keller released her to work with restrictions. (PX 12)

On July 11, 2017, Petitioner again saw Dr. Keller. She had suffered a recent incident of knee buckling while walking. Although she had been released to work with restrictions, she had been informed that she could not work with restrictions. Although FCE had been ordered, Workers' Compensation would not pay for it. Dr. Keller was looking for a second opinion from Dr. Bonutti. Dr. Keller discussed revision surgery with Petitioner. At this time, Petitioner did not want another knee surgery. (TX 39-40, PX 11)

On August 8, 2017, Dr. Keller again saw Petitioner. At this time Petitioner had suffered a fall. Dr. Keller noted that workers' compensation did not approve a second opinion with Dr. Bonutti. (PX 11)

On September 11, 2017, Petitioner returned to see IME Nikhil Verma, MD, for a second time. Petitioner testified that Dr. Verma spent very little time examining her knee, but that it was the right knee this time. (TX 41)

On October 10, 2017, Dr. Keller saw Petitioner for continued right knee pain. Her pain was 3/10 at that time, and 8/10 at night. Petitioner was taking Tylenol number three for her symptoms and was remaining off work. She remained off work. Dr. Keller again planned for a referral to joint replacement specialist, since she now had had an examination with a work comp physician who recommended it. (PX 11)

On November 7, 2017, Petitioner returned for revaluation. Her symptoms had been getting worse for the past few weeks. Her pain was 3/10 at that visit, and Petitioner reported that it was 8/10 at night. Petitioner was taking Tylenol number three with only mild pain relief. She remained off work. Referral to Dr. Bonutti or a total joint specialist in Peoria was again to be attempted. (PX 11)

Petitioner attended physical therapy January 9 and 11, 2017. (PX 11)

On January 23, 2017, Petitioner returned to see Dr. Keller and complained that her current medications were not helping the pain, which was 4/10, worse at night. Dr. Keller had referred her to pain

management and return her to work with restrictions of sit-down work. At this time, Petitioner was not interested in another surgery. (TX 42, PX 11)

On March 7, 2017, Petitioner again saw Dr. Keller. She continued to experience random knee buckling and swelling, also with increased pain at night. She continued to be off work. Dr. Keller ordered a functional capacity evaluation to consider a possible return to work. (PX 12)

On April 4, 2017, Petitioner again saw Dr. Keller. Her knee pain was worse going up and down stairs. Dr. Keller provided an injection in the right distal quadriceps region. (PX 12)

On May 2, 2017, Petitioner again saw Dr. Keller. After the injection she had received relief for approximately 1-2 weeks. Her discomfort was at 3-4/10, and she had some concern about her knee giving away on her. Dr. Keller planned to obtain a functional capacity evaluation

On January 23, 2018, Petitioner again saw Dr. Keller. Her current pain medications were not helping much anymore, and she had a constant pain level of 4/10, worse at night. Dr. Keller ordered blood work and a three-phase bone scan, and referred Petitioner to pain management for further treatment options. He returned her to work with restrictions of sit-down work only. (PX 13)

On February 27, 2018, Petitioner followed up with Dr. Keller. Her pain was 4/10. She had no worsening of her symptoms but had continued instability in her right knee. She was taking Tylenol number three with no relief of pain, and Meloxicam with minimal relief. (PX 11)

On April 4, 2018, Petitioner was seen by Dr. Joseph Ajdinovich at Bonutti Orthopedic Services in Effingham, Illinois. Dr. Ajdinovich felt that if active infection were ruled out, he would recommend revision total knee arthroplasty with attention paid to balancing of her soft tissues, more specifically tightening of medial relative to lateral. (PX 14)

On May 8, 2018, Petitioner saw Dr. Keller. She had been seen by Dr. Bonutti's office for a second opinion. They were in agreement with Dr. Keller regarding the potential benefits of revision. Pain was 4/10, with Tylenol number three and Meloxicam. Petitioner noted that she had recently been unable to rise to stand on her right knee due to pain. She was to contact Dr. Ajdinovich at Dr. Bonutti's office if she wished to pursue surgical options. At that time, she was fit with a hinged knee brace. (TX 43-44, PX 11)

Also on May 8, 2018, Petitioner was reevaluated by physical therapy. She was seen again by physical therapy from May 10, 2018 to May 24, 2018, at which time she was to continue with home exercise program. (PX 11)

On November 27, 2018, Petitioner returned to Dr. Keller. Her symptoms were about the same. She continued use of a hinged knee brace while walking and was not interested in revision surgery at that time. Petitioner was still off work due to the continued need for restrictions and was to follow as needed. (TX 46, PX 11)

A year later, November 12, 2019, Petitioner returned to Dr. Keller. She had continued pain and mild mid flexion instability. She noted more instability in her knee when walking up or down a grade. She continued not to be interested in revision surgery. Dr. Keller continued home exercises, continued her use

of a brace if she was more comfortable in it, and continued restricted duty indefinitely. She was to follow up in one year. (TX 44-45, PX 11)

Another year later, November 24, 2020, Petitioner returned to Dr. Keller. She presented with right knee complaints and stated that it felt like she was walking on a stilt. She had trouble sleeping due to the pain and it was worse issue an uphill or was carrying something heavy. If she was walking downhill, her knee would buckle. Her pain was 5/10, and 8/10 during activity. Dr. Keller continued her restricted work status indefinitely. (TX 46-47, PX 11)

Petitioner had a third visit with IME Nikhil Verma, MD, April 5, 2021. (TX 48)

Petitioner testified that she had been off work continuously ever since her knee replacement. She has not received TTD but has been receiving disability through SURS. (TX 48) Petitioner testified that she must periodically certify to SURS that she continues to be disabled. (TX 49-50, PX 18) On cross examination, Petitioner testified that she no longer receives disability from SURS, since she had been forced to stop disability and start using retirement when she turned 62. (TX 53)

Petitioner testified that she could not stand on her feet all day at work, and that although she could maybe work standing for a couple of hours, she could not do this every day, but could do it "maybe every other day." (TX 50) Petitioner testified that she had attempted to find work within her restrictions. (TX 50, PX 19)

Employee Status Reports

Dr. Keller provided Petitioner with Employee Status Reports detailing her work restrictions from 2015 to 2020. These were submitted as Petitioner exhibit 17. (PX 17)

SURS Report of Physician's Disability Form for Continuation of Benefits

From time to time, Dr. Keller filled out periodic medical evaluations to determine eligibility for continuing SURS disability benefits. Petitioner submitted these forms authored by Dr. Keller from 2016 to 2020. Dr. Keller also filled out FMLA certifications. These forms were submitted as Petitioner's Exhibit 18.

Report of Vocational Rehabilitation Consultant Dennis W. Gustafson, M.S., CRC

On September 2, 2020, a written Vocational Assessment Report was prepared by Vocational Rehabilitation Consultant Dennis W. Gustafson, M.S., CRC. This report was entered into evidence without objection as Petitioner's Exhibit 3. The report details Petitioner's work history and current limitations as expressed by IME Nikhil Verma, MD: "Work and light capabilities include sedentary work with intermittent walking, standing 1-2 hours per day, no climbing, squatting, or kneeling and a 15-pound lifting restriction."

Based on his interview of Petitioner, her education and work background, and her medically documented physical limitations, Mr. Gustafson concluded that she was limited to work which was "Sedentary" as described in the USDOL *Revised Handbook for Analyzing Jobs* (1991). He noted that "Prior and no other food service-related duties are consistent with *sedentary* work, thus she is unable to resume prior employment with Illinois State University."

Mr. Gustafson is of the opinion that because of Petitioner's age and the length of time since she last performed office work (10+ years as of his September 2, 2020, report) she would be unlikely to secure office work, and there was no other stable job market for her since there were no other sedentary job areas within which she could successfully compete with other available workers.

Requests for Vocational Rehabilitation

Petitioner's counsel requested vocational rehabilitation October 2, 2020, November 6, 2020, December 4, 2020, and October 8, 2021. (PX 16) Vocational rehabilitation was never provided. By the time of hearing, Petitioner no longer sought vocational rehabilitation.

Notes from Job Search

As above, vocational rehabilitation was never provided. Petitioner submitted a resume she prepared on her own as well as some records of a job search she conducted. (PX 19) As above, by the time of hearing, Petitioner no longer sought vocational rehabilitation.

Evidence deposition of Dr. Brett Keller taken July 15, 2016

The evidence deposition of Dr. Brett Keller, taken July 15, 2016, was introduced into evidence as Petitioner exhibit 1. Dr. Keller testified that he was a board-certified orthopedic surgeon. (PX 1, p. 4)

Dr. Keller testified that he saw Carmela Smith October 14, 2015, with complaints of right knee pain. He performed an examination and scheduled an MRI. (PX 1, pp. 6-7) Dr. Keller saw Petitioner again August 18, 2015. Her examination showed moderate joint effusion and moderate degenerative changes, but also showed a tear within the posterior horn of the medial meniscus and a small Baker's cyst. Dr. Keller testified that because Petitioner had a significant meniscus tear on MRI and was lacking five degrees of extension with a joint effusion, he scheduled her for MRI. Dr. Keller testified that "I felt like I could get her better quickly with a scope, with an arthroscopy." (PX 1, pp. 6-7)

On August 26, 2015, Dr. Keller performed arthroscopic surgery on Petitioner. His postoperative diagnosis was right knee medial meniscus tear, grade 3/4 chondromalacia of the patella, grade 3/4 chondromalacia medial femoral condyle, medial tibia plateau, loose joint body, and hypertrophic medial synovial plica. (PX 1, p. 9) He performed right knee arthroscopy, abrasion chondroplasty at the patella, partial medial meniscectomy, removal of loose joint body and debridement/excision of the synovial plica. Dr. Keller testified that, to a reasonable degree of medical and surgical certainty, the surgical procedure was necessary. (PX 1, p 10)

Dr. Keller testified that if on August 10, 2015, Petitioner was clearing tables at ISU, and twisted her knee when she turned to walk away from a table, this could have caused the medial meniscus tear that Dr. Keller found, because a twisting injury can cause a medial meniscus tear. The other things that Dr. Keller found in Petitioner would have been aggravated by the twisting injury. (PX 1, p. 11)

Dr. Keller testified that the use of a Game Ready system, which he prescribed on August 26, 2015, was necessary because the Game Ready system can minimize edema, help with pain control, and assist with earlier recovery and return to work. Petitioner would have been unable to return to work as of the date of her surgery. (PX 1, p. 11)

Dr. Keller saw Petitioner in follow-up September 10, 2015, for post-operative evaluation. She was progressing well and making good progress in physical therapy with range of motion and strength, but still had discomfort and swelling and relied on Norco for pain control, mainly at night. (PX 1, p. 13) Petitioner's knee incisions were well healed, and she had a slightly reduced range of motion. Dr. Keller prescribed Meloxicam, an anti-inflammatory, and Norco for pain control. He also kept her off work. (PX 1, p. 14)

On September 17, 2015, Dr. Keller again saw Petitioner in follow-up. With continued physical therapy, Petitioner continued to see improvements in her right knee. Her surgical sites were healed, she had mild joint effusion, and she had a normal range of motion. (PX 1, p. 14-16) Dr. Keller continued Petitioner's physical therapy for 7- 14 days, with home exercise program to follow. Although range of motion was normal, Dr. Keller testified that therapy can help with strengthening as well. Dr. Keller kept Petitioner on restrictions until September 21. 2015. (PX 1, p. 16)

On October 9, 2015, Dr. Keller again saw Petitioner. She had right knee pain and wanted follow-up evaluation. Petitioner related to Dr. Keller that on October 7, 2015, she had gone to the emergency room concerned about pain and swelling in her knee and foot. She was unsure of the cause of the pain but related that she had been sore after work on October 6, 2015, and woke up the next morning in severe pain, shooting in character, 5/10, with feeling of instability and mild swelling in the right knee and foot. She told Dr. Keller that she had been given prednisone in the emergency department with some relief. She had slightly decreased knee extension, but otherwise full range of motion. Although she had stopped attending physical therapy on September 23, 2015, due to scheduling conflicts, she was pleased with her progress. (PX 1, p. 17) Dr. Keller noted medial joint line tenderness, moderate joint effusion, and range of motion 0 to 110, representing a slight reduction. (PX 1, p. 17) Because of the increased pain, inflammation, and joint effusion, Dr. Keller gave Petitioner a cortisone injection and took her off work. (PX 1, p. 18)

October 16, 2015, Dr. Keller saw Petitioner again. She reported the knee continued to bother her when walking or if she sat for a long time. She also reported that it felt unstable, and that she experienced a sharp pain with pivoting, as well as difficulty sleeping due to an inability to get comfortable. (PX 1, p. 18) Dr. Keller kept Petitioner off work. (PX 1, p. 19)

November 5, 2015, Dr. Keller saw Petitioner nine weeks postoperatively. She was doing well postoperatively but had noted more pain in her knee recently. She had sharp shooting pain in her medial lateral aspects of her knee, had been controlling her pain with ice, and occasionally needed to use Norco. (PX 1, p. 19) Dr. Keller gave Petitioner an Euflexxa injection, which is a hyaluronic injection and has been shown to relieve the symptoms of osteoarthritis. (PX 1, p. 20) November 12, 2015, Dr. Keller provided a second Euflexxa injection, (PX 1, p. 20) and gave Petitioner a third Euflexxa injection November 24, 2015. (PX 1, p. 21) On November 24, 2015, Petitioner rated her pain as 4/10, with pain in the medial aspect of her right knee, and increased pain when at work. She continued to have a mild joint effusion. (PX 1, p. 21)

December 18, 2015, Petitioner again saw Dr. Keller. She continued to complain of right knee pain and had pain while lifting objects. She had tenderness at the medial femoral condyle, a slight varus alignment, and a range of motion which was slightly decreased, at 0-110 degrees. Dr. Keller recommended a medial unloader brace, and scheduled Petitioner to be fit for that. He considered that Petitioner had failed all

other conservative treatments, and she wanted to wait before pursuing total knee replacement. (PX 1, p. 22) However, Dr. Keller did recommend knee replacement on that date. (PX 1, p. 23)

March 10, 2016, Dr. Keller saw Petitioner in follow-up. Petitioner complained of swelling in her knee, pain after standing a long time, and that her knee was swollen, especially after work. She still had tenderness in the medial femoral condyle and a slightly decreased range of motion, with flexion at 110 degrees. (PX 1, p. 23)

On June 27, 2016, Dr. Keller performed right total knee replacement on Petitioner. She had failed all conservative treatment for her degenerative osteoarthritis, and knee replacement was necessary to treat it. (PX 1, p. 24) Dr. Keller testified that if on August 10, 2015, Petitioner was clearing tables and twisted her knee when turning to walk away from the table, that this work accident caused her meniscus tear and likely aggravated her preexisting osteoarthritis. (PX 1, p. 25)

On cross-examination, Dr. Keller testified that he saw Petitioner on September 19, 2014, for her hip. Although on that visit she noted increased inflammation in her knees, increased by sitting in a certain way or lying on her left side, he did not examine her knees, and did not make any comment about her knees. (PX 1, pp. 25-26) He next saw her for her left knee pain on April 3, 2015, and diagnosed her with left knee moderate to advanced osteoarthritis, right knee moderate osteoarthritis. (PX 1, p. 27) The next time Petitioner saw Dr. Keller was August 14, 2015. (PX 1, p. 28)

Also on cross-examination, Dr. Keller testified that if Petitioner were holding or pushing something at the time she had a twisting injury, it could have increased the force to which the knee was subjected, making it further likely that she had a twisting type mechanism causing her meniscus tear. (PX 1, p. 31)

Dr. Keller testified that the medial meniscus tear he observed on surgery was a large tear. A degenerative tear of the meniscus could look a bit degenerative or old and could have ossification. Dr. Keller testified that his operative reports did not mention ossification. (PX 1, p. 33) If the tear had been ossified, he would have mentioned it in his operative report. (PX 1, p. 34) A large medial meniscus tear would be typically caused by a compression and twisting injury or a twisting injury, and that after suffering such an injury a person could still potentially stand but would probably limp. They would not necessarily have to fall but would find it a bit difficult to put full weight on the knee due to sudden sharp pain. Petitioner would have possibly been able to complete her job duties after suffering such an injury, but it would have probably been difficult. (PX 1, pp. 34-35) Dr. Keller testified that Petitioner never told him that she had suffered similar pain prior to her work accident. (PX 1, p. 35)

Dr. Keller testified that the 3/4 chondromalacia he noted on arthroscopic surgery indicated moderate osteoarthritis. (PX 1, p. 36) He testified that it was unlikely that the chondromalacia could develop in the time between the accident and when he saw Petitioner. However, the accident injured the meniscus and likely aggravated the cartilage a bit at the same time, because the cartilage is in the joint. (PX 1, p. 38)

Dr. Keller testified that symptomatically it was likely that the work injury aggravated Petitioner's cartilage. "I think what happened, the combination of the meniscus tear inflamed the knee, irritated the knee. We took out the meniscus, and that in combination with the accident, you know, can progress symptoms which is what we saw with her. So when her symptoms completely did not resolve with the knee arthroscopy, that's when we went down the road of the anti-inflammatory injections and Euflexxa."

(PX 1, p. 42) Dr. Keller testified that after the initial meniscal surgery, "early on, she did pretty well. She presented normal post operatively with some swelling, some pain. She got better over the first 6 to 8 weeks, and then kind of plateaued and then got worse from there.… I don't think she had a new injury or anything like that.… She got worse to the point where we had to initiate cortisone injections and that sort of a thing." (PX 1, p. 46)

Regarding Petitioner's emergency room visit for knee pain and swelling, Dr. Keller confirmed that "in someone who has arthritis of the knee, and she did too much work, it could cause sudden onset of the painful swollen knee that I guess some people would go to the ER for." (PX 1, p. 49)

Dr. Keller testified that although it is hard to know exactly, when a portion of meniscus is removed, that makes the articular cartilage more prone to developing arthritis over time. (PX 1, p. 54) He testified that both the meniscus tear and the subsequent surgery aggravated Petitioner's arthritis. (PX 1, p. 55)

Clarifying and summarizing his previous testimony, Dr. Keller testified that "twisting injury caused the meniscus tear, which necessitated the knee arthroscopy which resulted in a progression of the arthritis." This is because without medial meniscus to distribute force between the femur and the tibia, there is more force on the cartilage. (PX 1, pp. 64-65; *see also* p. 67) He testified that although he had seen Petitioner prior to her work injury, he made no recommendation for a surgical procedure, and no recommendation for an MRI, and no findings of medial meniscal tear. (PX 1, pp. 63-64)

Evidence deposition of Dr. Brett Keller taken September 7, 2021

The evidence deposition of Dr. Brett Keller, taken September 7, 2021, was introduced into evidence as Petitioner's exhibit 26. Dr. Keller testified that he had continued to treat Petitioner after performing knee replacement June 27, 2016. (PX 26, p. 5)

On August 2, 2016, Dr. Keller saw Petitioner five weeks postoperatively. At this time, she was doing well, and he prescribed physical therapy. (PX 26, p. 6)

On August 16, 2016, Dr. Keller again saw Petitioner, and noted that she was progressing well with physical therapy. (PX 26, p. 7)

On September 27, 2016, Dr. Keller again saw Petitioner. He noted continued weakness and swelling. He continued home exercises as well as physical therapy, provided a heel lift to help with ambulation, and kept her off work due to continued weakness and instability. (PX 26, pp. 7-8)

On November 8, 2016, Dr. Keller saw Petitioner in further follow-up. He testified that there was no reason to believe that there was a change in her ability to work at that time. (PX 26, p. 8-9)

On December 13, 2016, Dr. Keller saw Petitioner for further follow-up. She was improved from the last visit, but had pain 6/10, with most of her pain at night, and had some swelling of her knee, as well as buckling and weakness, and problems with her strength if she stood for too long. (PX 26, p. 9) Dr. Keller testified that she would not have been able to return to a job that required full-time standing. (PX 26, p. 10)

On January 12, 2017, Petitioner again saw Dr. Keller. She had continued pain at the lateral joint line near the IT band, consistent with IT band tendinitis. She had no signs of loosening of any components but had

a slight left knee discrepancy. Dr. Keller planned continuing anti-inflammatories, finish physical therapy, and transition to home exercise. Dr. Keller noted that it was unlikely that Petitioner would be able to return to her normal job. At this time, Petitioner complained of knee buckling several times a day. (PX 26, p. 10)

On March 7, 2017, Dr. Keller again saw Petitioner. At this time, she was treated for right knee IT band syndrome. She continued to complain of pain and to be sore at times but was improving. She continued to experience some buckling and swelling. She had pain night. She continued to be off work. (PX 26, p. 11) Dr. Keller testified that to a reasonable degree of medical certainty and more probably true than not, she had IT band syndrome, which was a direct result of her knee replacement, and therefore a direct result of her work injury. (PX 26, p. 11) Dr. Keller testified that for the same reason he would relate Petitioner's knee buckling and swelling to her work accident. (PX 26, p. 12)

On April 4, 2017, Petitioner saw Dr. Keller. She continued to have pain, superior pole of the patella, worse with going up and down stairs. Her pain was 3/10. Dr. Keller diagnosed her with right knee distal quadriceps tendinitis with history of right total knee replacement. Again Dr. Keller related this to Petitioner's work injury and knee replacement. Dr. Keller performed a Kenalog and lidocaine injection. (PX 26, p. 12-13)

On May 2, 2017, Dr. Keller saw Petitioner in follow up to her April 4, 2017, injection. Petitioner stated she had received relief for 1 to 2 weeks but still had concerns about her knee giving way. Dr. Keller believed Petitioner would benefit from physical therapy but there were concerns about workers' compensation paying for it. Petitioner's work restrictions continued at this time. (PX 26, pp. 13-14)

On May 30, 2017, Dr. Keller again saw Petitioner. His diagnosis at that time was right knee quadriceps tendinitis. Symptoms seemed to be worse with physical therapy. Dr. Keller discontinued physical therapy and continued home exercise. Petitioner still had instability and buckling in her knee, and still had work restrictions. (PX 26, pp. 14-15)

On July 11, 2017, Petitioner again saw Dr. Keller. Dr. Keller considered that conservative treatment had been exhausted and was looking for a second opinion from Dr. Bonutti. Dr. Keller discussed revision surgery with Petitioner. Petitioner remained on work restrictions. At this time Petitioner did not want another knee surgery. (PX 26, pp. 15-16)

On August 8, 2017, Dr. Keller again saw Petitioner. At this time Petitioner has suffered a fall, it did not change the overall condition of her knee. Dr. Keller testified that the fall was "a transient thing." (PX 26, pp. 17-18)

On October 10, 2017, Dr. Keller saw Petitioner for continued right knee pain. Her pain was 3/10 at that time, and 8/10 at night. Petitioner was taking the Tylenol number three for her symptoms and was remaining off work. He kept her off work due to her right knee. (PX 26, pp. 18-19)

On November 7, 2017, Petitioner returned for revaluation. Her symptoms had been getting worse for the past few weeks. Her pain was 3/10 and she was taking Tylenol number three. Again Dr. Keller attempted to make a referral to Dr. Bonutti, noted that Petitioner would make a referral to a Springfield total joint specialist, and prescribed Tramadol. (PX 26, pp. 19-20)

On January 23, 2017, Petitioner returned to see Dr. Keller and complained that her current medications were not helping the pain. Dr. Keller ordered blood tests and a bone scan and referred her to pain management for additional recommendations. He returned Petitioner to work with restrictions of sit-down work. At this time, Petitioner was not interested in another knee surgery. Dr. Keller testified that the sit-down restrictions were a direct result of her work injury. (PX 26, pp. 21-22)

On February 27, 2018, Petitioner followed up with Dr. Keller. Her pain was 4/10. She had no worsening of her symptoms but had continued instability in her right knee. Blood tests did not indicate any sign of infection, fracture, or dislocation. Petitioner was taking Tylenol number three with no relief of pain, and Meloxicam with minimal relief. (PX 26, pp. 22-23)

On May 8, 2018, Petitioner saw Dr. Keller. She had been seen by Dr. Bonutti who agreed with Dr. Keller regarding the potential benefits of revision. Pain was 4/10, with Tylenol number three and Meloxicam. She noted that she had recently been unable to rise to stand on her right knee due to pain. She was to contact Dr. Ajdinovich if she wished to pursue surgical options. At that time, she got a hinged knee brace. (PX 26, pp. 23-24)

November 27, 2018, Petitioner returned to Dr. Keller. She had continued pain and mild mid flexion instability. Her symptoms were improved with a hinged knee brace and she was not interested in revision surgery at that time. Petitioner was still off work due to the continued need for restrictions and was to follow as needed. (PX 26, pp. 24-25)

A year later, November 12, 2019, Petitioner returned to Dr. Keller. She had continued pain and mild mid-flexion instability. She continued not to be interested in revision surgery. Dr. Keller continued home exercises, continue to use a brace, and continued restricted duty indefinitely. She was to follow up in one year. He testified that it was his opinion at this time that unless there was some new treatment, Petitioner's condition was about as good as it was going to get. He again considered that (PX 26, p. 25)

November 24, 2020, Petitioner returned to Dr. Keller with right knee complaints and stating that it felt like she was walking on a stilt. She had trouble sleeping due to the pain and it was worse when walking uphill or carrying something heavy. If she was walking downhill, her knee would buckle. Her pain was 5/10, and 8/10 during activities. Dr. Keller continued her restricted work status. He testified that to a reasonable degree of medical certainty and more probably true than not, the need for her work restrictions was due to her work accident. (PX 26, pp. 26-27)

Dr. Keller testified that from time to time he provided Petitioner with work restrictions for the purpose of her work disability. He testified that as of the time of the deposition he considered her to be unable to stand or walk more than two hours, unable to climb, and unable to kneel or squat. He testified that to a reasonable degree of medical certainty these limitations were a result of her work injury of August 10, 2015. (PX 26, p. 28)

Evidence deposition of Dr. Nikhil Verma taken July 31, 2019

The evidence deposition of Dr. Nikhil Verma taken July 31, 2019, was introduced into evidence as Respondent exhibit 8.

Dr. Verma testified that he is a board-certified orthopedic surgeon with an added qualification in sports medicine. (RX 8, p. 5) Dr. Verma testified that he had been retained by Respondent to perform two independent medical examinations of Petitioner, taking place September 21, 2016, and September 11, 2017. (RX 8, p. 8) He testified that at the first examination Petitioner gave a history of right knee work accident in which she twisted her knee and felt knee pain when clearing a table August 10, 2015. She subsequently had swelling, was told she had a meniscal tear that required surgery and underwent an arthroscopy and subsequently a knee replacement. (RX 8, p. 9) Dr. Verma gave a recap of Petitioner's medical history. (RX 8, pp. 10-11)

September 21, 2016, Dr. Verma performed a physical examination of Petitioner finding that her left knee had no effusion, had a range of motion from 0-130°, and normal stability, normal neurovascular examination, no limp, no pain through range of motion, no pain over the joint lines, and normal patellar examination. Her right knee had a limited range of motion from 0-95°. (RX 8, p. 12) At that this time, Dr. Verma was examining the left knee only, so he gave the opinion that there was no causal relationship between the left knee condition (preexisting arthritis with no active finding) and any work accident. (RX 8, p. 12)

September 11, 2017, Dr. Verma performed a physical examination of Petitioner's right knee and reviewed updated treatment records. He noted a mild limp on the right side, well-healed incision consistent with knee replacement, some persistent swelling, and a range of motion which was deficient at 0-100°, with normal stability and neurovascular examination. His impression was that she was status post a knee arthroplasty with persistent pain. (RX 8, p. 15) Dr. Verma testified that the arthritis in Petitioner's knee was the sort that was chronic or longstanding and that meniscal tears are present in 50% or more of patients with degenerative arthritis. (RX 8, p. 16) Dr. Verma testified that Petitioner needed treatment including a full knee replacement because of degenerative changes in her knee that took place over a long period of time and were not related to her work accident. (RX 8, pp. 17-18)

On cross examination, Dr. Verma testified that he charged $1,250.00 for each IME he performed of Petitioner, $2,000.00 to give a deposition, and said he performed 5 to 7 IMEs a week for a 44 to 45 workweek year. (RX 8, p. 21-22)

Dr. Verma testified that treatment to date for Petitioner's right knee had been reasonable and necessary, and it was appropriate that Petitioner be restricted to light duty capacity, standing 1 to 2 hours per day, no sliding, climbing, or kneeling, 15-pound listing restriction. (RX 8, pp. 23-24) he agreed that it was possible for a person to have the condition of arthritis and for that condition to be aggravated by trauma or surgery so that it became more symptomatic. (RX 8, p. 30)

Dr. Verma agreed that Petitioner had a meniscal tear. He agreed that nowhere in either IME report he prepared did he express any determination regarding Petitioner's meniscal tear. (RX 8, pp. 26-27)

Dr. Verma testified that he did not believe that Petitioner was faking her condition either time he saw her. (RX 8, p. 32)

Evidence deposition of Dr. Nikhil Verma taken October 6, 2021

The evidence deposition of Dr. Nikhil Verma taken October 6, 2021, was introduced into evidence as Respondent exhibit 9.

Dr. Verma testified that he again examined Petitioner April 5, 2021, to evaluate bilateral knees. (RX 9, p. 5) Dr. Verma testified that he believed Petitioner had reached maximum medical improvement, and that she would benefit from a functional capacity evaluation. (RX 9, pp. 8-9)

Dr. Verma testified that Petitioner's treatment she had undergone to date had been reasonable and necessary as it relates to the right knee, regardless of whether or not it was causally connected to her work accident. (RX 9, p. 8)

Bill List and Itemized Bills

A bill list and itemized bills related to Petitioner's knee injury were submitted without objection as Petitioner's Exhibit 22.

Records Pertaining to Petitioner's Thumb Injury

At the time of hearing, it was determined that no hearing would be held as to Petitioner's thumb injury. Therefore Exhibits 20, 21, 24, and 25, while submitted with Petitioner's exhibits, are not referenced herein and are not considered for the purpose of this Decision.

CONCLUSIONS OF LAW

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

The Arbitrator finds that Petitioner has carried her burden of showing that her injury to her right knee arose out of and in the course of her employment with Respondent. In support of this finding, the Arbitrator relies on the Petitioner's unrebutted testimony and the medical evidence from Petitioner's treating Physicians.

The Arbitrator notes that it is well established that "[t]o obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of the evidence, that [s]he has suffered a disabling injury which arose out of hand in the course of [her] employment." *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193. 203 (2003). An injury "arises out of" employment when "the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Id.* A risk is incidental to the employment when it belongs to or is connected with what the employee has to do in order to fulfill her job duties. *McAllister v. Illinois Workers' Compensation Comm'n*, 2020 IL 124848, ¶ 36. Put another way, an injury arises out of an employment-related risk (*i.e.*, a risk "distinctly associated with" and "incidental to" her employment) if, at the time of the currents, the employee was performing acts she was instructed to perform by her employer, acts which she had a common law or statutory duty to perform, or acts which the employee might "reasonably be expected to perform incident to [her] assigned duties." *Id*; *see also Caterpillar Tractor Co. v Industrial Comm'n*, 129 Ill. 2d 52, 58 (1989).

For these reasons, the Arbitrator concludes that, so long as Petitioner's injury came from pivoting while rushing to clear a table, at work, during a particularly busy time, the injury arose out of and in the course of her employment with Respondent. As below, the Arbitrator concludes that Petitioner has met her

burden of establishing that her injury was caused in precisely this manner, both by establishing a "chain of events," and by the testimony of her treating orthopedic physician Dr. Brett Keller.

The unrebutted testimony of Petitioner is that prior to August 10, 2015, her knees had never caused her to miss work, and she was able to perform all of her work duties without hindrance. Her unrebutted testimony is that on August 10, 2015, at the time of her accident, she was bussing tables and delivering food in an unusual rush because of a very high number of patrons. While rushing, and with dishes in her hands, she injured her knee. The Arbitrator finds the testimony of treating orthopedic surgeon Dr. Brett Keller more credible than that of IME physician Dr. Nikhil Verma as to the cause of Petitioner's knee injury for several reasons:

First, Dr. Keller credibly described how Petitioner's knee injury happened, in a manner which is consistent with Petitioner's own account of her injury.

Second, during surgery Dr. Keller saw the meniscal tear in Petitioner's knee and testified at deposition that it would have been difficult for Petitioner to work at her job with that tear.

Third, Dr. Keller had treated Petitioner prior to her work injury, and she did not report these symptoms. Although prior to the accident he did note osteoarthritis in both knees, he did not recommend an MRI, did not recommend a surgical procedure, and did not find meniscal tear.

Fourth, Dr. Keller testified that on surgery, Petitioner's meniscal tear did not look ossified or old, suggesting that it was not degenerative.

The Arbitrator further concludes that Petitioner's current condition as it relates to the right knee was causally connected to the accident through the "chain of events" analysis. Proof of prior good health and change immediately following and continuing after an injury may establish that the impaired condition was due to injury. *Ill. Power Co. v. Indus. Comm'n*, 176 Ill. App. 3d 317 (4th Dist. 1988).

In *Corn Belt Energy Corp. v. Illinois Workers' Comp. Comm'n*, 2016 IL App (3d) 150311WC, the court held that the Arbitrator could accord more weight to the chain of events analysis than the opinions of the Section 12 physician. In *Kawa v. Illinois Workers' Comp. Comm'n*, 2013 IL App (1st) 120469WC, the Appellate Court reaffirmed the chain of events analysis. The court found that the claimant established a "causal nexus between the accident and his condition of ill-being" based on the evidence that the claimant's condition had begun no sooner than the work-related accidents and continued with no intervening cause that broke the chain of events. *Id.*

Petitioner credibly testified that prior to August 10, 2015, she was never caused to miss work by any condition of her knee. It is unrebutted that after the accident her condition was markedly and consistently worse.

Additionally, an accident need only be *a* cause of a condition of ill-being for a claimant to recover under the Act. *Schroeder v. Ill. Workers' Comp. Comm'n*, 2017 IL App (4th) 160192WC ¶ 29.

For these reasons, the Arbitrator finds that an accident did arise out of and in the course of Petitioner's employment by Respondent.

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

The Arbitrator concludes that Petitioner's current condition of ill-being is causally related to her work injury. As set forth in the Arbitrator's analysis above, regarding disputed issue (C), the Petitioner has met her burden of showing by a preponderance of the evidence that the work-related accident of August 10, 2015, caused Petitioner's current condition of ill-being as it relates to her right knee, both by the chain of events analysis, and also by the testimony of her treating orthopedic surgeon, Dr. Brett Keller, which the Arbitrator finds more credible than that of IME physician Nikhil Verma, M.D.

The Arbitrator notes that Dr. Keller's explanation of how twisting could cause Petitioner's injuries is credible and is consistent with Petitioner's description of accident. Moreover, her onset of symptoms at work as described in her testimony and in the written report of injury further supports Dr. Keller's opinion.

The Arbitrator further notes in support of a finding that Petitioner's current condition of ill-being is causally related to her work accident the fact that Petitioner's medical records establish an unbroken chain of treatment from the date of the accident to the present.

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

The Arbitrator concludes that the medical services that have been provided to Petitioner were reasonable and necessary. In support of this, the Arbitrator notes that in his October 6, 2021, deposition, Respondent IME Dr. Verma testified that Petitioner's treatment to date had been reasonable and necessary. (RX 9, p. 8) The Arbitrator finds that even for IME physician Dr. Verma, the only issue in question was the cause of the injuries which were being treated.

The Arbitrator notes that Respondent does not claim to have paid any charges for Petitioner's medical services. The Arbitrator finds that Respondent has not paid the appropriate charges for these services.

Having found that Petitioner's right knee condition is causally related to Petitioner's work accident, the Arbitrator finds that the medical bills set forth in Petitioner's Exhibit 22, represent treatment that was reasonable and necessary to treat or relieve Petitioner's condition. The Arbitrator awards the following medical bills and orders Respondent to pay these bills subject to the fee schedule.

OSF St. Joseph Medical Center	$42,814.04
Heartland Emergency Specialists	$726.00
Bloomington Radiology	$219.00
Bloomington Medical Laboratories	$844.86
Central Illinois Orthopedic Surgery	$37,476.70

Bloomington Normal Healthcare Surgicenter	$225.00
McLean County Anesthesia	$2,228.59
Medsource	$1,830.50

Respondent has paid no bills and is not entitled to a credit.

WITH RESPECT TO ISSUE (K), WHAT TEMPORARY BENEFITS ARE IN DISPUTE, THE ARBITRATOR FINDS AS FOLLOWS:

The parties stipulated that Respondent paid neither TTD nor Maintenance benefits on this claim.

Petitioner was taken off work by Dr. Keller on August 25, 2015 (the date of her first arthroscopic surgery), through September 21, 2015 (when she was released to work), a period of 3 6/7 weeks.

She was again taken off work by Dr. Keller from October 10, 2015 (when she saw him after her emergency room presentation, and when he provided her a Kenalog injection), through October 23, 2015, a period of 1 6/7 weeks.

She was again taken off work by Dr. Keller from June 27, 2016 (the date of her knee replacement), and remained off work through the date of hearing, a period of 295 5/7 weeks.

While Petitioner testified that she sought work within restrictions, she was never provided with vocational rehabilitation, despite demands from Petitioner's counsel beginning at least October 2, 2020, and continuing through October 8, 2021. The Arbitrator further notes that this matter was originally noticed to be heard under § 19(b), seeking vocational rehabilitation.

Although the Arbitrator finds that Petitioner was owed TTD for the first two periods of disability, which total 5 5/7 weeks, as well as the time from her joint replacement surgery to the date of hearing, a period of 295 5/7 weeks, for a total of 301 3/7 weeks, the Arbitrator notes that if at some point between joint replacement and hearing Petitioner were to be considered to have reached maximum medical improvement, such as May 24, 2017 when she completed physical therapy, she would be entitled to maintenance for that period, since Respondent had an affirmative duty pursuant to Section 8(a) of the Act to provide vocational rehabilitation after maximum medical improvement was reached, even without the ongoing demands for vocational rehabilitation made by Petitioner's counsel. Therefore, the result would be the same. Respondent cannot avoid the responsibility to provide maintenance by refusing to provide vocational rehabilitation.

In either case, Petitioner is entitled to TTD (or TTD then maintenance) for 301 3/7 weeks.

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

Although Petitioner presented evidence of a wage loss, she has waived the right to recover under § 8(d)1. Petitioner is seeking an award not under Section 8(e)12, but under Section 8(d)2 of the Act.

Section 8(d)2 states, in pertinent part, the following: "If, as a result of the accident, the employee sustains serious and permanent injuries . . . [that] partially incapacitate him from pursuing the duties of his usual and customary line of employment but do not result in an impairment of earning capacity, or having resulted in an impairment of earning capacity, the employee elects to waive his right to recover under the foregoing subparagraph 1 of paragraph (d) of this Section," then she shall be entitled to 8(d)2 benefits.

Pursuant to Section 8.1 (b) of the Act, the Arbitrator, in determining the level of permanent partial disability, must use the following factors:

i. The reported level of impairment;
ii. The occupation of the injured employee;
iii. The age of the employee at the time of the injury;
iv. The employee's future earning capacity; and
v. Evidence of disability corroborated by the medical records.

With regard to (i) of Section 8.1(b) of the Act, the reported level of impairment:

There was no evaluation pursuant to the American Medical Association's Guide to the Evaluation of Permanent Impairment. Therefore the arbitrator gives no weight to this factor.

With regard to (ii) of Section 8.1(b) of the Act, the occupation of the injured employee:

Petitioner's occupation was as a snack bar attendant. This required her to be on her feet all day every day. She could not return to this job due to her restrictions and will never be able to do so. The Arbitrator gives considerable weight to this factor. Petitioner has suffered a job loss.

With regard to (iii) of Section 8.1(b) of the Act, the age of the employee at the time of the injury:

Petitioner was 56 years-old at the time of the accident and is less able than a younger person to develop job skills that accommodate her permanent restrictions. The Arbitrator notes that this is in accord with the report of Dennis Gustafson, which considers that at her age and with her lack of recent experience she would not be competitive with other workers for sedentary positions. The Arbitrator gives significant weight to this factor.

With regard to (iv) of Section 8.1(b) of the Act, the employee's future earning capacity:

Regarding Petitioner's future earning capacity, the Arbitrator finds persuasive the report of vocational consultant Dennis Gustafson. The Arbitrator agrees that given Petitioner's age and the length of time since she last performed office work (10+ years as of his September 2, 2020 report) she would be unlikely to secure office work, and there is likely no other stable job market for her since there are no other sedentary job areas within which she could successfully compete with other available workers.

The Arbitrator gives considerable weight to this factor.

With regard to (v) of Section 8.1(b) of the Act, evidence of disability corroborated by the medical records:

There was evidence of disability corroborated by the medical records, which show that Petitioner suffered meniscal tear initially requiring arthroscopic surgery, and subsequently requiring steroid injection, Effluxxa injections, the use of a brace, several rounds of physical therapy, joint replacement, more physical therapy, a different brace, and consultation for a revision total knee arthroplasty. The Arbitrator notes that as of November 24, 2020, Dr. Keller has restricted Petitioner to standing/walking 0-2 hours.

The Arbitrator considers that Petitioner is only able to function at the sedentary demand level. The Arbitrator gives significant weight to this factor.

Based on the factors above, the Arbitrator concludes the injuries sustained by Petitioner caused a 50% loss of use of the right leg and 20% loss of a person as a whole as provided in Section 8(d)2 of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC016658
Case Name	Christopher Crabtree v. State of Illinois – Pinckneyville Correctional Center
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	23IWCC0348
Number of Pages of Decision	19
Decision Issued By	Deborah Simpson, Commissioner, Deborah Simpson, Commissioner

Petitioner Attorney	Thomas Rich
Respondent Attorney	Shannon Rieckenberg

DATE FILED: 8/14/2023

/s/ Deborah Simpson, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Christopher Crabtree,

Petitioner,

vs. NO: 18 WC 16658

State of Illinois/Pinckneyville Correctional Center,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 11, 2022, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision.

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.

Pursuant to §19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review. Therefore, no appeal bond is set in this case.

August 14, 2023
o7/26/23
DLS/rm
046

/s/*Deborah L. Simpson*
Deborah L. Simpson

/s/*Stephen J. Mathis*
Stephen J. Mathis

/s/*Amylee H. Simonovich*
Amylee H. Simonovich

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC016658
Case Name	Christopher Crabtree v. State of Illinois/Pinckneyville Correctional Center
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	16
Decision Issued By	Linda Cantrell, Arbitrator

Petitioner Attorney	Thomas Rich
Respondent Attorney	Shannon Rieckenberg

DATE FILED: 7/11/2022

THE INTEREST RATE FOR THE WEEK OF JULY 6, 2022 2.50%

/s/ Linda Cantrell, Arbitrator
Signature

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

July 11, 2022

/s/ Michele Kowalski

Michele Kowalski, Secretary

Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF **MADISON**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

CHRISTOPHER CRABTREE
Employee/Petitioner

v.

STATE OF ILLINOIS/
PINCKNEYVILLE CORRECTIONAL CENTER
Employer/Respondent

Case # **18** WC **016658**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Linda J. Cantrell**, Arbitrator of the Commission, in the city of **Collinsville, Illinois**, on **April 28, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **04/10/2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**65,532.38**; the average weekly wage was $**1,260.24**.

On the date of accident, Petitioner was **41** years of age, ***single*** with **0** dependent children.

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

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

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

ORDER

Respondent shall pay the reasonable and necessary medical expenses outlined in Petitioner's Group Exhibit 1, directly to the medical providers per the Illinois medical fee schedule or PPO agreement, whichever is less, as provided in Section 8(a) and Section 8.2 of the Act. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits. Respondent shall receive credit for any medical expenses paid through its group medical plan and shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

The Arbitrator finds that Petitioner has not reached maximum medical improvement. Therefore, any award regarding the nature and extent of Petitioner's injuries shall be deferred until Petitioner's treating physician(s) establish that he has reached maximum medical improvement.

Respondent shall authorize and pay for prospective medical treatment recommended by Dr. Young, including, but not limited to, a left medial epicondylar release, cubital tunnel decompression, and carpal tunnel release, and post-operative care until Petitioner reaches maximum medical improvement.

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

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

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

JULY 11, 2022

Arbitrator Linda J. Cantrell

ICArbDec19(b)

STATE OF ILLINOIS)
) SS
COUNTY OF MADISON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

CHRISTOPHER CRABTREE,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	Case No.: 18-WC-016658
	)	
STATE OF ILLINOIS/PINCKNEYVILLE CORRECTIONAL CENTER,	)	
	)	
	)	
Employer/Respondent.	)	

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Collinsville on April 28, 2022, pursuant to Section 19(b) of the Act. The parties stipulate that Petitioner suffered accidental injuries that arose out of and in the course of his employment with Respondent on April 10, 2018. The issues in dispute are causal connection, medical bills, Section 8(j) credit, prospective medical care, and the nature and extent of Petitioner's injuries if the Arbitrator finds Petitioner reached maximum medical improvement. All other issues have been stipulated.

TESTIMONY

Petitioner was 41 years old, single, with no dependent children at the time of accident. Petitioner was hired by Respondent in 1998 and was a Correctional Officer at the time of accident. Petitioner testified that on 4/10/18 he escorted an inmate to the healthcare unit for a medical examination. The inmate began assaulting a nurse practitioner and Petitioner intervened. He removed the nurse from the room and scuffled with the inmate and they both fell to the floor. Petitioner testified that the incident was chaotic and he "ended up on the bottom of a pretty good pile of people" before the inmate was secured. Petitioner stated he injured his left hand, elbow, and arm, right knee, and right shoulder. He testified that his right knee and right shoulder were doing good now, but he still has problems with his left elbow and wrist. Petitioner testified that prior to the accident, he had not sustained any injuries or undergone any medical treatment to his left elbow or left wrist. Petitioner is right hand dominant.

Petitioner testified he has numbness in his left hand, fingers, and wrist. His symptoms increase with repetitive use, strenuous activities, and particularly work-related activities. He has not sustained any new accidents or trauma to his left wrist or elbow. He is currently under the

care of Dr. Young who he has not seen since November 2020. Dr. Young recommends surgery on his left elbow and wrist which he desires to undergo.

Petitioner testified he does not have any future appointments scheduled with Dr. Young or any other physicians with regard to his left upper extremity at this time. He is currently working full duty. He stops performing activities when his pain increases.

MEDICAL HISTORY

On 4/10/18, Traci Peek, RN, completed a Workers' Compensation Witness Report. (RX1) RN Peek indicated a Nurse Practitioner was being assaulted in the face by an inmate and Petitioner intervened. (RX1) While falling to the ground with the offender, Petitioner injured his left hand, left elbow, lower back, and right knee.

On 4/10/18, Tracy Peek, RN, completed an IDOC Incident Report and described an inmate striking a Nurse Practitioner in the face knocking her out of the chair and he continued to strike her while on the ground. (RX1) Petitioner restrained the inmate with the help of others and escorted him out of healthcare. An ambulance was called for the NP.

On 4/10/18, a First Report of Injury described Petitioner wrestled the combative inmate to the ground along with other staff. Petitioner had swelling and pain in his left hand, right knee pain, and soreness in his low back and right shoulder.

On 4/11/18, Petitioner completed a Workers' Compensation Employee's Notice of Injury form and stated an inmate began hitting a NP in the head with a closed fist. (RX1) He stated he tried to secure the inmate who was still fighting, and they all fell to the floor. Petitioner reported injuries to his left hand, right knee, lower back, and right shoulder.

On 4/12/18, Petitioner completed an IDOC Incident Report. (RX1) He reported an inmate began striking a NP in the face several times with a closed fist. Petitioner and other staff secured the inmate. Petitioner reported pain in the left hand and right knee.

On 4/13/18, Major D. Cleland completed a Supervisor's Report of Injury or Illness. (RX1) He reported Petitioner was assisting a combative inmate and had pain in his left hand, left elbow, right knee, and lower back.

Petitioner presented to the emergency department at Pinckneyville Community Hospital immediately after the accident. (PX3) He complained of pain in his left hand and right knee. It was noted the mechanism of injury was a direct blow from blunt trauma. Petitioner stated he was unsure how he injured his hand, he did not strike the inmate, and he struck his right knee on the ground when he and the inmate fell to the ground. Physical examination noted tenderness in the left sided fingers and right knee. X-ray of the left hand was normal and x-ray of the right knee revealed soft tissue swelling with no acute bony abnormality. Petitioner was diagnosed with a strained left hand and a right knee contusion. He was discharged with instructions to use ice, elevation, and over-the-counter medications and to follow up with his primary care provider within one to two days.

On 4/11/18, Petitioner presented to Workcare West where the history of injury was noted. (PX4) Petitioner reported left hand pain and swelling and right knee pain. Examination revealed pain with motion in the right shoulder, pain to palpation over the right patellar area, and pain with palpation and motion in the left hand, with limited range of motion. He was diagnosed with contusions of the right knee, left hand, and right shoulder. He was instructed to use ice, elevation, and over-the-counter medications, and continue working full duty.

On 4/17/18, Petitioner returned to Workcare and reported left hand tightness and aching He described his symptoms as minimal, improving, and varied with his level of activity. Petitioner reported increased symptoms with making a fist and improved with ice and rest. Swelling was noted. Petitioner complained of aching pain in his right knee that he described as minimal and rated 2/10. His pain increased with activity, kneeling, and palpation. Examination revealed pain with motion over the fourth left metacarpal with no swelling, and pain with motion and palpation of the right patellar area. Petitioner was placed at MMI and instructed to use ice for 20 minutes every two hours to reduce pain and swelling and to continue working on range of motion.

On 4/23/18, Petitioner presented to the Orthopaedic Institute of Southern Illinois, where the history of injury and initial symptoms were documented. (PX5) Petitioner reported left radial-sided DIP joint pain of the ring finger and discomfort to the dorsum side of his hand and forearm. Petitioner reported he got his finger "caught somehow" in the incident and initially had swelling, bruising, and decreased flexion of the DIP joint. He continued to have discomfort with flexion of his ring finger at the DIP joint. He noticed a knot at the radial side that resolved. Swelling and bruising has resolved. The pain radiates into his wrist and forearm that prevents him from performing his work duties without significant discomfort and weakness. No prior injuries were noted to his left hand. Examination revealed tenderness over the radial side of the DIP joint of the left ring finger, a palpable nodule, and discomfort upon flexion. X-rays of the left hand were normal. The working diagnosis was a tendon injury and Petitioner was instructed to follow up with Dr. Steven Young the following day. He was returned to work without restrictions effective 4/25/18.

On 4/24/18, Petitioner was examined by Dr. Young's PA-C, Timothy Jennings, who noted that since the work injury, Petitioner had been experiencing left forearm, hand, and ring finger pain rated 5-6/10. (PX5) X-rays of the left elbow and forearm were normal. Petitioner could make a full fist with his left hand and fully extend his fingers out to neutral. He had full wrist flexion and extension. He had full supination and pronation of the left forearm and full flexion and extension of the elbow with full strength and range of motion. PA Jennings noted it was unclear the exact mechanism of injury. He was diagnosed with a left upper arm contusion, prescribed Medrol Dosepak and Mobic, and instructed to follow up in four weeks. Petitioner did not want modified work duties.

On 5/17/18, Petitioner was examined by Dr. Steven Young for left hand swelling, numbness, and pain, and left forearm pain. (PX5) Dr. Young noted Petitioner's symptoms occurred constantly and were unchanged. Physical exam revealed pain over the left pronator tunnel, distal biceps tendon, and medial epicondyles, and pain with resisted flexion and supination of the left wrist. He was diagnosed with a contusion of the left upper arm and biceps

tendinitis, and possible pronator tunnel syndrome. A left elbow MRI was ordered, and he was returned to work without restrictions.

On 5/30/18, Petitioner was examined by Dr. George Paletta. (PX7) Dr. Paletta noted the history of assault and Petitioner's ongoing symptoms of left forearm and hand pain, with intermittent numbness and tingling, and swelling at the end of the day. Exam revealed tenderness over the pronator, medial epicondyle, and distal biceps tendon. Tinel's testing at the pronator caused sharp pain down the forearm without true dysesthesias. X-rays were normal and showed no evidence of premature degenerative changes. Dr. Paletta opined that the work injury was a causative or contributing factor to Petitioner's symptoms and noted that Petitioner had no prior history or pre-existing condition that would contribute to his symptoms. He ordered an EMG and nerve conduction study.

Petitioner presented to Dr. Daniel Phillips for the EMG/NCS on 6/25/18. (PX8) Dr. Phillips noted Petitioner suffered from left upper extremity pain, numbness, and weakness that increased over time. The study demonstrated mild demyelinative sensorimotor median neuropathy across the left carpal tunnel. The study was not impressive for pronator median nerve entrapment or radiculopathy and the ulnar nerve fell within the normal range. Dr. Paletta reviewed the study and noted that while Petitioner did have median nerve symptoms, the findings of carpal tunnel were mild, with no entrapment or compressive neuropathy. He recommended an MRI of Petitioner's forearm that was performed on 7/5/18 and revealed a normal left radius ulna. (PX7, 9)

Dr. Paletta recommended that Petitioner wear a cockup wrist splint and undergo an ultrasound-guided injection. On 7/19/18, Dr. Helen Blake noted Petitioner appeared to have referred proximal symptoms from a median nerve compression. (PX10) Examination revealed a positive Tinel's sign over the left wrist and a left corticosteroid injection to the carpal tunnel/median nerve area with ultrasound guidance was performed.

On 9/5/18, Dr. Paletta noted the injection did not provide any significant relief and Petitioner's elbow and forearm pain remained unchanged, while his fingers were worse. (PX7) An MRI of Petitioner's left elbow was performed that day and revealed radiocapitellar degenerative joint disease. (PX7, 11) Dr. Paletta felt the degenerative changes may have accounted for some of Petitioner's elbow pain but not for his neurologic complaints. He recommended a left elbow injection which was performed by Dr. Blake on 9/17/18.

On 10/31/18, Dr. Paletta noted the injection helped Petitioner's elbow pain by 50% but did not alleviate his hand symptoms. Petitioner still experienced pain and dysesthesias in his left third and fourth fingers. Dr. Paletta recommended a repeat EMG/NCS which was performed on 11/12/18 and revealed no significant changes from the previous study. (PX7, 8) Dr. Paletta recommended that Petitioner seek a second opinion on the etiology of his neurologic symptoms and referred him back to Dr. Young.

On 1/14/19, Dr. Young noted pain in Petitioner's left fingers, hand, and arm along with weakness. (PX5) Examination of the elbow was positive for pain in the radial tunnel and medial epicondyle, and a positive Tinel's sign. There was pain in the DIP joint of the left ring finger. X-

rays of Petitioner's left hand and wrist showed no malalignment or fracture. Petitioner underwent an injection in his left ring finger and he was instructed to follow up in three to four weeks. Due to his persistent symptoms, Dr. Young referred Petitioner for an MRI of his left ring finger, which was unremarkable. (PX5)

Petitioner underwent physical therapy at Rehab Unlimited. (PX12) The initial therapy note indicates Petitioner continued to experience pain in the elbow and hand, but therapy focused solely on his hand. On 4/25/19, Petitioner returned to Dr. Young's office following physical therapy and reported he was still symptomatic. At subsequent follow up visits, Petitioner continued to report the same symptoms of left hand and arm pain and numbness, which were aggravated by daily work activities. (PX5, 6/24/19, 8/15/19, 10/24/19) He was referred for additional physical therapy which did not improve his symptoms. (PX12; PX5, 8/15/19, 10/24/19, 1/20/20)

On 2/3/20, a repeat MRI of the left elbow was performed that revealed radial collateral and ulnar collateral ligament grade II injuries, medial and lateral epicondylitis, probable cartilage loss of the anterior radial head, tendinosis of the distal bicep tendon, and effusion. (PX13) Dr. Young assessed left elbow epicondylitis and left cubital and carpal tunnel syndrome. He recommended a left medial epicondylar release, cubital tunnel decompression, and carpal tunnel release. (PX5, 2/11/20, 11/10/20)

On 11/16/19, Petitioner was examined by Dr. Patrick Stewart pursuant to Section 12 of the Act. (RX2) Dr. Stewart noted Petitioner first mentioned symptoms of numbness and tingling during Dr. Paletta's examination. Physical examination revealed tenderness over the ulnar nerve and lateral epicondyle, positive Tinel's at the elbow, discomfort with pronation, positive Phalen's and physiologic median nerve compression over the carpal tunnel causing numbness in all digits and the dorsum of the hand, and tenderness over the DIP joint of the ring finger.

Dr. Stewart diagnosed left radiocapitellar arthritis, mild left medial epicondylitis, possible left cubital tunnel syndrome, and left carpal tunnel syndrome. Dr. Stewart opined that Petitioner's treatment and diagnostic testing had been reasonable and necessary, and Petitioner required additional treatment. However, he opined that because Petitioner's initial diagnostic testing was normal, his symptoms and conditions were not related to the work accident. He emphasized that the medial epicondylitis represented a change on the MRIs from 2018 to 2020, as the former was completely normal but the later positive. Dr. Stewart placed Petitioner at MMI.

Dr. Stewart authored an addendum on 12/18/20 and noted there was a possibility of a sprain or strain, and there were changes over the common flexor and medial epicondyle. (RX3) He felt the changes within the musculature were secondary to the pulsation artifact of the vessels overlying the changes.

Dr. Stewart testified by way of deposition on 3/9/21. (RX4) He is a board-certified hand surgeon. Dr. Stewart testified that medial epicondylitis is a condition that a person could develop from an acute injury, such as a contusion or being forcefully extended. He testified that cubital tunnel syndrome could result from an acute injury due to a direct trauma to the nerve, and that a person could develop carpal tunnel from an acute injury as well, which would cause immediate

symptoms. Dr. Stewart testified that for an acute injury, either direct trauma to the nerve would result in a lightning bolt sensation or swelling would occur sufficient enough to place pressure on the nerve.

Dr. Stewart reviewed the MRI films, as well as the reports, and the EMG/nerve conduction studies. Petitioner described his symptoms to include loss of strength, numbness in the left thumb and ring finger, loss of dexterity, and pain on the inside of the elbow extending into the forearm and aching within the hand. Dr. Stewart examined Petitioner and diagnosed elbow arthritis, mild medial epicondylitis, and possibly mild cubital tunnel syndrome which was asymptomatic. He opined that Petitioner's conditions were not caused by the work accident based on Petitioner's exhaustive workup, normal MRIs of the elbow, forearm, and finger, minor findings on EMG, lack of classic symptoms, worsening of symptoms after the carpal tunnel injection, and lack of objective symptoms supporting an injury to the medial epicondyle, lateral epicondyle, ulnar nerve, or median nerve. Dr. Stewart elaborated on causation of the medial epicondylitis, explaining that although Petitioner had mild evidence of the condition, it did not develop at the time of the accident as proven by the 2018 MRI which was normal compared to the 2020 MRI. Evidence of medial epicondylitis should have been present in 2018 if it was caused by the work accident. Dr. Stewart testified that the changing locations of Petitioner's symptoms and lack of consistent physical examination of the medial aspect of the elbow further supported his conclusions.

Dr. Stewart testified that the EMGs were essentially the same. He did not believe Petitioner had the classic symptoms of carpal tunnel syndrome and noted Petitioner's complaints and locations of the numbness and tingling varied throughout treatment including, at different times, all digits except his index finger. Dr. Stewart indicated the EMG showed no signs of ulnar neuropathy at the elbow and Petitioner's symptoms varied as to that "condition" as well.

Dr. Stewart testified he was not familiar with the sheering type of force around the nerve that Dr. Young explained in his deposition could have caused Petitioner's injury. He testified that Petitioner lacked findings of an acute injury immediately after the accident. He testified that Petitioner's upper extremity symptoms on the date of injury included pain in the left hand without swelling, tenderness, or instability, with full range of motion and normal strength.

Dr. Stewart had no evidence Petitioner experienced symptoms prior to the work accident or that he suffered any intervening accidents since that time. He identified comorbid factors in Petitioner for the development of carpal and cubital tunnel syndrome of hypertension and being a one pack per day smoker. Dr. Stewart noted that, during Petitioner's treatment, he changed positions of employment from being a correctional officer to a maintenance worker, both at Pinckneyville Correctional Center. Dr. Stewart questioned why one would move to a position that is more hand intensive if he was having difficulty using his upper extremity.

Dr. Young testified by way of deposition on 1/26/21. (PX15) Dr. Young is a board-certified orthopedic surgeon. He noted Petitioner exhibited left upper extremity pain, including the ring finger and forearm, and denied weakness, numbness, or tingling. Dr. Young initially diagnosed medial epicondylitis and possible radial tunnel syndrome. Dr. Young testified that Petitioner's symptoms failed to improve, including pain along the medial side of the elbow and numbness into his fingers. He recommended debridement of the medial epicondyle, release of

the ulnar nerve at the elbow, and carpal tunnel release. Dr. Young testified that Petitioner's right arm was doing fine after a carpal tunnel release years ago. He testified that a delay in treatment for nerve compression can be detrimental, but that would not be the case for the medial epicondyle. Dr. Young opined that Petitioner's conditions could be and are likely related to his work injury as his symptoms began shortly after the injury and they were not present prior to his fall. Dr. Young believed Petitioner has been working full duty since his accident. He opined that Petitioner has no comorbid risk factors, with the exception of smoking cigarettes which would only apply to carpal tunnel syndrome.

Dr. Young listed the physical exam findings which led to his diagnoses to include pain over the medial epicondyle and provocative signs for cubital and carpal tunnel including positive Tinel's at the elbow and positive median nerve flexion compression test. He agreed that Petitioner's symptoms changed from when he first saw him in April and May 2018 to January 2019 when Petitioner returned to see him. He stated that Petitioner's main source of discomfort in February and November 2020 was the medial epicondyle, which appeared to have worsened from being mildly positive in February 2020 to fully positive in November 2020. Dr. Young testified that at the June 2019 visit, Petitioner did not have tenderness over the medial epicondyle but did over the lateral epicondyle, including discomfort over the radial tunnel. He noted a positive Tinel's but could not state it was at the elbow or wrist since the report indicated both positive and negative findings. Dr. Young agreed that if Petitioner had negative Tinel's and lateral epicondyle tenderness in June 2019 that would be quite different from the symptoms Petitioner was expressing at his last visit in November 2020. However, Dr. Young opined that Petitioner's carpal or cubital tunnel could have been present in June 2019 based on his handwritten notes. He confirmed that at Petitioner's preceding appointment in April 2019, he had discomfort around the small and ring fingers with no other tenderness in any location, and the ring finger was the only treated area at that visit. In March and February 2019, treatment focused only on the ring finger with no other reports of pain to other parts of the upper extremity. He said Petitioner resumed treatment with him in January 2019 and Dr. Young administered an injection into Petitioner's left ring finger and noted Tinel's at the left elbow was slightly positive and he had pain in the radial tunnel greater than the medial epicondyle. Dr. Young confirmed that the period of treatment from January 2019 to November 2020, Petitioner's focus shifted from his ring finger to his elbow. He testified that it was not unusual as Petitioner had some elbow complaints that never resolved and could flare up again. Dr. Young testified that Petitioner's fingers appeared to be more worrisome.

Dr. Young testified he reviewed both of Petitioner's EMG and nerve conduction studies. He stated the June 2018 study revealed mild left carpal tunnel syndrome, meaning there were only some sensory findings. He testified the mild carpal tunnel should still be surgically repaired because it has been unresponsive to conservative management. Dr. Young agreed there were no findings to support cubital tunnel syndrome. Dr. Young reiterated that Dr. Phillips did not identify pronator median nerve entrapment and it is very unusual to find nerve compression up to the elbow level on a nerve conduction study, and the only place he found entrapment was at the carpal tunnel level or wrist. He agreed Dr. Phillips did not find tenderness at the medial epicondyle, lateral epicondyle, radial tunnel, or pronator during his physical examination in June 2018, which was different from what Dr. Young found in November 2020. Dr. Young agreed Dr. Phillips did not find positive Tinel or Phalen signs and that the examination was normal. Dr. Young testified you

have to take into account interobserver variability and a physician's interpretation of positive and negative findings.

With regard to the November 2018 EMG/NCS, Dr. Young testified Petitioner's main complaint was still tenderness and pain in his left ring finger. He agreed with Dr. Phillips there was no difference between the two studies, or the physical exams completed by Dr. Phillips. Dr. Young noted he last saw Petitioner two years after the EMG/NCS. He testified that Petitioner had always had elbow discomfort and complained of numbness and tingling throughout his treatment. He testified it is not unusual for a person to have cubital tunnel syndrome and have a negative nerve conduction study. He stated Petitioner had positive Tinel's or at least a positive ulnar nerve flexion compression test multiple times throughout his evaluation, including in January 2019.

Dr. Young testified he was aware Dr. Paletta found Petitioner to be negative for cubital tunnel syndrome on examination, with negative Tinel signs for carpal tunnel syndrome and no swelling, resulting in a normal examination. Dr. Young did not disagree with Dr. Paletta's conclusion that Petitioner was not suffering from carpal or cubital tunnel syndrome. Dr. Young testified it was certainly a possibility that Petitioner's carpal and cubital tunnel syndrome was present at that time, but not diagnosed. He opined that Petitioner experienced delayed onset for symptoms due to the "shearing-type force around the nerves" he sustained. He believed this caused Petitioner to develop carpal and cubital tunnel within the year after his accident. He testified that Petitioner's carpal tunnel syndrome was objectively confirmed on the first nerve condition study and that physical examination is only a subjective determination. Dr. Young stated that for cubital tunnel syndrome, he has to depend on what the patient tells him and the physical examination. He testified that the first documentation of cubital tunnel symptomatology was via positive Tinel's in January 2019. He agreed there was no evidence of cubital tunnel syndrome during Petitioner's appointments in February, March, April, and June 2019. In August 2019, Dr. Young indicated Petitioner's issue was located at the lateral elbow rather than the cubital tunnel and continued to be so located throughout the next several following appointments. Dr. Young testified that from August 2019 through January 2020, Petitioner exhibited a lot of epicondyle tenderness. He agreed he did not see any abnormalities in April 2019. Dr. Young suspected medial epicondylitis and mild lateral epicondylitis on Petitioner MRI in February 2020 which did not show on the September 2018 MRI, with no confirmed carpal and cubital tunnel syndrome. Dr. Young explained this to mean Petitioner has gotten worse or the radiologist had a more sensitive trigger. He stated it is possible the radiologist misinterpreted the first MRI and noted a different radiologist interpreted the 2020 MRI. Dr. Young agreed with Dr. Paletta's diagnosis of radial capitellar degenerative joint disease which was unrelated to the accident and nonsurgical. He agreed that Dr. Paletta's statement was reasonable, that if the 2018 MRI was normal there would be no condition or abnormality to explain Petitioner's complaints. Dr. Young found correlation between Petitioner's complaints, the MRIs, and EMG/NCS.

Dr. Young testified medial epicondylitis can develop due to repetitive use or a traumatic event and there is no way to tell the difference. He testified that if it is caused by a traumatic event, it usually presents close to the time of injury. He testified that the condition can be caused by hyperextension or hyperflexion. He was unaware of the events of Petitioner's accident and only knew he fell to the ground. He stated subsequent swelling would not have been necessary to cause any of the conditions he diagnosed.

Dr. Young testified Petitioner requires surgery because he has had symptoms for over two years, has had physical therapy ad nauseam, has hand injections everywhere, and has worn splints and braces. Dr. Young testified Petitioner had an injection to his carpal tunnel and another to his elbow area. He stated Petitioner is not scheduled for surgery because it has not been approved.

CONCLUSIONS OF LAW

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

Circumstantial evidence, especially when entirely in favor of the Petitioner, is sufficient to prove a causal nexus between an accident and the resulting injury, such as a chain of events showing a claimant's ability to perform manual duties before accident but decreased ability to still perform immediately after accident. *Pulliam Masonry v. Indus. Comm'n*, 77 Ill. 2d 469, 397 N.E.2d 834 (1979); *Gano Electric Contracting v. Indus. Comm'n*, 260 Ill.App.3d 92, 96–97, 197 Ill.Dec. 502, 631 N.E.2d 724 (1994); *International Harvester v. Indus. Comm'n*, 93 Ill.2d 59, 66 Ill.Dec. 347, 442 N.E.2d 908 (1982)

The record demonstrates that Petitioner had not sought treatment for, nor was he suffering from any symptoms in his left elbow, arm, wrist, hand, or fingers prior to the work accident. The day after the accident Petitioner reported left hand pain and swelling. Physical examination revealed pain with palpation and motion in the left hand, with limited range of motion. He returned six days later and reported left hand tightness and aching. He had pain with making a fist and swelling was noted. Examination revealed pain with motion over the fourth left metacarpal with no swelling; however, he was instructed to use ice for 20 minutes every two hours to reduce pain and swelling and to continue working on range of motion.

Two weeks after the accident, Petitioner was examined at Dr. Young's office for left radial-sided DIP joint pain of the ring finger and discomfort to the dorsum of the left hand and forearm. The pain was noted to radiate into Petitioner's wrist and forearm that prevented him from performing his work duties without significant discomfort and weakness. Examination revealed tenderness over the radial side of the DIP joint of the left ring finger, a palpable nodule, and discomfort upon flexion. The primary focus of Petitioner's treatment related to his symptomatic left ring finger and a tendon injury was initially suspected.

Five weeks after the accident, Dr. Young noted left hand swelling, numbness, and pain, and left forearm pain. Dr. Young noted pain over the left pronator tunnel, distal biceps tendon, and medial epicondyles, and pain with resisted flexion and supination of the left wrist. He diagnosed a contusion of the left upper arm and biceps tendinitis, and possible pronator tunnel syndrome. On 5/30/18, Dr. Paletta also noted Petitioner's ongoing symptoms of tenderness over the pronator, medial epicondyle, and distal biceps tendon. Tinel's testing at the pronator caused sharp pain down the forearm. Dr. Paletta opined that the work injury was a causative or contributing factor to Petitioner's symptoms and noted Petitioner had no prior history or pre-existing condition that would contribute to his symptoms.

An EMG/NCS in June 2018 revealed mild left carpal tunnel syndrome. Dr. Paletta noted that Petitioner exhibited signs of median nerve symptoms and recommended an MRI of Petitioner's forearm to determine the source of Petitioner's ongoing symptoms. The MRI did not reveal radius ulna involvement and Dr. Paletta recommended splinting and injections. Dr. Blake noted Petitioner had referred proximal symptoms from a median nerve compression. Her examination revealed a positive Tinel's sign over the left wrist.

The left elbow MRI in September 2018 revealed radiocapitellar degenerative joint disease. Dr. Paletta felt the degenerative changes may account for some of Petitioner's elbow pain, but not for his neurologic complaints. Dr. Blake administered a left elbow injection that improved Petitioner's elbow pain by 50% but did not alleviate his hand symptoms.

The Arbitrator is more persuaded by the opinions of Dr. Young than those of Dr. Stewart, as he gave reasonable explanations as to Petitioner's oscillating symptoms and the delayed onset pathology due to shearing and fibrotic response. Dr. Young also relied on Petitioner's diagnostic studies, examination, and history of post-accident symptoms. Dr. Stewart testified that Petitioner lacked findings of an acute injury immediately after the accident. There is ample subjective and objective evidence that Petitioner had left upper extremity symptoms within two weeks of the accident. Petitioner's treatment initially focused on his left ring finger, which was swollen, bruised, developed a knot, and was painful and limited in range of motion. Within two weeks of the accident, it was noted Petitioner had pain in the dorsum of his left hand and forearm. His pain radiated into his wrist and forearm and interfered with his work duties. Petitioner consistently complained of left wrist and radiating symptoms into his forearm that have not resolved.

Dr. Stewart agreed with the diagnoses and that all of Petitioner's treatment was reasonable and necessary, but opined the conditions were not causally related to Petitioner's work accident. Dr. Stewart agreed that all of Petitioner's conditions can be caused by an acute event and offered no explanation as to the genesis of Petitioner's symptoms that were not present prior to his work accident.

Based on the aforementioned medical evidence and testimony, the Arbitrator finds that Petitioner has met his burden of proof and that his current condition of ill-being is causally connected to his work injury of April 10, 2018.

Issue (J): Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

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

The right to be compensated for medical costs associated with work-related injuries is at the very heart of the Workers' Compensation Act. *Hagene v. Derek Polling Const*., 388 Ill. App. 3d 380, 383, 902 N.E.2d 1269, 1273 (2009). Upon establishing causal connection and the reasonableness and the necessity of recommended medical treatment, employers are responsible for necessary prospective medical care required by their employees. *Plantation Mfg. Co. v. Indus. Comm'n*, 294 Ill.App.3d 705, 691 N.E.2d. 13 (1997). This includes treatment required to

diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 325 Ill. App. 3d 527, 758 N.E.2d 18 (2001).

The Arbitrator finds that the medical treatment rendered to Petitioner was reasonable and necessary to treat his work-related injuries. Petitioner's treating physicians ordered a number of diagnostic tests and conservative treatment in an effort to diagnose and treat his unremitting symptoms. Respondent's Section 12 examiner, Dr. Stewart, agreed that Petitioner's testing and treatment had been reasonable and necessary despite his causation opinion. Dr. Young opined that Petitioner had exhausted conservative treatment measures and recommended surgery to cure the effects of his symptoms that had been present for the past several years.

Therefore, Respondent shall pay the reasonable and necessary medical expenses outlined in Petitioner's Group Exhibit 1, directly to the medical providers per the Illinois medical fee schedule or PPO agreement, whichever is less, as provided in Section 8(a) and Section 8.2 of the Act. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits.

The Arbitrator further finds Petitioner is entitled to receive the additional care recommended by Dr. Young. Therefore, Respondent shall authorize and pay for prospective medical treatment, including, but not limited to, a left medial epicondylar release, cubital tunnel decompression, and carpal tunnel release, and post-operative care until Petitioner reaches maximum medical improvement.

Issue (N): Is Respondent due any credit?

Based on the above findings as to causal connection and the reasonableness and necessity of Petitioner's medical bills, the Arbitrator finds that Respondent shall be given credit for medical benefits paid through its group medical plan, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Issue (O): Has Petitioner reached maximum medical improvement?

The factors to be considered in determining whether a claimant has reached MMI include: a release to return to work with restrictions or otherwise; medical testimony or evidence concerning claimant's injury; the extent of the injury; and, most importantly, whether the injury has stabilized. *Westin Hotel v. Indus. Comm'n*, 372 Ill. App. 3d 527, 542 (2007). In analyzing these factors, the Arbitrator finds that Petitioner's condition has not stabilized, has persisted for over four years, negatively affects his daily activities, and surgery has been recommended since February 2020. Dr. Young opined that a left medial epicondylar release, cubital tunnel decompression, and carpal tunnel release will cure the effects of Petitioner's work-related injuries.

The Arbitrator finds that Petitioner has not reached maximum medical improvement. Therefore, any award regarding the nature and extent of Petitioner's injuries shall be deferred until Petitioner's treating physician(s) establish that he has reached maximum medical improvement.

This award shall in no instance be a bar to further hearing and determination of any additional amount of medical benefits or compensation for temporary or permanent disability, if any.

Arbitrator Linda J. Cantrell Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC000227
Case Name	Terrance Jones v. State of Illinois/IYC St. Charles
Consolidated Cases	20WC005402;
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0349
Number of Pages of Decision	18
Decision Issued By	Amylee Simonovich, Commissioner

Petitioner Attorney	Thomas Rich
Respondent Attorney	James Gale

DATE FILED: 8/14/2023

/s/Amylee Simonovich, Commissioner

Signature

23IWCC0349

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Terrance Jones,

Petitioner,

vs. NO: 17 WC 0227

State of Illinois / IYC St. Charles,

Respondent.

DECISION AND OPINION ON REVIEW

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

In the interest of efficiency, the Commission primarily relies on the detailed recitation of facts in the Arbitration Decision. Petitioner worked as an educator for Respondent. On November 28, 2016, he sustained injuries after several youths assaulted him. As a result of the assault, Petitioner sustained physical and psychological injuries. His physical injuries, including a right shoulder SLAP tear with subacromial bursitis and annular bulging at L4-L5 and L5-S1 with associated neuroforaminal stenosis, were treated conservatively. A June 2017 FCE determined Petitioner could work at the light physical demand level. In July 2017, Dr. Sokolowski placed Petitioner at MMI regarding the lumbar spine with permanent restrictions pursuant to the FCE. Dr. Cole placed Petitioner at MMI regarding the right shoulder as of September 18, 2017, and cleared him to return to work full duty.

Petitioner also began treatment with Dr. Singer and was diagnosed with acute PTSD. Petitioner regularly followed up with Dr. Singer. Dr. Singer cleared Petitioner to return to work on November 20, 2017, with no inmate contact during the first two weeks. He recommended that Petitioner then slowly ramp up his work duties by first teaching a class with a guard outside the room for one week. Dr. Singer recommended that Petitioner gradually increase to teaching three classes per week while still attending therapy. Respondent could not accommodate the return to work plan established by Petitioner; thus, Petitioner remained off work for approximately another year. Throughout 2018, Petitioner continued to experience flashbacks and panic attacks at the

thought of returning to work. In December 2018, Petitioner requested that Dr. Singer release him to return to work full duty. Despite his opinion that Petitioner should gradually return to work pursuant to the plan he outlined in November 2017, Dr. Singer released Petitioner to return to work full duty. Petitioner finally returned to work on December 27, 2018. In January 2019, Petitioner told Dr. Singer that he experienced ongoing symptoms after returning to work. He continued to work until his September 23, 2019, work accident. The September 23, 2019, work accident is addressed in case number 20 WC 5402.

The Arbitrator concluded Petitioner sustained a 2.5% loss of the whole person due to his physical injuries, and a 7.5% loss of the whole person due to his psychological injury. While the Commission generally agrees with the Arbitrator's analysis of the five factors pursuant to Section 8.1b(b) of the Act, the Commission modifies the award of permanent partial disability. After carefully considering the totality of the evidence, the Commission affirms the award of 2.5% loss of the whole person due to Petitioner's physical injuries; however, it finds an award of 5% loss of the whole person due to the psychological injury is most appropriate.

The evidence shows that Petitioner continued to experience symptoms relating to his chronic PTSD more than two years after the November 28, 2016, work accident. While he was off work for a prolonged period, this was partly due to Respondent's inability to return Petitioner to work pursuant to the plan established by Dr. Singer. Ultimately, Petitioner successfully returned to his normal job without restrictions in late December 2018, albeit with some initial difficulty. Petitioner continued working full duty until his subsequent September 2019, work accident. In fact, after his January 28, 2019, follow up with Dr. Singer, Petitioner did not seek any additional treatment related to this work accident. After considering the totality of the evidence, the Commission finds Petitioner sustained a 2.5% loss of the whole person due to his physical injuries, and a 5% loss of the whole person due to his psychological injury as a result of the November 28, 2016, work accident.

The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 29, 2021, is modified as stated herein.

IT IS FURTHER ORDERED that Respondent shall pay Petitioner temporary total disability benefits of $916.13/week for 61-1/7 weeks, commencing October 17, 2017, through December 28, 2018, as provided in Section 8(b) of the Act.

IT IS FURTHER ORDERED that Respondent shall pay Petitioner permanent partial disability benefits of $775.18/week/week for 37.5 weeks. Petitioner's physical injuries caused a 2.5% loss of the whole person and his psychological injury caused a 5% loss of the whole person pursuant to Section 8(d)2 of the Act.

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

IT IS FURTHER ORDERED that Respondent pay to Petitioner interest pursuant to Section 19(n) of the Act, if any.

Pursuant to Section 19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review.

August 14, 2023
d: 6/13/23
AHS/jds
51

/s/ *Amylee H. Simonovich*
Amylee H. Simonovich

/s/ *Maria E. Portela*
Maria E. Portela

/s/ *Kathryn A. Doerries*
Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC000227
Case Name	JONES, TERRANCE v. STATE OF ILLINOIS/IYC ST CHARLES
Consolidated Cases	20WC005401 20WC005402
Proceeding Type	Request for Hearing
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	14
Decision Issued By	Stephen Friedman, Arbitrator

Petitioner Attorney	Thomas Rich
Respondent Attorney	Adam McCall

DATE FILED: 12/29/2021

/s/Stephen Friedman, Arbitrator
Signature

INTEREST RATE WEEK OF DECEMBER 28, 2021 0.21%

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

December 29, 2021

/s/Michele Kowalski

Michele Kowalski, Secretary

Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF **Kane**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Terrence Jones
Employee/Petitioner

v.

State of Illinois/ IYC St. Charles
Employer/Respondent

Case # **17** WC **000227**

Consolidated cases: **See Decision**

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 **Stephen J. Friedman**, Arbitrator of the Commission, in the city of **Geneva**, on **November 15, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **November 28, 2016**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**71,496.00**; the average weekly wage was $**1,374.92**.

On the date of accident, Petitioner was **46** years of age, ***single*** with **0** dependent children.

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

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

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

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $916.13/week for 61 1/7 weeks, commencing October 17, 2017 through December 28, 2018, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $775.18/week for 50 weeks, because the injuries sustained caused the 10% loss of the person as a whole, as provided in Section 8(d)2 of the Act. See the decisions in consolidated cases 20WC005401 and 20WC005402 for further permanent partial disability awards.

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.

/s/ Stephen J. Friedman

Signature of Arbitrator

December 29, 2021

Statement of Facts

This matter was tried in conjunction with consolidated cases 20WC005401 (DOA 9/19/2018) and 20WC005402 (9/23/2018). A single transcript was prepared although the Arbitrator has issued separate decisions. The Arbitrator notes that Petitioner listed a period of disputed temporary total disability from 10/17/17 through 12/28/218 on each Request for Hearing form although this period could only be addressed in the present case. The Arbitrator also notes that Petitioner offered medical bills claimed as compensable in PX 1 and Respondent offered a payment log as RX 1. Respondent stipulated that all reasonable, necessary, and causally related medical bills have been paid or will be paid pursuant to the fee schedule or negotiated rate and that PX 1 represents the list of the bills that Respondent has stipulated that they will pay as reasonable and necessary bills. Therefore, the Arbitrator has made no findings with respect to Medical.

Petitioner Terrence Jones testified that he is currently employed by the Bureau of Blind Services. He helps vision impaired individuals find services and to live more independently. He began that job March 1, 2021, following a job search of several months. He was previously employed as an educator for Respondent IYC St. Charles. Petitioner testified that he did not suffer any prior mental health issues or have any prior history of PTSD.

He testified that on November 28, 2016, he was attacked by about 5 youths in his classroom who were trying to get his keys and his computer. One grabbed him from behind while others grabbed his legs and arm and lifted him up. He was able to call for help and security came.

Petitioner was seen at Kishhealth on November 29, 2016 complaining of back pain (PX 3). He reported the attack at work and complained of pain in the middle back. Physical exam noted tenderness along the lower right posterior ribs. There were abrasions on the knuckles of both hands (PX 3). The assessment was injury of the right ring finger and right sided rib pain. X-rays of the ring finger and shoulder were negative (PX 4). Petitioner returned on December 2, 2016. He stated he was experiencing pain in the right shoulder radiating down his back on the right side. The cut on his right thumb is healing and the swelling in the knuckle of his right ring finger is better but still sore. He reported no appetite, emotional upset. The assessment was post-traumatic stress. Petitioner received an order for counseling. On December 8, 2016, Dr. Ahmad assessed continued pain in his right shoulder and recommended he continue the exercises he was shown and to follow up if his symptoms worsened (PX 3).

Petitioner saw Dr. Singer for counseling on December 9, 2016. He reported the details of the attack. Dr. Singer diagnosed PTSD, acute. He stated Petitioner related this to his mistreatment at the hands of the prisoners. He noted multiple conditions and symptoms consistent with PTSD. He stated it would not be safe for Petitioner to return to work at that time (PX 3, p 34). Petitioner began individual psychotherapy. His records through April 19, 2017 note no significant change in mood/affect, thought process/orientation, motor activity and speech, and behavior/functioning (PX 3, p 89). Petitioner continued with psychotherapy sessions with Dr. Singer throughout his ongoing orthopedic treatment.

On December 22, 2016, Petitioner continued to have back pain located on the right side. Dr. Ahmad ordered an MRI of the thoracic spine, physical therapy, and a consult (PX 3, p 40-44). Petitioner testified he was referred to Dr. Mark Sokolowski. Petitioner was seen by Dr. Sokolowski on December 30, 2016 with complaints of right periscapular pain, right shoulder pain, lumbar pain with extension into the right buttock, left elbow pain. Petitioner reported he had started treatment with Dr. Ahmad, but physical therapy was not yet approved. He

was taking muscle relaxers and anti-inflammatories without significant relief. Physical examination revealed painful back range of motion with flexion and extension, tenderness to palpation over the right L4-5 joint, positive Spurling sign on the right, positive impingement signs on the right shoulder, right anterior glenohumeral tenderness, and left lateral epicondylar tenderness. Dr. Sokolowski assessed lumbar pain, right periscapular and shoulder pain, and left elbow pain. He recommended Petitioner take ibuprofen and Dendracin, start physical therapy, receive MRIs of his right shoulder and lumbar spine, and be fitted for a lumbosacral orthosis. Dr. Sokolowski kept Petitioner off work and recommended he follow up in four weeks (PX 5, p 1-4). MRIs of Petitioner's right shoulder and lumbar spine were taken on January 7, 2017 (PX 6). The report notes abnormal signal within the superior labrum suspicious for a SLAP tear, prominent acromioclavicular joint arthropathy, and subacromial/subdeltoid bursitis on the right shoulder MRI. The lumbar MRI revealed annular bulging at L4-5 and L5-S1 more severe towards the left side (PX 6). Petitioner began therapy at Northern Rehab on January 10, 2017 (PX 7). On February 7, 2017, Dr. Sokolowski noted Petitioner had started physical therapy. Dr. Sokolowski reviewed the MRI reports, finding they were consistent with a SLAP tear, subacromial bursitis, and AC joint arthropathy in the right shoulder, and annular bulging at L4-5 and L5-S1 with associated neuroforaminal stenosis in the lumbar spine. He recommended continued physical therapy, stay off work, and return in four to six weeks. If his right shoulder symptoms persisted, he recommended Petitioner consider injections or a referral to a specialist. If his lumbar symptoms persisted, he recommended considering lumbar injections at the right L4-5 (PX 5). On March 21, 2017, Petitioner reported that as the demands of physical therapy had increased, so had his back and neck pain. Physical exam noted pain with flexion and extension in the back, sciatic notch tenderness, and facet joint tenderness all persisted. He continued to have right shoulder impingement signs and pain with right supraspinatus strength testing. Dr. Sokolowski reviewed the actual images of the right shoulder and lumbar MRIs and noted his interpretation was similar to the radiologist's. Dr. Sokolowski prescribed a Medrol Dosepak and Dendracin and kept Petitioner off work (PX 5).

On April 25, 2017, Petitioner saw Dr. David Hartman, a psychologist, for a Section 12 Examination (RX 2). Dr. Hartman took his history, and noted Petitioner had been in psychotherapy with Dr. Singer and was diagnosed with PTSD as a result of the incident. Petitioner reported having psychological symptoms, including repeatedly thinking about the event and the feeling of dread when he sensed someone standing behind him in a public setting; nightmares where people were grabbing, pulling, and twisting him, three to four times per week. He reported that he felt he had made more progress physically than psychologically. After conducting testing, Dr. Hartman concluded Petitioner's symptom profile was "implausible and malingered" and that his treatment with Dr. Singer was not reasonable, necessary, or effective. Dr. Hartman further opined that Petitioner did not have posttraumatic stress disorder. It was possible that Petitioner had minor, lingering anxieties about returning to work. Dr. Hartman also stated that psychological treatment would be reasonable and necessary for Petitioner, but did not believe Dr. Singer was providing "appropriate" therapy (RX 2).

On May 2, 2017, Dr. Sokolowski noted Petitioner had begun a work-conditioning program, but continued to have pain. He reported his right shoulder symptoms remained functionally limiting for him. Dr. Sokolowski recommended Petitioner see an independent shoulder specialist for further recommendations of his shoulder symptoms, to continue his prescriptions, and to remain off work pending further improvement (PX 5). Petitioner saw Dr. Brian Cole on May 8, 2017 for evaluation of his shoulder (PX 8). Dr. Cole noted Petitioner's complaints of right shoulder pain, anterior and posterior, parascapular pain, and right sided neck pain. Dr. Cole reviewed Petitioner's right shoulder imaging and found bursa side cuff fraying and a SLAP tear present. His objective findings included significant shoulder scapular elevation and weakness, tenderness over the biceps, and scapular dyskinesis. He diagnosed right shoulder scapular dyskinesis, biceps tendonitis, and AC joint pain

Dr. Cole recommended he continue physical therapy and NSAIDs, and to return in six weeks. He stated this was causally related to the alleged industrial accident (PX 8, p 31). Petitioner continued physical therapy until May 17, 2017 (PX7). On May 31, 2017, Dr. Sokolowski noted Petitioner's work conditioning program was interrupted due to a lack of approval. Petitioner reported continued symptoms, rating his pain as 2/10 at rest, with his pain increasing with greater activity. Dr. Sokolowski noted that he submitted an appeal to continue Petitioner's physical therapy. He recommended Petitioner proceed with an FCE to objectively delineate his capabilities, which could further substantiate the need for ongoing treatment. Petitioner was to continue taking Dendracin and ibuprofen and to remain off work pending his FCE results (PX 5, p 15).

On June 7, 2017, ATI Physical Therapy performed a Functional Capacity Evaluation (PX 9). They found he demonstrated issues with sitting and standing for prolonged periods of time, bending/stooping, kneeling, and neck flexion and rotation. Petitioner reported that he felt the need to get stronger, as he still felt weak. The FCE was found to be valid and found Petitioner capable of work in the Light PDL. His job as a teacher was rated as Light (PX 9). On June 27, 2017, Dr. Sokolowski noted that the independent facility was unable to get Petitioner's FCE report to his office. He stated they would continue to attempt to obtain the FCE report and kept Petitioner off work pending review of the FCE (PX 5). On June 29, 2017, Dr. Cole noted Petitioner was able to complete two weeks of physical therapy following his previous visit, which he felt were helpful, but the remainder was not approved by workers' comp. Dr. Cole believed Petitioner should have a full six weeks of physical therapy approved by workers' comp. He was to follow up after completing six weeks of physical therapy (PX 8). On July 11, 2017, Dr. Sokolowski reviewed the FCE report. He noted Petitioner was off work for his shoulder due to risk of re-injury. Dr. Sokolowski found Petitioner to be at MMI for his lumbar spine and noted his FCE capabilities on the report of June 7, 2017 represented his permanent restrictions with respect to his back. Dr. Sokolowski stated he was found to be significantly functionally limited on the FCE with overhead lifting. He should remain off work until cleared by his shoulder specialist. Dr. Sokolowski noted that although his lumbar symptoms were improved, Petitioner was not asymptomatic, and should follow up as needed (PX 5, p 20).

Petitioner continued to participate in physical therapy for his shoulder from July 20, 2017 through August 22, 2017 (PX 7). On August 24, 2017, Dr. Cole records that Petitioner reported his shoulder was 80% better since his November 2016 accident, but he continued to have shoulder pain around the AC joint. Petitioner noted pain with working overhead. He also raised concerns about altercation risk, but said he understands that is a rarity. He feels that strength is the main deficit. Examination noted no significant scapular dyskinesis, moderate AC joint and mild right biceps tenderness. There was full range of motion and excellent rotator cuff strength. Petitioner refused an injection. Dr. Cole recommended Petitioner continue physical therapy for the remaining 3 weeks and released him to work full duty with regards to his shoulder after completion, effective September 18, 2017 (PX 8). Petitioner returned to Dr. Sokolowski on November 12, 2018. He noted increase symptoms with physically demanding activities. He rated his shoulder and back pain as 2/10 noting he understands he will likely have residual pain indefinitely. He denied any other neurologic changes. Dr. Sokolowski confirmed Petitioner was at MMI. He released Petitioner to return to his regular job as a teacher (PX 5, p 23-24).

On October 19, 2017, Dr. Singer authored a report on Petitioner's progress. He repeated his diagnosis of PTSD and stated his issues were created by the incident at work. He stated that Petitioner was at the point where he feels safe to return him to work slowly. He returned Petitioner to work November 26, 2017, stating "however, importantly**,** he is to have no contact with the juvenile inmates the first two weeks of his return." After two weeks he stated Petitioner should enter the teaching platform slowly, teaching one class with a guard outside for one week and then moving to 3 classes. Dr. Singer stated Petitioner would need to continue weekly

or biweekly sessions (PX 3, p 200-201). On November 20, 2017, Dr. Singer notes Petitioner is sweating just at the thought of returning to work (PX 3, p 270). On November 30, 2017, Dr. Singer notes that Respondent is not following the plan of action to get Petitioner back to work. He is still off work which violates the plan and is delaying Petitioner getting better. Petitioner is still suffering symptoms and is not able to fully face going back to work (PX 3, p 224, 271-272). Petitioner was to continue his sessions with Dr. Singer who documented Respondent's refusal to comply with his return to work program and noted Petitioner's increased additional anxiety due to the delay (PX 3, p 274-285).

Petitioner saw Dr. Thomas Rostafinski, a licensed clinical psychologist, at the referral of Dr. Sokolowski on December 20, 2017 (PX10). Dr. Rostafinski took Petitioner's history of accident and medical treatment for his back and shoulder as well as his therapy with Dr. Singer. Dr. Rostafinski noted he had not returned to work. Petitioner had difficulty avoiding thinking about the incident and felt anxiety and anger whenever it came up. He quickly becomes uneasy any time someone walked behind him, even at public locations and his sleep was sporadic, as he was often wakened by thoughts and dreams about the incident, waking up feeling weak, helpless, and short of breath. Dr. Rostafinski noted he reviewed Dr. Singer's and Dr. Sokolowski's records. He stated he strongly supported Dr. Singer's recommendations that Petitioner return to work gradually, starting with one class per day, and that Petitioner only return to teaching once there was a full security presence in the classroom area. He noted Petitioner's PTSD symptoms had improved, though not resolved, and that he should continue with Dr. Singer until he has made a full and reasonably comfortable return to work (PX 10). Petitioner testified that he wanted to return to work gradually and was ready, but Respondent did not allow him to return in that capacity.

On February 23, 2018, Dr. Hartman reviewed additional notes from Dr. Singer and prepared an addendum report (RX 4). Dr. Hartman did not change his opinions. He found no credible evidence of PTSD and stated Petitioner self-reports new symptoms and Dr. Singer accepts them without concern and makes no attempts to distinguish PTSD from malingering PTSD. Dr. Hartman stated that there are no notes to demonstrate significant psychotherapy or improvements from therapy with Dr. Singer. He also stated that none of Dr. Singer's treatment notes provide any information that contradicts his own reports conclusions or demonstrates actual PTSD (RX 4). On September 17, 2018, he reviewed Dr. Rostafinski's report and prepared a further addendum report (RX 5). Dr. Hartman opined that, based upon his previous examination, that Dr. Rostafinski was incorrect and nondispositive. He stated the report did not change his previous opinions, diagnosis, or recommendations (RX 5).

Dr. Hartman testified by evidence deposition taken November 9, 2018 (RX 6). He testified to his examination. Petitioner underwent an all-day examination and underwent several psychological tests. These tests included an intelligence test, a card sorting test, a personality assessment inventory, and a structured inventory of malingered symptomatology. Dr. Hartman also reviewed records from Dr. Singer, Dr. Sokolowski, as well as physical therapy notes. Dr. Hartman diagnosed Petitioner with adjustment disorder with mixed emotional features and malingered PTSD. He testified that Petitioner had longstanding personality issues that were exaggerated on the psychological tests. He stated that these types of results are almost impossible to reach unless doing on purpose. Dr. Hartman determined that there was no reasonable likelihood that Petitioner's repeatedly exaggerated results represent a credible effort. Due to this, the results were considered invalid due to exaggeration (RX 6).

Dr. Hartman testified that the treatment with Dr. Singer is not effective and does not provide any specific techniques to handle work anxiety or work return adjustment. He stated that Petitioner may have lingering

anxieties about returning to work because he does not appear to have been treated with appropriate or effective psychotherapy after the assault. Dr. Hartman opined that in relation to the anxiety issues, Petitioner should have reached maximum medical improvement after six cognitive behavior therapy sessions. Dr. Hartman agreed with Dr. Singer that Petitioner should return to work slowly for a work reentry. He found that Petitioner reached maximum medical improvement regarding the work related accident, and that any further delay in returning to work would be considered in the service of malingering and work avoidance (RX 6).

Dr. Hartman testified to his review of Dr. Singer's additional records. The additional information review by Dr. Hartman did not change his opinion that Petitioner had malingered PTSD. He found no credible evidence of PTSD and stated Petitioner self-reports new symptoms and Dr. Singer accepts them without concern and makes no attempts to distinguish PTSD from malingering PTSD. Dr. Hartman noted that there are no notes to demonstrate significant psychotherapy or improvements from therapy with Dr. Singer. He also stated that none of Dr. Singer's treatment notes provide any information that contradicts his own reports conclusions or demonstrates actual PTSD. Dr. Hartman testified that Dr. Rostafinski did not perform any tests and seemed to have only a brief evaluation as opposed to the one he conducted that lasted over six hours. Dr. Hartman found Dr. Rostafinski's report to be incorrect and nondispositive. He reiterated his opinions from the first addendum (PX 6).

Dr. Hartman testified that above 85% of his practice was devoted to psychological legal work, with 80-90% being for defense or third party brokers. Dr. Hartman testified that he saw Petitioner once for a single evaluation. Dr. Hartman did not know the extent of Petitioner's current orthopedic treatment, and testified that he had no opinion on any of his orthopedic care, treatment, diagnosis, or prognosis. Dr. Hartman claimed privilege with regard to the hand filled out and computer-generated tests that Petitioner took while in his office. When asked if he knew if Petitioner was being compensated, as he stated on direct Petitioner was just going to stay home and be compensated, he testified he did not know if Petitioner was being paid. Dr. Hartman testified he was not aware that any records existed or that Petitioner had admitted to any prior formal treatment (RX 6).

Petitioner continued to treat with Dr. Singer for his PTSD through January 28, 2019 (PX 3). Dr. Singer's notes reflect Petitioner's desire to return to work so he can work through his issues, but Respondent failure to allow a gradual return is "getting in the way of his treatment and his improving" (PX 3, p 305). Dr. Singer notes that the continued delay in return to work is causing Petitioner to have issues with continuing to practice the skills he will need when he does return to work (PX 3, p 354-355). On August 26, 2018, Petitioner discussed a part-time job starting to teach at the University. He requested a letter to return to unrestricted work so he can go back to work. He stated he does not really want to return to work for Respondent and does not think he will really be ever able to teach there again. Dr. Singer notes he continues to have PTSD symptoms every day (PX 3, p 362-363). On October 18, 2018, Dr. Singer notes Petitioner is more positive and feels up to attempting to return to work (PX 3, p 374). On November 30, 2018, Dr. Singer notes Petitioner thinks he will be allowed to return to work at the end of December. He is having a mild panic attack, sweating profusely and uncontrollably (PX 3, p 383). On December 5, 2018, Petitioner discussed wanting to be released to work without a plan. This is the only way that will accept him back and he wants to get back to work to see if he can do it. Dr. Singer states he should go back to work with the plan, however per the client's request, he will be released without a plan (PX 3, p 386-387). On December 18, 2018, Dr. Singer notes Petitioner is returning to work on December 27. He sat in sweat profusely, thinking about it. His symptoms have been exacerbated of late, but he is going to go back December 27 and face everything. He is tired of waiting and needs to get back to see if he can (PX 3, p 389-390).

Petitioner testified that he returned to work in December 28, 2018 as an educator. He did not miss any time from work from that date to September 2019 when he was again injured. Petitioner saw Dr. Singer on January 28, 2019. He reported difficulty in the situations at work, but he has not had much choice since he was forced to go back (PX 3, p 392).

Petitioner testified that on September 19, 2019, he was walking in the hallway when a student came up to him and started shoving him against a brick wall, causing injuries to his upper torso and shoulder. [This injury is the subject of consolidated case 20WC005401 decided in conjunction with this matter.] Following that injury, he continued to work. On September 23, 2019, Petitioner was attacked again when he was struck in the head with a chair by a youth. [This is the subject of consolidated case 20WC005402 decided in conjunction with this matter.] Petitioner testified he sustained a lump on his head and started having headaches. On September 23, 2019, Petitioner was seen at the emergency department at Northwestern Medicine Delnor Hospital (PX 11). He told emergency physicians he was struck in the head with a chair by a student and had blurred vision and associated dizziness. He stated the majority of his symptoms have resolved but he continued to have headaches and some visual changes. Physical examination revealed a contusion to the occipital parietal scalp. Petitioner was diagnosed with a concussion without loss of consciousness. He declined a CT scan. He was discharged with medication and advised to return to the ER if he has dizziness, vomiting or worsening headaches (PX 11).

On September 25, 2019, Petitioner presented to Dr. Singer for a psychiatric evaluation (PX 3). Dr. Singer noted that Petitioner had multiple incidents recently that caused him to return to therapy, including being held by prisoners and hit as well as being hit by chairs. Dr. Singer found Petitioner was again having moderate to serious symptoms of posttraumatic stress disorder. Dr. Singer recommended Petitioner return to weekly therapy and to be granted leave from work to be determined week by week (PX 3, p 396). On September 27, 2019, Petitioner returned to Dr. Ahmad. Dr. Ahmad took his history, noting he was recently hit on the top of his head by a chair by a student. He reported having a bump on his head, headaches, was waking up at night and having trouble sleeping, and was having eye pain while wearing glasses. Dr. Ahmad assessed Petitioner to have non-intractable headaches. He noted Petitioner is neurologically stable. He would continue to monitor Petitioner and if his headache worsened, recommended follow up visits PX 3, p 403-406). Petitioner reinstated regular visits with Dr. Singer. On October 4, 2019, Petitioner told Dr. Singer he does not want to go back to work in the prison again. Dr. Singer notes that he was trembling and sweating talking about the story (PX 3, p 414). On November 21, 2019, Petitioner states he is doing better as long as he is away from his job. Dr. Singer notes when he discussed going back to work, Petitioner begins to sweat profusely (PX 3, p 437). On December 3, 2019, Dr. Singer notes that when we talk about the incidents, he immediately gets stressed and sweaty, so we need to go slow (PX 3, p 443). Petitioner reported seeking a new employment situation. Dr. Singer notes that every time they discuss the incident, he exhibits symptoms very rapidly (PX 3, P 463). On January 9, 2020, Dr. Singer noted that it is recommended that due to issues beyond his control, the job may be too overwhelming for his psychological condition (PX 3, p 479). Petitioner continued sessions with Dr. Singer through April 2020 addressing his decision not to return to work in the prison due to fear of being beaten again, his frustrations with his situation, and his efforts to find other jobs. On April 23, 2020, Dr. Singer stated Petitioner does not feel he could go back, and he agrees he should never go back to the prison for work (PX 3, p 558).

On April 8, 2020, Petitioner underwent a Section 12 evaluation at his attorney's request with Dr. Adam Sky via videoconference (PX 13, Ex 2). Dr. Sky took a history of the attacks in 2019 and 2019 and reviewed the treatment records. He conducted a medical status examination including reviewing Petitioner's current

symptoms. Dr. Sky diagnosed Petitioner with PTSD and major depression with anxious distress as a result of the November 28, 2016 attack. He found the condition to be causally connected to the November 2016 attack, He assesses 25% disability. He found Petitioner was at maximum medical improvement although he still required ongoing treatment. He noted Petitioner will have restrictions on return to work and particularly in any correctional institution (PX 13, Ex 1).

Dr. Sky reviewed additional records and authored an addendum report on June 9, 2020. He reviewed the additional emergency room records on September 23, 2019. He opined that the subsequent 2019 attacks certainly aggravated the 2016 injury. Dr. Sky felt the need to continue the psychotherapy Petitioner was already undergoing with Dr. Singer, but would also benefit from a therapist who specializes in posttraumatic stress disorder. Dr. Sky reiterated his diagnosis of PTSD and again found Petitioner to be at MMI, but requiring ongoing psychiatric treatment. However, he also amended his prior assessment and now finds Petitioner to be at a 35% permanent psychiatric disability to the body as a whole in conjunction with the September 2019 attacks. He based this on Petitioner's self-reported symptoms and their recurrence when confronted with triggering events (PX 13, Ex. 3).

Dr. Sky testified by evidence deposition taken June 25, 2020 (PX 13). He testified that he is board certified in psychiatry and neurology with added qualifications. He testified to his videoconference with Petitioner on April 8, 2020. The examination was virtually identical to a clinical patient. He testified to his interview with Petitioner including the details of the attacks and his symptoms. He testified to review of the treating records. Dr. Sky testified to the testing he conducted including the Montgomery-Asberg Depression exam and PCL-5 exam, noting severe depression, moderate to mild anxiety and posttraumatic stress disorder. Dr. Sky opined that Petitioner's November 2016 assault was the causative factor in those diagnoses. The September 2019 injuries aggravated the injury. He based this on Petitioner's self-reported symptoms and their recurrence when confronted with triggering events (PX 13).

Dr. Sky testified that Petitioner will need additional treatment. The treatment to date has been reasonable and necessary. Petitioner is at maximum medical improvement. He agrees with Dr. Singer keeping Petitioner off work. He opined that Petitioner was not able to return to any kind of work that would put him in danger of being assaulted, such any kind of correctional facility. This job change was causally related to the injuries. Dr. Sky disagreed with Dr. Hartman's opinion that Petitioner is feigning, or malingering symptoms based on the totality of the information. He stated that most of the tests done by Dr. Hartman were not relevant to reaching a proper diagnosis and did not see the need to repeat them during his evaluations (PX 13).

Petitioner continued regular visits with Dr. Singer (PX 3). On May 28, 2020, they discussed moving on to another job (PX 3, p 586). On June 4, 2020, Dr. Singer notes Petitioner must push forward to a different job (PX 3, p 595). On June 11, 2020, Petitioner reported applying for other jobs. He notes the effect of COVID (PX 3, p 600).

Petitioner was seen for a vocational plan on July 22, 2020 by Edward Steffen (PX 15). A vocational plan to assist Petitioner is preparing his resume and learning job seeking skill as a component of his self-directed job search was proposed (PX 15). Petitioner conducted a job search from July 16, 2020 through February 16, 2021 (PX 14). Petitioner continued to see Dr. Singer for weekly sessions. He discussed the difficulties in his job search and his difficulties with COVID (PX 3). On February 18, 2021, Petitioner discussed a job transfer to work with the blind. Dr. Singer stated this would be much safer position and would work to get him released (PX 3, p 863). Petitioner last saw Dr. Singer on February 25, 2021 (PX 3, p 872).

Petitioner testified that he did not return to work for Respondent following the September 23, 2019 assault. He began work at the Bureau of Blind Services on March 1, 2021. He helps vision impaired individuals find services and to live more independently. He is currently earning $97,000 per year. Petitioner testified that if he was still working at IYC St. Charles, he would be making a little more money than his current employment. He testified that his physical injuries were near baseline where they were before the accidents, however, the more activity he did, the more pain he had Petitioner testified he still has nightmares at least once a week, he has trouble sleeping and trouble concentrating. He continues to have headaches daily, and takes ibuprofen for pain. He was concerned about having to go back on medication for PTSD previously prescribed by Dr. Singer. He continues to get nervous when he is around a group of youths with his heart rate escalating and his palms becoming sweaty. He stated before the accidents he was more relaxed. Now he gets nervous and tries to avoid any groups of youths. Petitioner testified has thought about going back to counseling to help with his concentration.

Conclusions of Law

In support of the Arbitrator's decision with respect to (K) Temporary Compensation, the Arbitrator finds as follows:

Temporary compensation is provided for in Section 8(b) of the Workers' Compensation Act, which provides, weekly compensation shall be paid as long as the total temporary incapacity lasts, which has interpreted to mean that an employee is temporarily totally incapacitated from the time an injury incapacitates him for work until such time as he is as far recovered or restored as the permanent character of his injury will permit.

The dispositive test is whether the claimant's condition has stabilized, i.e., reached MMI. *Sunny Hill of Will County Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 760 (4th Dist. 2003). To be entitled to TTD benefits a claimant must prove not only that he did not work but that he was unable to work. *Freeman United Coal Min. Co. v. Indus. Comm'n*, 318 Ill. App. 3d 170, 175, 741 N.E.2d 1144, 1148 (2000).

The parties agree that Petitioner received appropriate benefits from the date of accident though his benefit cut off on October 17, 2017. Petitioner is seeking temporary total disability from the benefit cut off on October 17, 2017 through Petitioner's return to work for Respondent on December 28, 2018. Petitioner was declared MMI for his lumbar spine by Dr. Sokolowski on July 11, 2017. Dr. Cole released him to work full duty with regards to his shoulder effective September 18, 2017. On a November 12, 2018 return visit, Dr. Sokolowski confirmed Petitioner was at MMI. He released Petitioner to return to his regular job as a teacher.

Petitioner was under continuous psychological treatment with Dr. Singer for his PTSD symptoms. On October 19, 2017, Dr. Singer stated that Petitioner was at the point where he feels safe to return him to work slowly. He outlined the gradual return to work process as "importantly**,** he is to have no contact with the juvenile inmates the first two weeks of his return. After two weeks he should enter the teaching platform slowly, teaching one class with a guard outside for one week and then moving to 3 classes." Petitioner was to continue weekly sessions with Dr. Singer. Dr. Singer documented Respondent's refusal to comply with his return to work. On December 20, 2017, Dr. Thomas Rostafinski strongly supported Dr. Singer's recommendations that Petitioner return to work gradually, starting with one class per day, and that Petitioner only return to teaching once there was a fully security presence in the classroom area. He noted Petitioner's PTSD symptoms had improved, though not resolved, and that he should continue with Dr. Singer until he has made a full and reasonably

comfortable return to work. Petitioner testified that he wanted to return to work gradually and was ready, but Respondent did not allow him to return in that capacity.

Petitioner continued sessions with Dr. Singer. On November 30, 2018, Dr. Singer notes Petitioner thinks he will be allowed to return to work at the end of December. On December 5, 2018, Petitioner discussed wanting to be released to work without a plan. This is the only way that will accept him back and he wants to get back to work to see if he can do it. Dr. Singer states he should go back to work with the plan, however per the client's request, he will be released without a plan. On December 18, 2018, Dr. Singer notes Petitioner is returning to work on December 27. His symptoms have been exacerbated of late, but he is going to go back December 27 and face everything. He is tired of waiting and needs to get back to see if he can.

Respondent terminated benefits based upon Dr. Hartman's opinions that Petitioner did not have PTSD and was malingering. On September 17, 2018, Dr. Hartman opined that, based upon his previous examination, that Dr. Rostafinski was incorrect and nondispositive.

It is the Commission's province to assess the credibility of witnesses, draw reasonable inferences from the evidence, determine what weight to give testimony, and resolve conflicts in the evidence, particularly medical opinion evidence. *Berry v. Industrial Comm'n*, 99 Ill. 2d 401, 406-07, 459 N.E.2d 963, 76 Ill. Dec. 828 (1984); *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 675, 928 N.E.2d 474, 340 Ill. Dec. 475 (2009); *Fickas v. Industrial Comm'n*, 308 Ill. App. 3d 1037, 1041, 721 N.E.2d 1165, 242 Ill. Dec. 634 (1999). Expert testimony shall be weighed like other evidence with its weight determined by the character, capacity, skill and opportunities for observation, as well as the state of mind of the expert and the nature of the case and its facts. *Madison Mining Company v. Industrial Commission*, 309 Ill. 91, 138 N.E. 211 (1923). The proponent of expert testimony must lay a foundation sufficient to establish the reliability of the bases for the expert's opinion. *Gross v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100615WC, 960 N.E.2d 587, 355 Ill. Dec. 705. If the basis of an expert's opinion is grounded in guess or surmise, it is too speculative to be reliable. Expert opinions must be supported by facts and are only as valid as the facts underlying them. *In re Joseph S.*, 339 Ill. App. 3d 599, 607, 791 N.E.2d 80, 87, 274 Ill. Dec. 284 (2003). A finder of fact is not bound by an expert opinion on an ultimate issue, but may look 'behind' the opinion to examine the underlying facts. Not only may the Commission decide which medical view is to be accepted, it may attach greater weight to the opinion of the treating physician. *International Vermiculite Co. v. Industrial Comm'n*, 77 Ill.2d 1, 31 Ill.Dec. 789, 394 N.E.2d 1166 (1979); *ARA Services, Inc. v. Industrial Comm'n*, 226 Ill. App. 3d 225, 168 Ill. Dec. 756, 590 N.E. 2d 78 (1992).

Having heard the testimony and reviewed the exhibits, the Arbitrator finds Petitioner's testimony credible and finds the opinions of Dr. Singer and Dr. Rostafinski persuasive. The Arbitrator does not find the testimony of Dr. Hartman persuasive. Further the Arbitrator notes that Dr. Hartman agreed with Dr. Singer that Petitioner should return to work slowly for a work reentry. Based upon the evidence, Petitioner did not reach MMI until his release to return to work without restriction on December 28, 2018.

Based upon the record as a whole, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that he is entitled to temporary total disability commencing October 17, 2017 through December 28, 2018 a period of 61 1/7 weeks.

In support of the Arbitrator's decision with respect to (L) Nature & Extent, the Arbitrator finds as follows:

Petitioner's date of accident is after September 1, 2011 and therefore the provisions of Section 8.1b of the Act are applicable to the assessment of partial permanent disability in this matter.

In the present case, Petitioner is seeking compensation for orthopedic injuries to the right hand, right shoulder, and low back as well as psychological injuries including PTSD. Petitioner has also filed two subsequent injuries for attacks in September 2019. These subsequent cases do not involve the orthopedic injuries alleged in this matter, but do include a claim for further psychological injury.

In awarding permanent partial disability (PPD) benefits in a matter where Petitioner has sustained two separate and distinct injuries to the same body part and the claims are consolidated for hearing and decision, unless there is some evidence presented at the consolidated hearing to delineate and apportion the nature and extent of permanency attributable to each accident, it is proper for the Commission to consider all the evidence presented to determine the nature and extent of the claimant's permanent disability as of the date of the hearing. *City of Chicago v. Illinois Workers' Compensation Commission*, 409 Ill, App. 3d 258. The Arbitrator finds that the credible opinions of Dr. Singer and Dr. Sky do provide evidence to delineate and apportion the nature and extent of permanency of the psychological injury to each accident. After Petitioner's December 28, 2018 return to work, Dr. Singer only saw Petitioner one time in January 2019 until Petitioner returned on September 25, 2019 when Dr. Singer now notes increased symptoms following the September 2019 attacks and opined that Petitioner should not return to work at the prison. Dr. Sky reviewed the records and assessed an aggravation in Petitioner's condition and increased his disability assessment from 25% to 35%.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no opinion comporting with the specific requirements of §8.1b(a) was submitted into evidence. However, the Arbitrator has considered Dr. Sky's comments as a factor in the evaluation of Petitioner's permanent partial disability as required by §8.1b(b)(i). The doctor noted a 25% loss as a result of the accident but does not explain the basis or criteria used in arriving at this assessment . Because of this, the Arbitrator therefore gives lesser weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as an educator at the correction facility at the time of the accident and that he was able to return to work in his prior capacity as a result of said injury. The Arbitrator notes Petitioner was recommended to have a gradual return which was not accommodated but chose to go back without a gradual program and was able to work until his subsequent attacks in September 2019. Because of these facts, the Arbitrator therefore gives some weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 46 years old at the time of the accident. This would make Petitioner a younger worker with many years to remain in the workforce. Because of this, the Arbitrator therefore gives some weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes Petitioner initially returned to his regular job and is currently making more than at the time of the accident. Because of this, the Arbitrator therefore gives no weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes That Petitioner was initially treated at Kishhealth complaining of pain in the middle back Physical exam noted tenderness along the lower right posterior ribs. There were abrasions on the knuckles of both hands. The assessment was injury of the right ring finger and right sided rib pain. Dr. Sokolowski treated Petitioner's lumbar spine and Dr. Cole treated his right shoulder. MRI finding were consistent with a SLAP tear, subacromial bursitis, and AC joint arthropathy in the right shoulder, and annular bulging at L4-5 and L5-S1 with associated neuroforaminal stenosis in the lumbar spine. Petitioner underwent conservative treatment and was released to full duty at MMI in late 2017. Other than one follow-up with Dr. Sokolowski in November 2018, he has had no further treatment for these orthopedic conditions.

Petitioner was also diagnosed with PTSD and had extensive treatment with Dr. Singer. Dr. Singer notes symptoms throughout his session. Petitioner did return to his regular job despite his anxiety. On January 28, 2019, he reported difficulty in the situations at work, but he has not had much choice since he was forced to go back. Because of these facts, the Arbitrator therefore gives greater weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 2.5% loss of use of whole person for Petitioner's multiple orthopedic injuries to the rib, right hand and fingers, right shoulder, and neck and back and 7.5% loss of use of whole person for Petitioner's psychological injuries including PTSD, for a total of 10% loss of the person as a whole pursuant to §d(2) of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC005402
Case Name	Terrance Jones v. State of Illinois - IYC St. Charles
Consolidated Cases	17WC000227;
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0350
Number of Pages of Decision	12
Decision Issued By	Amylee Simonovich, Commissioner

Petitioner Attorney	Aaron Chappell
Respondent Attorney	James Gale

DATE FILED: 8/14/2023

/s/ Amylee Simonovich, Commissioner

Signature

23IWCC0350

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Terrance Jones,

Petitioner,

vs. NO: 20 WC 5402

State of Illinois / IYC St. Charles,

Respondent.

DECISION AND OPINION ON REVIEW

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

In the interest of efficiency, the Commission primarily relies on the detailed recitation of facts in the Arbitration Decision. Petitioner worked as an educator for Respondent. He previously suffered physical and psychological injuries due to a work-related assault on November 28, 2016. The prior work injury is addressed in case number 17 WC 0227. Petitioner returned to work without restrictions on December 28, 2018, following his prior work accident, and continued to perform his normal work duties until he was assaulted at work on September 23, 2019. Petitioner sustained minor physical injuries that were treated conservatively. Petitioner also sustained a significant psychological injury due to this work accident.

Petitioner resumed treatment for his chronic PTSD with Dr. Singer after the September 23, 2019 assault. Soon after the work accident, Petitioner told Dr. Singer that he did not want to return to his job with Respondent. Dr. Singer wrote that Petitioner experienced significant symptoms such as trembling and profusely sweating when they discussed a possible return to work. In January 2020, Dr. Singer opined that Petitioner's job might be too overwhelming for his psychological condition. Throughout 2020, Petitioner continued to exhibit symptoms during discussions regarding a possible return to his job with Respondent. In April 2020, Dr. Sky, a board-certified psychiatrist, performed a Section 12 examination at Petitioner's request. He expressed significant concern regarding Petitioner's ability to return to work in a corrections or law enforcement environment where there is a high likelihood of physical harm. On February 18, 2021, Petitioner

told Dr. Singer that he found a new job. Dr. Singer wrote that the new position appeared to be safer and would not exacerbate Petitioner's PTSD. Petitioner last saw Dr. Singer on February 25, 2021. He began working for the Bureau of Blind Services on March 1, 2021, and helps vision-impaired people find services and devices to help them live independently.

The Arbitrator concluded Petitioner sustained a 1% loss of the whole person due to his physical injuries, and a 2.5% loss of the whole person due to the aggravation of Petitioner's preexisting psychological injury. While the Commission generally agrees with the Arbitrator's analysis of the five factors pursuant to Section 8.1b(b) of the Act, the Commission modifies the award of permanent partial disability. After carefully considering the totality of the evidence, the Commission affirms the award of 1% loss of the whole person due to Petitioner's physical injuries; however, it finds an award of 10% loss of the whole person due to Petitioner's psychological injury is most appropriate.

The evidence shows that this work accident exacerbated the psychological injury Petitioner sustained due to his prior November 2016 work accident. Extensive treatment allowed Petitioner to eventually return to his normal job without restrictions following the prior accident; however, the September 23, 2019, work accident significantly and permanently worsened his psychological condition. Petitioner testified that he continues to have weekly nightmares and has difficulty sleeping. He testified that he has difficulty concentrating on his work and maintaining focus. Petitioner also testified that he continues to experience flashbacks regarding the September 23, 2019, assault. Petitioner testified that his heart starts racing and his palms begin to sweat when he encounters a group of youths. He testified that he continues to try to avoid such groups. Perhaps most importantly, the evidence shows that Petitioner was unable to return to his normal job as an educator in a secure youth facility following this work accident. After considering the totality of the evidence, the Commission finds Petitioner sustained a 10% loss of the whole person due to the exacerbation of his psychological condition as a result of the September 23, 2019, work accident.

The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 29, 2021, is modified as stated herein.

IT IS FURTHER ORDERED that Respondent shall pay Petitioner permanent partial disability benefits of $836.69/week for 55 weeks. Petitioner's physical injuries caused a 1% loss of the whole person and his psychological injury caused a 10% loss of the whole person, pursuant to Section 8(d)2 of the Act.

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

IT IS FURTHER ORDERED that Respondent pay to Petitioner interest pursuant to Section 19(n) of the Act, if any.

Pursuant to Section 19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review.

August 14, 2023

d: 6/13/23
AHS/jds
51

/s/ *Amylee H. Simonovich*
Amylee H. Simonovich

/s/ *Maria E. Portela*
Maria E. Portela

/s/ *Kathryn A. Doerries*
Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC005402
Case Name	JONES, TERRANCE v. STATE OF ILLINOIS/IYC ST. CHARLES
Consolidated Cases	
Proceeding Type	Request for Hearing
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	8
Decision Issued By	Stephen Friedman, Arbitrator

Petitioner Attorney	Thomas Rich
Respondent Attorney	Adam McCall

DATE FILED: 12/29/2021

/s/Stephen Friedman, Arbitrator

Signature

INTEREST RATE WEEK OF DECEMBER 28, 2021 0.21%

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

December 29, 2021

/s/ Michele Kowalski

Michele Kowalski, Secretary

Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF **Kane**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Terrence Jones
Employee/Petitioner

v.

State of Illinois/ IYC St. Charles
Employer/Respondent

Case # **20** WC **005402**

Consolidated cases: **See Decision**

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 **Stephen J. Friedman**, Arbitrator of the Commission, in the city of **Geneva**, on **November 15, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **September 23, 2019**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**57,815.48**; the average weekly wage was $**1,521.46**.

On the date of accident, Petitioner was **49** years of age, ***single*** with **0** dependent children.

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

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

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

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

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of $836.69/week for 17.5 weeks, because the injuries sustained caused the 3.5% loss of the person as a whole, as provided in Section 8(d)2 of the Act. See the decisions in consolidated cases 17WC000227 and 20WC005401 for additional permanent partial disability awards.

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.

/s/ Stephen J. Friedman

Signature of Arbitrator

December 29, 2021

Statement of Facts

This matter was tried in conjunction with consolidated cases 17WC000227 (DOA 11/28/2016) and 20WC005401 (9/19/2018). A single transcript was prepared although the Arbitrator has issued separate decisions. The Arbitrator notes that Petitioner listed a period of disputed temporary total disability from 10/17/17 through 12/28/2018 on each Request for Hearing form although this period could only be addressed in case 17WC000227. The Arbitrator also notes that Petitioner offered medical bills claimed as compensable in PX 1 and Respondent offered a payment log as RX 1. Respondent stipulated that all reasonable, necessary, and causally related medical bills have been paid or will be paid pursuant to the fee schedule or negotiated rate and that PX 1 represents the list of the bills that Respondent has stipulated that they will pay as reasonable and necessary bills. Therefore, the Arbitrator has made no findings with respect to Medical. The Arbitrator incorporates by reference the Statement of Facts from case 17WC000227 as if fully set forth herein.

To briefly summarize the statement of facts incorporated by reference, Petitioner suffered an injury on November 28, 2016 when he was attacked by about 5 youths in his classroom who were trying to get his keys and his computer. One grabbed him from behind while others grabbed his legs and arm and lifted him up. He was able to call for help and security came. He was treated for his orthopedic injuries and began psychological treatment for a diagnosis of PTSD. Petitioner was treated by Dr. Singer. He was evaluated by Dr. Rostafinski and Dr. Sky.

Petitioner was seen by Dr. Hartman for an evaluation at Respondent's request. Dr. Hartman diagnosed Petitioner with adjustment disorder with mixed emotional features and malingered PTSD. He testified that Petitioner had longstanding personality issues that were exaggerated on the psychological tests. He stated that these types of results are almost impossible to reach unless doing on purpose. Dr. Hartman determined that there was no reasonable likelihood that Petitioner's repeatedly exaggerated results represent a credible effort. He found Petitioner at MMI and capable of return to work at full duty. Petitioner testified that he returned to work in December 28, 2018 as an educator. He did not miss any time from work from that date to September 2019 when he was again injured.

Petitioner testified that on September 19, 2019, he was walking in the hallway when a student came up to him and started shoving him against a brick wall, causing injuries to his upper torso and shoulder. [This is the subject of consolidated case 20WC005401 decided in conjunction with this matter.] Following that injury, he continued to work. On September 23, 2019, Petitioner was attacked again when he was struck in the head with a chair by a youth. Petitioner testified he sustained a lump on his head and started having headaches. On September 23, 2019, Petitioner was seen at the emergency department at Northwestern Medicine Delnor Hospital (PX 11). He told emergency physicians he was struck in the head with a chair by a student and had blurred vision and associated dizziness. He stated the majority of his symptoms have resolved but he continued to have headaches and some visual changes. Physical examination revealed a contusion to the occipital parietal scalp. Petitioner was diagnosed with a concussion without loss of consciousness. He declined a CT scan. He was discharged with medication and advised to return to the ER if he has dizziness, vomiting or worsening headaches (PX 11).

On September 25, 2019, Petitioner presented to Dr. Singer for a psychiatric evaluation (PX 3). Dr. Singer noted that Petitioner had multiple incidents recently that caused him to return to therapy, including being held by prisoners and hit as well as being hit by chairs. Dr. Singer found Petitioner was again having moderate to serious symptoms of posttraumatic stress disorder. Dr. Singer recommended Petitioner return to weekly

therapy and to be granted leave from work to be determined week by week (PX 3, p 396). On September 27, 2019, Petitioner returned to Dr. Ahmad. Dr. Ahmad took his history, noting he was recently hit on the top of his head by a chair by a student. He reported having a bump on his head, headaches, was waking up at night and having trouble sleeping, and was having eye pain while wearing glasses. Dr. Ahmad assessed Petitioner to have non-intractable headaches. He noted Petitioner is neurologically stable. He would continue to monitor Petitioner and if his headache worsened, recommended follow up visits (PX 3, p 403-406). Petitioner reinstated regular visits with Dr. Singer. On October 4, 2019, Petitioner told Dr. Singer he does not want to go back to work in the prison again. Dr. Singer notes that he was trembling and sweating talking about the story (PX 3, p 414). On November 21, 2019, Petitioner states he is doing better as long as he is away from his job. Dr. Singer notes when he discussed going back to work, Petitioner begins to sweat profusely (PX 3, p 437). On December 3, 2019, Dr. Singer notes that when we talk about the incidents, he immediately gets stressed and sweaty, so we need to go slow (PX 3, p 443). Petitioner reported seeking a new employment situation. Dr. Singer notes that every time they discuss the incident, he exhibits symptoms very rapidly (PX 3, P 463). On January 9, 2020, Dr. Singer noted that it is recommended that due to issues beyond his control, the job may be too overwhelming for his psychological condition (PX 3, p 479). Petitioner continued sessions with Dr. Singer through April 2020 addressing his decision not to return to work in the prison due to fear of being beaten again, his frustrations with his situation, and his efforts to find other jobs. On April 23, 2020, Dr. Singer stated Petitioner does not feel he could go back, and he agrees he should never go back to the prison for work (PX 3, p 558).

On April 8, 2020, Petitioner underwent a Section 12 evaluation at his attorney's request with Dr. Adam Sky via videoconference (PX 13, Ex 2). Dr. Sky took a history of the attacks in 2019 and 2019 and reviewed the treatment records. He conducted a medical status examination including reviewing Petitioner's current symptoms. Dr. Sky diagnosed Petitioner with PTSD and major depression with anxious distress as a result of the November 28, 2016 attack. He found the condition to be causally connected to the November 2016 attack, He assesses 25% disability. He found Petitioner was at maximum medical improvement although he still required ongoing treatment. He noted Petitioner will have restrictions on return to work and particularly in any correctional institution (PX 13, Ex 1).

Dr. Sky reviewed additional records and authored an addendum report on June 9, 2020. He reviewed the additional emergency room records on September 23, 2019. He opined that the subsequent 2019 attacks certainly aggravated the 2016 injury. Dr. Sky felt the need to continue the psychotherapy Petitioner was already undergoing with Dr. Singer, but would also benefit from a therapist who specializes in posttraumatic stress disorder. Dr. Sky reiterated his diagnosis of PTSD and again found Petitioner to be at MMI, but requiring ongoing psychiatric treatment. However, he also amended his prior assessment and now finds Petitioner to be at a 35% permanent psychiatric disability to the body as a whole in conjunction with the September 2019 attacks. He based this on Petitioner's self-reported symptoms and their recurrence when confronted with triggering events (PX 13, Ex. 3).

Petitioner continued regular visits with Dr. Singer (PX 3). On May 28, 2020, they discussed moving on to another job (PX 3, p 586). On June 4, 2020, Dr. Singer notes Petitioner must push forward to a different job (PX 3, p 595). On June 11, 2020, Petitioner reported applying for other jobs. He notes the effect of COVID (PX 3, p 600). Petitioner continued treatment with Dr. Singer through February 25, 2021. Dr. Singer recommended he not return to work in the prison. Petitioner was seen for a vocational plan on July 22, 2020 by Edward Steffen. A vocational plan to assist Petitioner is preparing his resume and learning job seeking skill as a

component of his self-directed job search was proposed. Petitioner conducted a job search from July 16, 2020 through February 16, 2021.

Petitioner testified that he did not return to work for Respondent following the September 23, 2019 assault. He began work at the Bureau of Blind Services on March 1, 2021. He helps vision impaired individuals find services and to live more independently. He is currently earning $97,000 per year. Petitioner testified that if he was still working at IYC St. Charles, he would be making a little more money than his current employment. He testified that his physical injuries were near baseline where they were before the accidents, however, the more activity he did, the more pain he had Petitioner testified he still has nightmares at least once a week, he has trouble sleeping and trouble concentrating. He continues to have headaches daily, and takes ibuprofen for pain. He was concerned about having to go back on medication for PTSD previously prescribed by Dr. Singer. He continues to get nervous when he is around a group of youths with his heart rate escalating and his palms becoming sweaty. He stated before the accidents he was more relaxed. Now he gets nervous and tries to avoid any groups of youths. Petitioner testified has thought about going back to counseling to help with his concentration.

Conclusions of Law

In support of the Arbitrator's decision with respect to (F) Causal Connection, the Arbitrator finds as follows:

A Workers' Compensation Claimant bears the burden of showing by a preponderance of credible evidence that his current condition of ill-being is causally related to the workplace injury. *Horath v. Industrial Commission*, 449 N.E.2d 1345, 1348 (Ill. 1983) citing *Rosenbaum v. Industrial Com.* (1982), 93 Ill.2d 381, 386, 67 Ill. Dec. 83, 444 N.E.2d 122). The Commission may find a causal relationship based on a medical expert's opinion that the injury "could have" or "might have" been caused by an accident. *Mason & Dixon Lines, Inc. v. Industrial Comm'n*, 99 Ill. 2d 174, 182, 457 N.E.2d 1222, 1226, 75 Ill. Dec. 663 (1983). However, expert medical evidence is not essential to support the Commission's conclusion that a causal relationship exists between a claimant's work duties and his condition of ill-being. *International Harvester v. Industrial Comm'n*, 93 Ill. 2d 59, 63, 442 N.E.2d 908, 911, 66 Ill. Dec. 347 (1982). A chain of events suggesting a causal connection may suffice to prove causation. *Consolidation Coal Co. v. Industrial Comm'n*, 265 Ill. App. 3d 830, 839, 639 N.E.2d 886, 892, 203 Ill. Dec. 327 (1994). Prior good health followed by a change immediately following an accident allows an inference that a subsequent condition of ill-being is the result of the accident. *Navistar International Transportation Co. v. Industrial Comm'n*, 315 Ill. App. 3d 1197, 1205 (2000).

It is unrebutted that Petitioner suffered a head injury as a result of the September 23, 2019 attack. Petitioner also alleges an aggravation of his preexisting PTSD initially suffered in the November 28, 2017 accident (See consolidated case 17WC 000227). In such cases, "if a claimant is in a certain condition, an accident occurs, and following the accident, the claimant's condition has deteriorated, it is plainly inferable that the intervening accident caused the deterioration." Schroeder, 2017 IL App (4th) 160192WC, 414 Ill. Dec. 198, 79 N.E.3d 833. "The salient factor is not the precise previous condition; it is the resulting deterioration from whatever the previous condition had been." Id.

Dr. Hartman does not address the subsequent injuries in his examinations or reports which all predate the September 2019 injuries. On September 25, 2019, Petitioner returned to Dr. Singer for a psychiatric evaluation. Dr. Singer noted that Petitioner had multiple incidents recently that caused him to return to therapy,

including being held by prisoners and hit as well as being hit by chairs. Dr. Singer found Petitioner was again having moderate to serious symptoms of posttraumatic stress disorder. Dr. Singer recommended Petitioner return to weekly therapy and to be granted leave from work. After months of treatment, Dr. Singer agreed that Petitioner should never return to the prison for work. Dr. Sky opined that Petitioner's September 2019 injuries aggravated the injury. He based this on Petitioner's self-reported symptoms and their recurrence when confronted with triggering events. He opined that Petitioner was not able to return to any kind of work that would put him in danger of being assaulted, such any kind of correctional facility. He also amended his prior assessment of 25% permanent psychiatric disability, and now finds Petitioner to be at a 35% permanent psychiatric disability to the body as a whole in conjunction with the September 2019 attacks.

Based upon the record as a whole, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that, as a result of the accident on September 23, 2019, he suffered a concussion and aggravation of his preexisting psychiatric conditions including PTSD.

In support of the Arbitrator's decision with respect to (L) Nature & Extent, the Arbitrator finds as follows:

Petitioner's date of accident is after September 1, 2011 and therefore the provisions of Section 8.1b of the Act are applicable to the assessment of partial permanent disability in this matter. The Petitioner has sustained a head injury including a diagnosis of concussion and also an aggravation of his psychiatric condition including PTSD. The Arbitrator has awarded Petitioner 7.5% loss of use of the person as a whole for this condition as a result of the November 28, 2017 accident in consolidated case 17WC 000227.

In awarding permanent partial disability (PPD) benefits in a matter where Petitioner has sustained two separate and distinct injuries to the same body part and the claims are consolidated for hearing and decision, unless there is some evidence presented at the consolidated hearing to delineate and apportion the nature and extent of permanency attributable to each accident, it is proper for the Commission to consider all the evidence presented to determine the nature and extent of the claimant's permanent disability as of the date of the hearing. *City of Chicago v. Illinois Workers' Compensation Commission*, 409 Ill, App. 3d 258. As discussed in the decision in consolidated case 17WC000227, the Arbitrator finds that the credible opinions of Dr. Singer and Dr. Sky do provide evidence to delineate and apportion the nature and extent of permanency of the psychological injury to each accident. After Petitioner's December 28, 2018 return to work, Dr. Singer only saw Petitioner one time in January 2019 until Petitioner returned on September 25, 2019 when Dr. Singer now notes increased symptoms following the September 2019 attacks and opined that Petitioner should not return to work at the prison. Dr. Sky reviewed the records and assessed an aggravation in Petitioner's condition. He agrees Petitioner cannot return to work for Respondent and increased his disability assessment from 25% to 35%.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no opinion comporting with the specific requirements of §8.1b(a) was submitted into evidence. However, the Arbitrator has considered Dr. Sky's comments as a factor in the evaluation of Petitioner's permanent partial disability as required by §8.1b(b)(i). The doctor noted an increase from his prior 25% assessment to 35% loss as a result of the accident but does not explain the basis or criteria used in arriving at this assessment. Because of this, the Arbitrator therefore gives lesser weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as an educator at the correction facility at the time of the accident and that he was not able to return to work in his prior capacity as a result of said injury. The Arbitrator notes Petitioner has returned to work at a new occupation which continues to utilize his education and training after a successful self-directed job search. Because of these facts, the Arbitrator therefore gives some weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 49 years old at the time of the accident. This would make Petitioner a younger worker with many years to remain in the workforce. Because of this, the Arbitrator therefore gives some weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that Petitioner's new position has higher earning than he made at the time of the injury. Petitioner testified his old job would now pay slightly higher. Because of this, the Arbitrator therefore gives lesser weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that with respect to the head injury, Petitioner was diagnosed with a concussion without loss of consciousness. On September 27, 2019, Dr. Ahmad noted he was recently hit on the top of his head by a chair by a student. He reported having a bump on his head, headaches, was waking up at night and having trouble sleeping, and was having eye pain while wearing glasses. Dr. Ahmad assessed Petitioner to have non-intractable headaches. He noted Petitioner is neurologically stable.

With respect to the aggravation of his psychiatric condition, Petitioner returned to Dr. Singer, who noted that Petitioner had multiple incidents recently that caused him to return to therapy, including being held by prisoners and hit as well as being hit by chairs. Dr. Singer found Petitioner was again having moderate to serious symptoms of posttraumatic stress disorder. Dr. Singer recommended Petitioner return to weekly therapy and to be granted leave from work. After months of treatment, Dr. Singer agreed that Petitioner should never return to the prison for work. Dr. Sky amended his prior assessment of 25% permanent psychiatric disability, and now finds Petitioner to be at a 35% permanent psychiatric disability to the body as a whole in conjunction with the September 2019 attacks. Because of these facts, the Arbitrator therefore gives greater weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 1% loss of use of whole person for the concussion and a further 2.5% loss of the whole person for the aggravation of Petitioner's psychological injuries including PTSD, for a total of 3.5% loss of the person as a whole pursuant to §d(2) of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC028674
Case Name	John Summit v. Mobile Mini, Inc
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0351
Number of Pages of Decision	14
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Steven Seidman
Respondent Attorney	Marcy Bennett

DATE FILED: 8/15/2023

/s/ Deborah Baker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JOHN SUMMIT,

Petitioner,

vs. NO: 19 WC 28674

MOBILE MINI, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of the casual connection, and the nature and extent of Petitioner's permanent disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 30, 2022 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 the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $48,700. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

August 14, 2023

/s/ *Deborah J. Baker*

DJB/lyc

O: 08/09/23

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/s/ *Stephen J. Mathis*

/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC028674
Case Name	Summit, John v. Mobile Mini, Inc.
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	11
Decision Issued By	Roma Dalal, Arbitrator

Petitioner Attorney	Steven Seidman
Respondent Attorney	Marcy Bennett

DATE FILED: 6/30/2022

THE INTEREST RATE FOR THE WEEK OF JUNE 28, 2022 2.50%

/s/ Roma Dalal, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF **WILL**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

John Summit
Employee/Petitioner

v.

Mobile Mini, Inc.
Employer/Respondent

Case # **19** WC **028674**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Roma Dalal**, Arbitrator of the Commission, in the city of **Joliet**, on **May 13, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **August 7, 2019**, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $**42,152.24**; the average weekly wage was $**810.62**.

On the date of accident, Petitioner was **61** years of age, single with **0** dependent children.

Petitioner has received all reasonable and necessary medical services.

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

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

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

ORDER

Respondent shall pay permanent partial disability benefits of $486.37 for 100 weeks because the injury sustained caused a loss of trade to the extent of 20% loss of the person as a whole, as provided in Section 8(d)(2) of the Act.

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

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

Signature of Arbitrator

JUNE 30, 2022

State of Illinois)
)
County of WILL)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

John Summit,)
)
v.) Case: 19 WC 028674
)
Mobile Mini, Inc.)

STATEMENT OF FACTS

This matter proceeded to hearing on May 13, 2022 in Joliet, Illinois before Arbitrator Roma Dalal on Petitioner's Request for Hearing. Issues in dispute include causal connection and nature and extent. (Arb. Ex. 1). John Summit (referred herein as the "Petitioner") was a 61-year-old single male with zero dependents. He was employed by Mobile Mini (hereinafter referred to as the "Respondent"). Petitioner testified he worked for Respondent since December of 2018 and was initially hired as a truck driver. (T.9). His job responsibilities involved driving a semi-truck as well as loading and unloading different containers to various commercial and non-commercial job sites. (T.9-10). He worked from 5:30 in the morning until 1 or 2:00 PM. (T.10).

On August 7, 2019, Petitioner was working for Respondent and was sent to pick up a container that was buried in stone and mud. (T.11). Petitioner went into his truck's trailer, pulled out the chain, looped it around the container, and hooked it back up to the trailer to lift the container up so that he could wedge a block of wood underneath it. (T.11). After doing so, Petitioner unhooked the chain and abruptly slipped in the mud and the stone and felt extreme pain in his low back. (T.12). Petitioner subsequently called dispatch and advised them what happened and received care by telephone with Tele-Med that same day. (T.12-13).

On August 8, 2019 Petitioner presented to Advocate Medical Group and was evaluated for low back pain. (T.13, PX3). Petitioner complained of back pain at a 6/10 after a slip and fall yesterday. (PX3, p.5). He was diagnosed with acute left sided low back pain without sciatica. He was told to 'stay active' and limit bed rest along with gentle stretching and heat/ice. (PX3, p.6).

Petitioner returned on August 14, 2019 to Advocate Medical Group. (PX3, p.7). Petitioner still complained of constant throbbing low back pain. Petitioner was diagnosed with acute left-sided low back pain with sciatica. (PX3, p.11). Petitioner was provided medication and was to undergo an X-ray. Petitioner underwent an X-ray the same day that revealed decreased intervertebral disc height at L5-S1 and endplate spurring "compatible with" degenerative change. (PX3, p.12-13).

In an August 15, 2019 follow up, Petitioner continued to complain of severe low back pain. Petitioner was assessed with acute left-sided low back pain without sciatica, as well as spondylosis of the lumbar region without myelopathy or radiculopathy. (PX3, p.18). He was taken off work,

recommended physical therapy, would consider an MRI to follow if his pain persisted, and referred to Dr. Lawrence Okafor. (PX3, p.20-21).

On August 20, 2019, Petitioner presented to PTSIR for his physical therapy initial evaluation. (PX6, p.21). Petitioner was to undergo therapy two to three times a week for four weeks. (PX6, p. 23). Petitioner continued to attend physical therapy sessions at PTSIR until his appointment with Dr. Okafor. (PX6, p.27-50).

On September 5, 2019 Petitioner presented to Dr. Lawrence Okafor, MD at Advocate Medical. (PX3, p.22). Dr. Okafor diagnosed Petitioner with "low back pain, unspecified back pain laterality, unspecified chronicity, with sciatica presence unspecified." (PX3, p.26). Dr. Okafor kept Petitioner off work and referred Petitioner to pain management specialist Dr. Howard Robinson. (PX3, p.26-27).

On September 25, 2019, Petitioner saw Dr. Robinson at Primary HealthCare Associates. (PX5, p.9). Petitioner complained of back pain and was diagnosed with a herniated lumbar disc. He was to undergo a CT of the lumbar spine. (PX5, p.12).

Petitioner underwent a CT scan on October 8, 2019 at Munster Open MRI facility. (PX4, p.5, and PX5, p.19). The CT scan demonstrated mild multilevel spondylosis with suggestion of disc bulging from L4-S1, straightening of the normal lumbar lordosis, with no visible fracture or dislocation. (PX4, p.6).

Petitioner followed up with Dr. Robinson on October 15, 2019. Petitioner requested a second opinion. Dr. Robinson offered an injection targeting the L4-L5 level, which Petitioner declined. Petitioner was advised to follow up with Dr. Robinson after evaluation by a surgeon and was noted that he "smokes like a chimney." (PX5, p.24).

On November 15, 2019 Petitioner presented to Dr. Srinivasu Kusuma. Petitioner was a 61-year-old male who presented with low back pain after a slip and fall on August 7, 2019. Petitioner complained of constant pain. (PX4, p.7). Petitioner was diagnosed with L4-5 significant facet arthrosis/spondylosis. Petitioner wanted to proceed conservatively and was provided pain medication. (PX4, p.7).

In a December 5, 2019 follow up, Dr. Robinson recommended a transforaminal epidural steroid injection. (PX5, p.33). On December 15, 2019, Petitioner underwent a L4 and L5 transforaminal epidural steroid injection. (PX5, p.41, T.16).

Petitioner saw Dr. Robinson again on January 15, 2020 who noted pain with radiation into his left leg and buttock. Petitioner noted no improvement following the recent injection. He was to be reevaluated by his surgeon and follow up on an as needed basis. (PX5, p.46).

On January 24, 2020, Petitioner returned to Dr. Kusuma complaining of worsened pain in his low back, which was an 8 out of 10. (PX4, p.15). Dr. Kusuma noted Petitioner received an ESI on December 19, 2019 with Dr. Robinson, and that it 'drastically increased his pain' for 2 days. Dr. Kusuma recommended L4-5 decompressive laminectomy and fusion. (PX4, p.15).

Petitioner returned to Dr. Kusuma on February 21, 2020. Surgery was again recommended. Petitioner was to follow up after treatment with his primary care. (PX4, p.23).

On March 16, 2020, Petitioner was seen for a Section 12 examination with Dr. Wellington Hsu at Northwestern Spine Center. Dr. Hsu reviewed medical records and performed a physical examination. Based on the same, he diagnosed Petitioner with a lumbar strain and lumbar spondylosis. He opined the lumbar strain was caused by Petitioner's accident and Petitioner's lumbar spondylosis was "age- and genetic-related." (RX2, p.5). He opined Petitioner should undergo work hardening with a total of two to four weeks, five days a week. He placed Petitioner with work restrictions of no lifting more than 20 pounds and no more than occasional bending, crouching, and stooping. (RX2, p.5).

Petitioner returned to light-duty work with Respondent after March 29, 2020. Respondent accommodated Petitioner's restrictions. (T.21).

On April 10, 2020, Petitioner followed up with Dr. Kusuma via a telemedicine visit. (PX4, p.29). Dr. Kusuma sent Petitioner to work hardening "due to IME results." Petitioner was placed with restrictions of no sitting or standing more than 20 minutes, no more than occasional bending, crouching, or stooping, and no lifting more than 20 pounds. (PX4, p.29).

On April 27, 2020, Petitioner presented to Athletico for his initial evaluation of work hardening. Petitioner was to undergo the same for 3.5-4 hours per day for four weeks. (PX7, p.18). Petitioner only attended four visits of work conditioning. (PX7, p.33).

Petitioner was seen via telemedicine on May 7, 2020 with Dr. Kusuma. The Doctor noted Petitioner underwent work conditioning which worsened his low back symptoms. Due to Petitioner's symptoms worsening with work hardening, Dr. Kusuma recommended discussion of a second IME. (PX4, p.33).

On May 17, 2020, Petitioner was discharged from work hardening at Athletico after not returning to the program. Petitioner as discharged due to non-compliance. (PX7, p.56).

Petitioner was seen again by Dr. Kusuma via telemedicine on June 5, 2020. Dr. Kusuma again suggested Petitioner be evaluated by a second independent doctor. (PX4, p.36-37).

Petitioner and Respondent mutually agreed to examination by a second independent doctor, Dr. Edward Goldberg. (RX5). On August 19, 2020, Dr. Goldberg examined Petitioner and opined Petitioner had no nerve root compression that would warrant surgery. (RX4, p.4). He further noted Petitioner had no radicular complaints. He believed it was likely that his symptoms were coming from L4-5 facet arthropathy that was aggravated by the work injury. Dr. Goldberg recommended Petitioner undergo facet joint injections. He opined Petitioner could continue working light duty in the meantime. (RX4, p.4).

On October 6, 2020 Petitioner followed up with Dr. Robinson. Dr. Robinson diagnosed Petitioner with spondylosis without myelopathy. Bilateral L4-5 facet joint injections were recommended. Petitioner told Dr. Robinson he was working on decreasing smoking. (PX5, p.51-55).

On December 14, 2020, Petitioner presented to University of Chicago Medical Group for a follow-up on his low back condition, where he was seen by Dr. Cyrus Akrami. (PX4, p.41). Petitioner reported continued lumbar spine pain with uncontrolled diabetes. (PX4, p.45). Dr. Akrami diagnosed Petitioner with spinal stenosis. (PX4, p.45). Petitioner continued to treat with Dr. Akrami for his diabetes. (PX4).

On February 1, 2021 Petitioner underwent bilateral L4-L5 facet joint injections. (PX5, p.60). Petitioner followed up with Dr. Robinson on February 19, 2021. Petitioner noted no significant improvement. He continued to have severe back pain. Dr. Robinson indicated he had nothing else to offer Petitioner. Petitioner was to follow up as needed. (PX5, p.65).

Petitioner followed up with Dr. Kusuma on April 21, 2021. Petitioner underwent two lumbar epidural injections with Dr. Robinson. He still had continued low back pain. (PX4, p.116). Dr. Kusuma noted Petitioner's x-ray and CT demonstrated significant right L4-L5 facet arthrosis. Petitioner was diagnosed with spondylolisthesis of lumbar region and facet arthropathy. Petitioner was recommended to follow up with Dr. Kusuma after deciding whether to proceed with surgery. (PX4, p.119).

On May 11, 2021, Petitioner underwent a functional capacity evaluation at Athletico. (PX7, p.45). The FCE was invalid. The results revealed 56% overall effort/reliability. Petitioner was capable of greater functional abilities than demonstrated during the FCE. (PX7, p.45). There were also positive Waddell findings. (PX7, p.46). The therapist noted Petitioner's performance was inconsistent throughout testing, and he would "[d]efer to physician to accurately identify restrictions." (PX7, p.45).

At the hearing, Petitioner testified he tried his best during the FCE. (T.19). Petitioner believed the FCE was deemed invalid because he could not perform some of the functions they wanted him to. (T.20).

On May 21, 2021 Petitioner followed up with Dr. Kusuma. (PX4, p. 131). The Doctor noted the FCE was inconclusive but opined Petitioner could return to work with no lifting greater than 20 pounds. (PX4, p.134.)

Petitioner followed up again on July 30, 2021. (PX4, p.143). Petitioner noted he was back to work with restrictions but continued to complain of achiness in the right side of his low back. Petitioner was placed with permanent restrictions no lifting greater than 20 pounds and was to return in four weeks. (PX4, p.146).

On August 27, 2021, Petitioner had his final visit with Dr. Kusuma. (PX4, p.148). Dr. Kusuma opined Petitioner was at MMI. (PX4, p.151). He released Petitioner back to work with permanent restrictions of no sitting or standing more than 20 minutes, occasional bending, crouching, or stooping, and no lifting more than 20 pounds. (PX4, p.152).

On February 28, 2022 Petitioner was seen again by Dr. Hsu at Respondent's request. Once again, Dr. Hsu reviewed the medical records and examined Petitioner. Dr. Hsu opined his previous opinions had not changed. He opined Petitioner sustained a lumbar strain from his work accident and his ongoing symptoms were not related to same. (RX3, p.4). He noted Petitioner's current symptoms were not related to the alleged accident and his injuries from the accident had been

adequately treated with conservative care. Dr. Hsu opined Petitioner's treatment had been reasonable and necessary, and he had exhausted conservative care for his lumbar condition. He further opined Petitioner had reached maximum medical improvement on May 21, 2021 and could return to work without restrictions secondary to the invalid FCE. (RX3, p.4).

Petitioner returned to work for Mobile Mini on March 9, 2020. Respondent has accommodated a position for Petitioner. (T.21). Petitioner's current work schedule includes 5:30 am arrival and 2:30 pm daily departure. (T.21). Petitioner testified he enters daily trip sheets for drivers, orders parts and other office duties. (T.22). Petitioner testified his back hurts and is in constant pain. Petitioner has a hard time sleeping, walking, standing for any length of time, kneeling bending, or sitting. (T.22). He is not on any prescription medications. (T.22).

On cross examination, Petitioner testified he is a smoker and has been told his entire life to stop smoking, including during the pendency of treatment in this case. (T.25). Petitioner then clarified that Dr. Goldberg was a mutual IME. (T.26).

CONCLUSIONS OF LAW

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

Decisions of an arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e). Credibility is the quality of a witness which renders his evidence worthy of belief. The Arbitrator, whose province it is to evaluate witness credibility, evaluates the demeanor of the witness and any external inconsistencies with his/her testimony. Where a claimant's testimony is inconsistent with his/her actual behavior and conduct, the Commission has held that an award cannot stand. McDonald v. Industrial Commission, 39 Ill. 2d 396 (1968); Swift v. Industrial Commission, 52 Ill. 2d 490 (1972).

It is the function of the Commission to judge the credibility of the witnesses and to resolve conflicts in the medical evidence and assign weight to witness testimony. O'Dette v. Industrial Commission, 79 Ill.2d 249, 253, 403 N.E.2d 221, 223 (1980); Hosteny v. Workers' Compensation Commission, 397 Ill. App. 3d 665, 674 (2009). Internal inconsistencies in a claimant's testimony, as well as conflicts between the claimant's testimony and medical records, may be taken to indicate unreliability. Gilbert v. Martin & Bayley/Hucks, 08 ILWC 004187 (2010).

In this case at hand, the Arbitrator observed Petitioner during the hearing and finds him to be a credible witness. Petitioner was well mannered. The Arbitrator compared Petitioner's testimony with the totality of the evidence submitted and did not find any material contradictions that would deem the witness unreliable.

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

The Arbitrator adopts the Statement of Facts in support of the Conclusions of Law. To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the

evidence, all of the elements of his claim (O'Dette v. Industrial Commission, 79 Ill.2d 249, 253 (1980) including that the accidental injury both arose out of and occurred in the course of his employment (Horvath v. Industrial Commission, 96 Ill.2d. 349 (1983)) and that there is some causal relationship between the employment and her injury. Caterpillar Tractor Co. v. Industrial Commission, I29 Ill. 2d 52, 63 (1998). Decisions of an Arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e).

To obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. A work-related injury need not be the sole or principal causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. Even if the claimant had a preexisting degenerative condition which made him more vulnerable to injury, recovery for an accidental injury will not be denied as long as he can show that his employment was also a causative factor. Thus, a claimant may establish a causal connection in such cases if he can show that a work-related injury played a role in aggravating his preexisting condition. Sisbro, Inc. v. Industrial Comm'n, 207 Ill. 2d 193, 205, 797 N.E.2d 665, 278 Ill. Dec. 70 (2003). "A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." International Harvester v. Industrial Com., 93 Ill. 2d 59, 63 442 N.E.2d 908 (1982).

The parties agree Petitioner sustained an accident arising out of and in the course of his employment; however, Respondent disputes Petitioner's current condition of ill-being is causally connected. (Arb. Ex. 1).

Petitioner's unrebutted testimony establishes on August 7, 2019 he slipped at work and sustained pain in his low back. Petitioner reported he had no pain in his back prior to the accident.

The opinions of Petitioner's treating physicians buttress this conclusion. Dr. Robinson reviewed the scans and diagnosed Petitioner with herniated discs in his lumbar spine. (PX5, p.21, 24). On a similar basis, Dr. Kusuma consistently diagnosed Petitioner with "right L4-L5 significant facet arthrosis / spondylosis – symptomatic following work injury." (PX4, p.119.) Consistent with Dr. Kusuma's opinion, Dr. Goldberg also observed facet arthropathy and foraminal stenosis in Petitioner's lumbar spine at L4-5—for his part, he explicitly opined that Petitioner's "symptoms are coming from L4-5 facet arthropathy that was aggravated by the work injury." (RX4, p.4.)

Petitioner credibly testified and the totality of the medical evidence supports that his current condition of ill-being is causally related to the injury of August 7, 2019. There is no evidence suggesting Petitioner had difficulty performing his job duties or underwent any back-related care prior to the August 7, 2019 accident. Petitioner provided prompt notice of his accident and provided all physicians with a consistent account of the mechanism of injury. Furthermore, the mutual Section 12 examiner, Dr. Goldberg opined Petitioner's facet arthropathy at L4-5 was aggravated by Petitioner's work accident. (RX4, 4.) The Arbitrator finds Dr. Goldberg credible—as an expert hired by both parties. Based on the above, the Arbitrator adopts Dr. Goldberg's causal opinion and finds that Petitioner's lumbar spine condition is causally related to his work accident of August 7, 2019. The Arbitrator further notes Dr. Goldberg opined no surgical intervention was necessary.

Based on the foregoing, along with Petitioner's credible and undisputed testimony concerning his ongoing back condition, the opinions of his treating physicians and the objective findings, the Arbitrator finds causal connection between the undisputed work accident and Petitioner's current back condition.

Issue L, what is the Nature and Extent of the Injury, the Arbitrator finds as follows:

Consistent with the Illinois Workers' Compensation Act, the Arbitrator is to base the permanency determination on the following factors:

i. The reported level of impairment pursuant to subsection (a) (e.g., the AMA rating)
ii. The occupation of the injured employee
iii. The age of the employee at the time of the injury
iv. The employee's future earning capacity
v. Evidence of disability corroborated by the treating medical records.

With regard to subsection (i) of § 8.1b(b), the Arbitrator notes no party introduced an impairment rating at trial and as such, no weight is given to this factor.

With regard to subsection (ii) of § 8.1b(b), the Arbitrator notes Petitioner was released to permanent restrictions that the Respondent is accommodating. Petitioner was employed as a driver but is now employed as an office worker. The Arbitrator further notes, however, that the treating physician did not comment on the invalid FCE. The Arbitrator gives the restrictions and invalid FCE moderate weight.

With regard to subsection (iii) of § 8.1b(b), the age of the employee at the time of the injury, the Arbitrator notes that Petitioner was 61 years old at the time of the accident. Give the length of his work life, the Arbitrator gives moderate weight to this factor.

With regard to subsection (iv) of § 8.1b(b), the Arbitrator concludes no evidence was provided whether Petitioner's earnings were affected. The Arbitrator has considered the same and gives some weight to this factor.

With regard to subsection (v) of § 8.1b(b), the Arbitrator notes Petitioner's medical records indicated Petitioner continues to complain of back pain. He testified he has a hard time sleeping, standing, walking, bending kneeling, or sitting for any length of time. Petitioner is currently taking no prescription medications. Petitioner has not sought any medical care or prescribed medication since August 2021.

Dr. Kusuma placed Petitioner with permanent restrictions of no sitting or standing more than 20 minutes, no more than occasional bending, crouching, or stooping, and no lifting more than 20 pounds. Dr. Kusuma, however, did not comment on the invalid FCE. The Arbitrator also considers the fact that Petitioner is no longer working as a truck driver for Respondent, but rather doing a desk job. Lastly the Arbitrator considers the invalid FCE. The Arbitrator assigns significant weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 20% loss of use of the person as a whole as

provided in §8(d)2 of the Act. Respondent shall pay Petitioner permanent partial disability benefits of $486.37 for 100 weeks.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC017420
Case Name	Jacob Reynolds v. State of Illinois/ Illinois Department of Transportation
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0352
Number of Pages of Decision	18
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Thomas C Rich
Respondent Attorney	Shannon Rieckenberg

DATE FILED: 8/15/2023

/s/Christopher Harris, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JACOB REYNOLDS,

Petitioner,

vs. NO: 20 WC 17420

STATE OF ILLINOIS,
ILLINOIS DEPARTMENT
OF TRANSPORTATION,

Respondent.

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed October 4, 2022, 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.

Pursuant to §19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review. Therefore, no appeal bond is set in this case.

August 15, 2023

d: 08/10/23
CAH/tdm
052

/s/ *Christopher A. Harris*
Christopher A. Harris

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC017420
Case Name	Jacob Reynolds v. State of Illinois/Illinois Department of Transportation
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	15
Decision Issued By	Linda Cantrell, Arbitrator

Petitioner Attorney	Thomas Rich
Respondent Attorney	Shannon Rieckenberg

DATE FILED: 10/4/2022

THE INTEREST RATE FOR THE WEEK OF OCTOBER 4, 2022 3.85%

/s/ Linda Cantrell, Arbitrator
Signature

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

October 4, 2022

/s/ Michele Kowalski

Michele Kowalski, Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

JACOB REYNOLDS
Employee/Petitioner

v.

STATE OF ILLINOIS/
ILLINOIS DEPARTMENT OF TRANSPORTATION
Employer/Respondent

Case # **20-WC-017420**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Linda J. Cantrell**, Arbitrator of the Commission, in the city of **Collinsville**, on **July 26, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **June 9, 2020**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**64,154.00**; the average weekly wage was $**1,233.73**.

On the date of accident, Petitioner was **43** years of age, ***married*** with **0** dependent child(ren).

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

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

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

Respondent is entitled to a credit of **TBD and any and all paid,** under Section 8(j) of the Act, **pursuant to the stipulation of the parties.**

ORDER

Respondent shall pay the reasonable and necessary medical expenses outlined in Petitioner's Group Exhibit 1, directly to the medical providers per the Illinois medical fee schedule or PPO agreement, whichever is less, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall receive a credit for any and all medical bills paid through its group medical plan under Section 8(j) of the Act pursuant to the stipulation of the parties.

Respondent shall pay temporary total disability benefits of $**822.49**/week for the period **6/11/20 through 6/19/20**, representing **1-2/7th** weeks.

Permanent partial disability benefits have been awarded in Consolidated Case No. 20-WC-019941.

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.

OCTOBER 4, 2022

Linda J. Cantrell

Arbitrator Linda J. Cantrell

STATE OF ILLINOIS)
) SS
COUNTY OF MADISON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

JACOB REYNOLDS,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	Case No.: 20-WC-017420
	)	
STATE OF ILLINOIS/ILLINOIS DEPARTMENT OF TRANSPORTATION,	)	
	)	
Employer/Respondent.	)	

FINDINGS OF FACT

These claims came before Arbitrator Linda J. Cantrell for trial in Collinsville on July 26, 2022. On July 23, 2020, Petitioner filed an Application for Adjustment of Claim alleging injuries to his right hip, bilateral knees, and right ankle as a result of catching his toe on uneven concrete and falling down steps on June 9, 2020. (Case No. 20-WC-017420). On August 21, 2020, Petitioner filed an Application for Adjustment of Claim alleging injuries to his right knee and hip as a result of hooking a trailer to a truck and pushing tongue of trailer on July 28, 2020. (Case No. 20-WC-019941). The cases were consolidated on April 21, 2022.

The issues in dispute in Case No. 20-WC-017420 are causal connection, medical bills, temporary total disability benefits, and the nature and extent of Petitioner's injuries. The parties stipulate that Petitioner sustained accidental injuries on 6/9/20 that arose out of and in the course of his employment with Respondent. The parties stipulate that Respondent is entitled to a credit for any and all medical bills paid through its group medical plan and that if medical bills are awarded Respondent shall pay same directly to the medical providers pursuant to the Illinois medical fee schedule or PPO Agreement, whichever is less. The Arbitrator has simultaneously issued a separate Decision in Case No. 20-WC-019941.

TESTIMONY/ACCIDENT REPORTS

Petitioner was 43 years old, married, with no dependent children at the time of accident. Petitioner was employed by Respondent for approximately nine years and was a highway maintainer at the time of accident. Petitioner testified that on 6/9/20 he caught his toe on uneven concrete in the parking lot that caused him to trip and fall down steps. He stated that while he was falling, he took a long step to catch himself from going headfirst. His left knee struck a wall causing him to spin around and land on his right foot. He felt immediate sharp pain in his right knee. Petitioner testified he reported the accident on 6/11/20.

On 6/11/20, a Form 45: Employer's First Report of Injury was completed. (RX1) Petitioner indicated he sustained injury to his right ankle, knee, hip, and lower back after his toe caught on uneven concrete, causing him to fall forward down the steps, hitting his left knee on the wall, and landing on the right leg and right side of his body. He reported that his right ankle, bilateral knees, right hip, and lower back were sore, and his left knee was bruised. It was noted that Petitioner would be going to SIH Workcare.

On 6/11/20, Petitioner completed an Employee Accident/Incident Report stating he tripped on uneven concrete, fell forward down the steps, hit his left knee on a concrete wall causing him to land on his right leg with all of his weight, and he hit the wall at the bottom of the steps. (RX1, PX15)

On 6/11/20, Petitioner completed a Workers' Compensation Employee's Notice of Injury form in which he described a consistent history of injury. (RX1) He reported there were no handrails to hold onto.

On 6/11/20, Petitioner's supervisor completed a Supervisor's Report of Injury or Illness. (RX1, PX15). He described Petitioner's accident to have occurred when he tripped on concrete going down the stairs to the truck barn, causing soreness to the left knee, right knee, hip, ankle, and lower back. (PX15).

On 6/11/20, Jesse Higgerson completed a Workers' Compensation Witness Report indicating he heard a thump on the side of the garage followed by a loud yelp/scream like someone was in pain. (PX15) He reported that Petitioner then stumbled into the garage a few seconds later complaining his knee and face hurt due to tripping over the outside step entrance. He stated that Petitioner took about five minutes inspecting his face and knee. (PX15)

Petitioner testified that between 6/9/20 and 6/11/20 he had knee pain and had difficulty moving. He stated that his supervisor noticed his injuries and "pushed" him to report the accident. Petitioner was examined at SIH Workcare where x-rays were taken. He stated he returned to work and was not allowed to drive or get in the truck. Petitioner treated with Dr. Paletta who referred him to Dr. Becton for injections. Petitioner testified he was not able to get an appointment and was referred to Dr. Bradley. Petitioner sustained a second work-related injury on 7/28/20 before he was examined by Dr. Bradley.

Petitioner testified that on 7/28/20 he was hooking up a message board to the back of his work truck and as he was lowering the trailer onto the hitch and pushing down sideways he felt three pops in his knee. He stated he laid over the side of his truck for quite a while and could not bear weight on his leg. He required assistance to get in his truck and he went to the doctor. Petitioner filled out an accident report and went to his primary care physician at Graham Family Medicine.

On 7/28/20, a Form 45: Employer's First Report of Injury was completed. (RX2) Petitioner reported he was hooking up a message board to a pick-up when he had a pop in his right knee and hip. He had pain in his right knee and hip and was unable to put weight on his entire right leg.

On 7/28/20, Petitioner completed a Workers' Compensation Employee's Notice of Injury form in which he reported he was attaching a message board to his work truck by pushing the tongue of the trailer over to lower it to the hitch when he felt a pop in his right knee. He felt immediate pain in his knee and hip, rendering him unable to bear weight. (RX2)

On 7/28/20, Petitioner's supervisor completed a Supervisor's Report of Injury or Illness. (RX2) He described Petitioner's accident to have occurred while hooking up a message board to his truck and he felt a pop in his right knee. Petitioner reported right knee soreness.

On 7/29/20, Petitioner completed an Employee Accident/Incident Report stating he was pushing the tongue of the trailer over to lower it to the hitch and felt a pop in his right knee. He reported he had immediate pain in his right knee and hip and was unable to bear weight.

Petitioner testified that he presented to Dr. Bradley on 8/3/20 and reported both of his work accidents. Dr. Bradley performed a right knee arthroscopic partial medial meniscectomy on 8/21/20 and ordered Petitioner off work. Petitioner testified that his knee felt good for approximately three weeks following surgery and then the pain and swelling returned. He stated he did not sustain any new injuries following surgery. Dr. Bradley administered a cortisone injection and ordered another MRI. Dr. Bradley recommended a knee replacement which was performed on 2/16/21. Petitioner testified that his knee condition improved following the second surgery and physical therapy.

Petitioner returned to full duty work without restrictions on 2/1/22. Petitioner testified that prior to 6/9/20 he did not have any problems or receive any treatment with respect to his right knee. Petitioner testified he is doing well since his second surgery. Since returning to full duty work, he has constant soreness, swelling, and pain in his knee. He has decreased range of motion. He cannot squat like he did prior to his accidents, and he cannot kneel on his knee. He has difficulty getting up off the floor. He has loss of strength with descending stairs. He takes over-the-counter Ibuprofen at least once per day. His knee gets stiff and swells down to his calf and shin at the end of the day. His symptoms have negatively affected his hobby of restoring old cars and motorcycles. He is not able to volunteer for the high school fishing team because he cannot stand on a boat.

On cross-examination, Petitioner testified he currently works in Respondent's lighting department and travels to 16 counties to maintain lights and traffic signals. Petitioner has not returned to Dr. Bradley since his last visit on 4/11/22. Petitioner testified that he told Dr. Bradley he was unable to fully squat, had decreased strength, and had swelling and soreness in his knee as of 4/11/22. Petitioner testified he is supposed to follow up with Dr. Bradley in 1 to 2 years, but not for his ongoing symptoms.

Marilyn Reynolds testified on behalf of Petitioner. Mrs. Reynolds has been married to Petitioner for 12 years and is a registered nurse. Mrs. Reynolds testified that Petitioner did well for a few weeks following his first knee surgery and then his knee started to decline with pain, swelling, and stiffness. She testified that a short time after Petitioner's second surgery he experienced unbearable pain and she took him to the emergency room. Petitioner had a seizure on the way to the hospital and a second one at the hospital. Petitioner underwent testing for a potential blood clot which was negative. Mrs. Reynolds testified that Petitioner's leg was swollen and red

and he had difficulty walking. Dr. Bradley drained ten vials of blood off his knee and Petitioner slowly improved.

MEDICAL HISTORY

On 6/11/20, Petitioner presented to SIH Workcare and reported bilateral knee, right hip, lower back, and right ankle pain after falling down stairs at work two days prior. (PX3) He stated his pain was worse with movement and rated it 6/10 in his hip/spine and bilateral knees, and 2/10 in his right ankle. X-rays of his bilateral knees and lumbar spine were negative for fracture. Physical examination showed pain with palpation and motion over the lumbar spine about the sacroiliac joint, bruising over the patellar area of the left knee, bilateral knee pain with motion and palpation, limited left and right knee range of motion and strength, and pain with motion and palpation over the right posterior knee. He was assessed with a left knee contusion, and sprain/strain of the right knee, right hip, right ankle/foot, and low back. Petitioner was instructed to apply ice/heat and was prescribed medication. He was placed on restrictions of no lifting greater than 10 pounds and no bending, kneeling, or squatting.

Petitioner continued to follow up at SIH Workcare through June 2020 and his symptoms and diagnoses remained unchanged. He advised that his left knee and back pain resolved, but he continued to have pain in his right hip and right leg/posterior knee with swelling. Physical examination of his right hip and knee continued to demonstrate discomfort. Physical therapy and over-the-counter pain medication were recommended. On 6/19/20, Petitioner was released to full duty work. On 6/26/20, it was noted that Petitioner's diagnosis was not yet clear.

On 6/30/20, Petitioner was examined by Dr. George Paletta. (PX4) Petitioner reported taking a long step with his left knee to avoid falling down the steps. His left knee hit the wall which caused him to spin around and land on his right leg. Dr. Paletta noted that Petitioner did not fall to the ground and had persistent right knee pain and intermittent swelling, particularly at the end of the day. Petitioner reported he had been trying to work full duty and tolerate his condition. Physical examination of the right knee was positive for trace effusion and lateral compartment meniscal rotary signs with joint line pain. Dr. Paletta recommended an MRI and opined that Petitioner's condition was related to the work accident. He was allowed to return to work without restrictions.

The MRI was performed on 7/14/20 and revealed a complex tear of the medial meniscal body and posterior horn with a radial tear of the posterior horn and a horizontal oblique tear of the posterior horn extending to the superior surface, Grade IV chondral fissuring and probable chondral flap formation of the medial and lateral patellar facets with diffuse medial femoral condylar weight-bearing chondral thinning, and Grade III chondral fissuring of the weight-bearing lateral tibial plateau. (PX5)

On 7/15/20, Dr. Paletta diagnosed tricompartmental osteoarthritis and a medial meniscus tear. He recommended conservative treatment and referred Petitioner to Dr. Wendell Becton for injections and recommended physical therapy.

On 7/28/20, Petitioner presented to Graham Family Medicine and reported he injured himself at work that day when he was hooking up a construction sign to his truck. (PX6) He reported he bent down to push the tongue of the trailer and felt his right knee pop and crack. Petitioner advised that the knee pop caused more pain and swelling, and he reported a history of a prior torn meniscus. Petitioner could barely put pressure on his leg without terrible pain. He complained of significant swelling in his knee and lower leg that was "pitting", and he was wearing a knee brace. X-rays were normal. NP Summers expressed concern that his condition was worse than depicted on the MRI and prescribed Ketorolac for pain.

On 8/3/20, Petitioner was examined by Dr. Matthew Bradley. (PX7) Petitioner reported both of his work accidents and described the first accident as including a twisting-type injury. Dr. Bradley surmised that Petitioner tore his meniscus, with slightly more pain laterally than medially. He noted that Petitioner's knee had only improved to about 50% at the time he suffered his second work accident. Petitioner reported a new pain that was significantly increased compared to what it was before the second injury. Physical examination of Petitioner's right hip revealed only slight pain to palpation over the greater trochanter and lateral iliotibial area. Petitioner's right knee demonstrated reduced motion, moderate effusion, a significant amount of pain to palpation over multiple aspects of the knee, and positive McMurray and reverse McMurray testing.

Based on a review of the MRI dated 7/14/20 and his physical examination, Dr. Bradley believed that the second work accident worsened his knee condition. Dr. Bradley reviewed Dr. Paletta's records and noted consistent histories of injury and agreed with Dr. Paletta's radiology interpretations. Dr. Bradley opined that physical examination findings were consistent with a meniscal tear. He was concerned with Petitioner's symptoms of posterior fullness or tightness with full extension. He suspected that the medial meniscus tear shown on MRI had been significantly worsened into a full thickness tear with complete extrusion. Dr. Bradley noted some preexisting degenerative disease on the MRI but did not appreciate any bone-on-bone arthritis, significant osteophyte formation, or subchondral sclerosis. Dr. Bradley ordered Petitioner off work and ordered an MRI.

Petitioner returned to Dr. Bradley following the MRI who noted it showed significant worsening of the medial meniscus tear with fairly notable extrusion. Dr. Bradley opined that Petitioner was a candidate for a medial unicompartmental arthroplasty but preferred to avoid such a surgery given Petitioner's young age and high activity level. Dr. Bradley recommended a partial medial meniscectomy and chondroplasties and continued Petitioner off work.

On 8/21/20, Dr. Bradley performed an arthroscopic partial medial meniscectomy and chondroplasty of the patella. (PX7, 9) Intraoperatively, Dr. Bradley noted a fairly acute appearing tear with sharp edges, with no significant fraying or degenerative disease. Petitioner's lateral meniscus was notably pristine.

On 8/27/20, Dr. Bradley noted Petitioner's right knee was doing well and he had some quadriceps weakness. (PX7) Petitioner reported some left knee pain for which Dr. Bradley recommended home exercises.

On 9/22/20, Petitioner reported to Dr. Bradley he had clicking in his knee when he walked, which did not cause pain. Dr. Bradley believed it was likely secondary to adhesions and scar tissue formation. He recommended home exercises and possibly a corticosteroid injection if his symptoms continued. Petitioner's range of motion and strength were making excellent progress.

On 10/12/20, Dr. Bradley noted Petitioner's knee swelled and filled with fluid with sustained use. Petitioner had restricted motion, tightness, and discomfort. Petitioner denied any interval trauma. Dr. Bradley performed an intra-articular corticosteroid injection and encouraged Petitioner to continue his home exercises. Petitioner was placed on light duty restrictions.

On 11/2/20, Petitioner reported sharp, stabbing pain along the medial aspect of his knee, severe lateral-sided pain, and giving way. Dr. Bradley ordered an MRI that showed a large, full thickness tear to the medial meniscus, with Grade IV medial femoral condyle thinning and fissuring. Dr. Bradley diagnosed a recurrent, very large and likely full thickness meniscal tear. Dr. Bradley compared the MRI films and opined Petitioner was suffering from an acute acceleration of some degenerative disease and delamination of the articular cartilage. Dr. Bradley recommended a total knee replacement. He referred Petitioner to Dr. Paletta for a second opinion due to his young age. Petitioner remained off work.

On 12/23/20, Petitioner was examined by Dr. Michael Nogalski pursuant to Section 12 of the Act. (RX3) Dr. Nogalski believed that Petitioner suffered from a complex degenerative medial meniscal tear with chondromalacia of the patella and posterior aspect of the lateral tibial plateau and synovitis. He characterized Petitioner as "reticent and cryptic" and stated Petitioner's wife "embellished or enhanced his answers on several occasions." He found Petitioner's description of his injuries without the aid of his wife to be "relatively bland" and "relatively innocuous events." Dr. Nogalski opined that Petitioner's condition was not causally related to the 7/28/20 work accident. He opined that the accident might have or could have temporarily aggravated Petitioner's degenerative meniscal tear.

Dr. Nogalski opined that the MRI findings before and after Petitioner's second work accident were relatively unchanged, though he acknowledged he did not have a gadolinium MRI prior to the second accident to make a direct comparison. He stated that Petitioner's treatment did not appear to be reasonable and necessary and took special interest in Petitioner's care being transferred to Dr. Bradley. He opined that Petitioner should have undergone physical therapy following his second injury which played a role in his hip weakness and current clinical status. Dr. Nogalski opined Petitioner was not a candidate for knee replacement as he "did not identify any specific objective findings for these extensive and exaggerated MRI findings". He stated that Dr. Bradley was "leading [Petitioner] down the path to considering knee replacement by embellishing statements about Petitioner's knee and creating psychological 'fear of missing out' on further possible surgical treatment from a perceived work injury." Dr. Nogalski recommended

anti-inflammatory medication and opined Petitioner could work light duty with restrictions of no climbing more than 3 feet and no lifting greater than 20 pounds.

On 1/4/21, Petitioner returned to Dr. Bradley and reported his pain had almost entirely resolved, with the exception of intermittent episodes of catching or clicking which was not overly painful. (PX7) Petitioner reported his greatest pain was the aching in the front of his knee after prolonged sitting. Dr. Bradley noted the MRI findings dated 11/2/20 were significantly different from that visualized at the time of surgery. Petitioner denied any interval trauma or falls that would explain the significant change to the architecture on the inside of his knee. He recommended a repeat MRI with contrast at a different facility as he was concerned that the MRI was misread or he was given the results of a different patient, given Petitioner's very minimal if any symptoms or pains. Dr. Bradley placed Petitioner off work pending the MRI.

On 1/13/21, Petitioner underwent the MRI that revealed partial medial meniscectomy changes with high degree of suspicion of recurrent oblique/radial tear involving the truncated posterior horn remnant, medial tibiofemoral Grade IV chondrosis with Grade III/IV chondral fissuring along the lateral patellar facet, and a subtle lateral patellar drift. (PX10)

On 1/18/21, Dr. Bradley noted the MRI showed significant worsening of the chondrosis in the medial femoral condyle. He reported that the last two MRIs showed a fairly large area of full thickness loss of cartilage to the medial femoral condyle with some extrusion of the medial meniscus, a new tear or a propagation from his previous, and mild arthritic changes to the lateral joint line and patellofemoral joint. He noted Petitioner continued to have pain along the medial aspect of his knee that prevented him from completing all of his activities of daily living and job requirements. Dr. Bradley recommended a total knee arthroplasty versus a medial unicompartmental arthroplasty due to Petitioner's size and early lateral degenerative signs.

Petitioner underwent a right total knee arthroplasty and partial patellectomy on 2/16/21. (PX11) Intraoperative findings included full-thickness loss of cartilage over almost the entire aspect of the weight-bearing portion of the medial femoral condyle with a significant amount of delamination and loose fibril-type cartilage.

On 2/24/21, Petitioner presented to the emergency room at Heartland Regional Medical Center. (PX8) Petitioner's wife reported he passed out and had a seizure-type event on the way to the hospital. Testing was negative for pulmonary embolism, deep vein thrombosis, or infection. He was discharged the following day.

On 3/1/21, Petitioner returned to Dr. Bradley and reported severe swelling and pain in his right lower extremity which caused him to pass out. Dr. Bradley noted significant bruising and yellowing of Petitioner's skin from the tibial tubercle distally to the malleoli of the ankle. He aspirated 70 mL of blood from Petitioner's knee which provided significant improvement in Petitioner's pain and stiffness. Dr. Bradley believed Petitioner suffered from a post-operative intra-articular hematoma and hemarthrosis secondary to aspirin use since surgery. He prescribed physical therapy and kept Petitioner off work.

Petitioner attended 22 physical therapy visits at SIH Rehab through 4/20/21. (PX12) At his last visit, Petitioner reported 90-95% improvement with full range of motion, strength, joint mobility, gait pattern, balance, stair negotiation, and activity tolerance.

Follow-up visits with Dr. Bradley in March and May 2021 show Petitioner made much progress with rehabilitation, though he continued to have some stiffness due to swelling in his leg. (PX7) Dr. Bradley again noted slow, gradual progress in June, when Petitioner reported greater walking tolerance and substantial improvement in pain. Petitioner reported that after one hour of activity he developed significant swelling that resolved with elevation. Dr. Bradley recommended that Petitioner continue utilizing anti-inflammatory medication and a good home exercise program.

On 10/28/21, Petitioner reported he was doing well overall but continued to have some swelling and stiffness after prolonged standing. (PX7) Dr. Bradley encouraged Petitioner to continue working to increase his activity and endurance. He released Petitioner to desk work only and prescribed Diclofenac.

On 11/5/21, Dr. Nogalski authored an addendum report. (RX4) Dr. Nogalski reviewed additional records and stated they did not alter his opinions expressed in his previous report. He acknowledged that Petitioner may have ongoing symptoms from degenerative meniscal tissue and inflammation from chondromalacia based on his last two MRI studies. Dr. Nogalski opined there was no causal relationship between Petitioner's objective findings contained within his operative report and his work accident. He continued to believe that not all of Petitioner's treatment had been reasonable or necessary, and he strongly disagreed with a total knee replacement. He stated that Dr. Bradley's records and operative report did not contain enough findings to support proceeding with an aggressive knee replacement. He believed Petitioner was at MMI at the time of his election to have the total knee replacement.

On 11/22/21, Dr. Nogalski authored a second addendum report. (RX5) He stated that Petitioner may have sustained a contusion during his work accident but did not believe this created any acute injury appreciable on the July 2020 MRI. Dr. Nogalski stated that Dr. Bradley seemed to embellish or add a history of 'twisting' to the right knee relative to the work accident.

On 1/6/22, Petitioner continued to report improvement overall, though he continued to have some swelling and stiffness after prolonged standing or use of his right knee. Dr. Bradley released Petitioner to full duty work starting 2/1/22 and recommended home exercises.

On 4/11/22, Petitioner reported he was doing well with only occasional stiffness. Dr. Bradley noted Petitioner had excellent range of motion and placed Petitioner at MMI.

Dr. Michael Nogalski testified by way of deposition on 1/10/22. (RX6) He diagnosed Petitioner with chondromalacia of the patellofemoral joint and lateral tibial plateau, neither of which he said were caused by the work accidents. He explained that the MRI and operative findings were consistent with degenerative knee conditions. Dr. Nogalski testified that the tear was complex, consisting of many small pieces or shreddings, and the tissue was old, leading him to believe it was degenerative and not acute. He opined that the multiple imaging studies did not

reveal objective evidence of permanent injury. Dr. Nogalski believed Petitioner sustained a temporary aggravation of a degenerative condition or tear. In comparing the MRIs from July and August 2020 (before and after the second accident), Dr. Nogalski testified there were no changes in the findings, noting the use of Gadolium contrast for one and not the other may have accounted for the amount of detail shown in each. Dr. Nogalski indicated the mechanisms of injury did not support an injury to the knee outside of a contusion potentially caused by the first accident. He noted Dr. Bradley was the only physician to describe a twisting-type of injury.

Dr. Nogalski testified that the treatment Petitioner received as of the date of his initial IME in December 2020 had not been reasonable and necessary, including the arthroscopy. Dr. Nogalski testified that physical therapy would have been appropriate and would have helped Petitioner's hip weakness which could have been leading to the dysfunction in his knee. Dr. Nogalski reviewed the records of Dr. Paletta and noted he identified the existence of a meniscal tear but recommended only non-operative treatment. Though Dr. Nogalski agreed there were objective operative findings, he testified the findings were degenerative but not characterized as such by Dr. Bradley. Dr. Nogalski testified that the MRI images and reports support his position over that of Dr. Bradley's. Dr. Nogalski did not have the opportunity to review any intraoperative photographs as they were not provided.

When Dr. Nogalski authored his addendum IME reports in November of 2021, he said he was provided additional medical records, including the operative report for the total knee replacement. He opined that the total knee replacement was not reasonable and necessary or causally related to either work accident. He noted the presence of cartilage as identified on MRIs in August 2020, November 2020, and January 2021, followed by Dr. Bradley's intraoperative findings in February 2021 which indicate there was none. Dr. Nogalski also identified the contradictory information from Dr. Bradley's records following the first procedure wherein Petitioner reported he was doing well postoperatively with resolved pain. Despite this Dr. Bradley obtained more MRI scans and recommended a total knee replacement, a decision Dr. Nogalski disagreed with in light of Petitioner's age and lack of formal therapy at the time. Dr. Nogalski believed Petitioner would have reached MMI six to eight weeks after each injury and recommended therapy, which he found difficult to provide a specific date for in light of Dr. Bradley's treatment.

Dr. Nogalski admitted he did not have records to demonstrate Petitioner had symptoms predating his work accidents. Dr. Nogalski's understanding of Petitioner's job duties was similar to that of Dr. Bradley. Dr. Nogalski acknowledged that early x-rays of Petitioner's knee showed mild osteoarthritis. He acknowledged that the later MRI studies taken in November 2020 and January 2021 showed Grade III to IV changes with a possible full thickness area of cartilage loss in the lateral facet. He admitted that the MRI magnet at MRI Partners of Chesterfield was possibly the strongest available near his office. He acknowledged that both radiologists who performed the MRI studies were qualified. He acknowledged that his physical examination was positive for swelling, orthopedic signs, and pain with forward flexion. He admitted there was no indication of a subjective return of Petitioner's symptoms to baseline. Dr. Nogalski acknowledged that Petitioner's job required him to walk on uneven surfaces, climb in and out of trucks, use ladders, lift heavy objects, and operate heavy machinery such as jackhammers. He was unaware of any problems Petitioner had performing such activities prior to his accident on

6/9/20. Though Dr. Bradley noted in his operative report that Petitioner's tear had an acute appearance, Dr. Nogalski felt the findings were degenerative.

Dr. Matthew Bradley testified by way of deposition on 2/17/21. (PX14) After summarizing the history of Petitioner's work injuries and treatment records, Dr. Bradley stated that many patients have asymptomatic degenerative tears that are made symptomatic by traumatic events. He believed that Petitioner's MRI findings were consistent with his complaints and clinical presentation. Dr. Bradley noted that although Petitioner's MRIs before and after his second accident were similar in showing arthritis and meniscal tearing, the later MRI showed worsening of his meniscal tear. He believed that an arthroscopy was initially the best option to treat Petitioner's pain, knowing that it would not treat the arthritis and the large meniscus tears and extruded meniscus which would continue to be a problem. He testified that Petitioner had significant pain, inability to bear weight, and a large meniscus tear that was not appropriate for conservative treatment.

Dr. Bradley opined that both of Petitioner's work accidents contributed to the development of his symptomatic meniscus tear and exacerbated his underlying arthritis. He noted age-appropriate wear and tear of Petitioner's knee and early arthritis that was exacerbated by the work injuries and caused the medial meniscus tear. He opined that the arthroscopy was causally related and the natural sequela of the work injuries.

Dr. Bradley testified that during the arthroscopy he observed some thinning of the cartilage but no full-thickness loss of cartilage or bone-on-bone degeneration. He noted the tear was fairly acute with sharp edges without much fraying. He testified that Petitioner initially did well following surgery, with some weakness and left knee symptoms caused by an altered gait. He stated that as of October 2020, Petitioner began having substantial trouble with his right knee. Dr. Bradley testified that he initially believed Petitioner increased his activity level too quickly but repeat imaging showed substantial deterioration which were consistent with Petitioner's complaints and required a knee replacement. He stated that imaging showed a severe degree delaminated cartilage throughout Petitioner's knee and a new meniscus tear without new trauma. He opined that the work accident and arthroscopy significantly accelerated the arthritic condition in Petitioner's knee.

Dr. Bradley testified that intraoperatively he found delaminating cartilage no longer attached to the underlying bone. He testified that the overall findings were "almost identical" to the changes seen on the MRI. He opined that Petitioner's need for knee replacement was a combination of both work injuries. He testified that he did not recommend physical therapy following the arthroscopy as every patient does not require same and Petitioner was young, healthy, and performing home exercises

Dr. Bradley testified that during the second work accident, Petitioner had all of his weight on his knee while the trailer was pushing back and the force on his meniscus and twisting motion caused a tear. He testified that during the first work accident Petitioner suffered a direct impact to his left knee on the wall and twisted his right knee as he fell and struck the concrete.

CONCLUSIONS OF LAW

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

Causal connection between accident and claimant's condition may be established by chain of events including claimant's ability to perform manual duties before accident, decreased ability to still perform immediately after accident, and other circumstantial evidence. *Pulliam Masonry v. Indus. Comm'n*, 77 Ill. 2d 469, 397 N.E.2d 834 (1979). When a preexisting condition is present, a claimant must show that "a work-related accidental injury aggravated or accelerated the preexisting [condition] 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." *St. Elizabeth's Hospital v. Workers' Comp. Comm'n*, 864 N.E.2d 266, 272-273 (5th Dist. 2007).

The law holds that accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it is a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672 (2003). "Petitioner need only show that some act or phase of the employment was a causative factor of the resulting injury." *Fierke v. Industrial Commission*, 723 N.E.2d 846 (3d Dist. 2000). Allowing a claimant to recover under such circumstances is a corollary of the principle that employment need not be the sole or primary cause of a claimant's condition. *Land & Lakes Co. v. Indus. Comm'n*, 834 N.E.2d 583 (2d Dist. 2005). Employers are to take their employees as they find them. *A.C. & S. v. Industrial Comm'n*, 710 N.E.2d 837 (Ill. App. 1st Dist., 1999) citing *General Electric Co. v. Industrial Comm'n*, 433 N.E.2d 671, 672 (1982). If a preexisting condition is aggravated, exacerbated, or accelerated by an accidental injury, the employee is entitled to benefits. *Rock Road Constr. v. Indus. Comm'n*, 227 N.E.2d 65, 67-68 (Ill. 1967); see also *Illinois Valley Irrigation, Inc. v. Indus. Comm'n*, 362 N.E.2d 339 (Ill. 1977). Even where a claimant was a surgical candidate prior to a work injury, where the work injury accelerates the need for surgery, a claimant is entitled to benefits. *Schroeder v. Illinois Workers' Comp. Comm'n*, 2017 IL App (4th) 160192WC, 79 N.E.3d 833 (2017).

The Arbitrator places significant weight on the absence of any prior complaints or treatment for Petitioner's right knee condition prior to the accident. Petitioner performed full duty work as a highway maintainer for nine years prior to 6/9/20. While objective studies show some evidence of degenerative changes in Petitioner's right knee, there is no evidence that his pre-existing condition was symptomatic or affected his ability to work or perform activities of daily living.

Petitioner testified that he continued to work following his accident on 6/9/20 and his supervisor noticed his symptoms and encouraged him to report his injuries. On 6/11/20, Petitioner sought treatment and was placed on light duty work restrictions. He continued to follow up at SIH Workcare through June 2020 for complaints of right hip and knee pain with swelling for which conservative treatment was recommended. On 6/30/20, Dr. Paletta noted Petitioner was attempting to perform full duty work and his knee swelled by the end of the workday. He suspected a meniscus tear, ordered an MRI, and allowed Petitioner to continue full duty work. An MRI performed on 7/14/20 confirmed a complex tear of the medial meniscal body with tricompartmental osteoarthritis. Dr. Paletta recommended physical therapy and injections.

Petitioner did not receive the recommended conservative treatment prior to sustaining a second work accident on 7/28/20. The evidence supports that Petitioner's right knee condition substantially changed following his July 2020 work accident which resulted in a surgical recommendation and required him to remain off work.

The Arbitrator finds that Petitioner's condition of ill-being in his right knee is causally connected to his work accident on 6/9/20.

Issue (J): Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

Based upon the above findings as to causal connection, the Arbitrator finds that the care and treatment Petitioner received up until his second work injury on 7/28/20 was reasonable and necessary to treat the injuries sustained on 6/9/20. Dr. Nogalski acknowledged that Petitioner likely suffered some exacerbation of his condition, though he felt Petitioner's symptoms would resolve with conservative care.

Respondent shall pay the reasonable and necessary medical expenses outlined in Petitioner's Group Exhibit 1, directly to the medical providers per the Illinois medical fee schedule or PPO agreement, whichever is less, as provided in Section 8(a) and Section 8.2 of the Act. Respondent shall receive a credit for any and all medical bills paid through its group medical plan under Section 8(j) of the Act pursuant to the stipulation of the parties.

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

The Arbitrator finds that Petitioner is entitled to temporary total disability benefits from 6/11/20 through 6/19/20 when he was released to full duty work by SIH Workcare, representing 1-2/7th weeks.

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

Permanent partial disability benefits have been awarded in Consolidated Case No. 20-WC-019941.

Arbitrator Linda J. Cantrell DATED:

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC019941
Case Name	Jacob Reynolds v. State of Illinois/ Illinois Department of Transportation
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0353
Number of Pages of Decision	22
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Thomas C Rich
Respondent Attorney	Shannon Rieckenberg

DATE FILED: 8/15/2023

/s/ Christopher Harris, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JACOB REYNOLDS,

Petitioner,

vs. NO: 20 WC 19941

STATE OF ILLINOIS,
ILLINOIS DEPARTMENT
OF TRANSPORTATION,

Respondent.

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed October 4, 2022, 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.

Pursuant to §19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review. Therefore, no appeal bond is set in this case.

August 15, 2023

d: 08/10/23
CAH/tdm
052

/s/ *Christopher A. Harris*
Christopher A. Harris

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC019941
Case Name	Jacob Reynolds v. State of Illinois/Illinois Department of Transportation
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	19
Decision Issued By	Linda Cantrell, Arbitrator

Petitioner Attorney	Thomas Rich
Respondent Attorney	Shannon Rieckenberg

DATE FILED: 10/4/2022

THE INTEREST RATE FOR THE WEEK OF OCTOBER 4. 2022 3.85%

/s/ Linda Cantrell, Arbitrator

Signature

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

October 4, 2022

/s/ Michele Kowalski

Michele Kowalski, Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

JACOB REYNOLDS
Employee/Petitioner

v.

STATE OF ILLINOIS/
ILLINOIS DEPARTMENT OF TRANSPORTATION
Employer/Respondent

Case # **20-WC-019941**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Linda J. Cantrell**, Arbitrator of the Commission, in the city of **Collinsville**, on **July 26, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **July 28, 2020**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**64,154.00**; the average weekly wage was $**1,233.73**.

On the date of accident, Petitioner was **43** years of age, ***married*** with **0** dependent child(ren).

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

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

Respondent shall be given a credit of $**64,039.76** for TTD, $**0** for TPD, $**0** for maintenance, and $**five service-connected days,** for a total credit of $**64,039.76, plus five service-connected days pursuant to the stipulation of the parties.**

Respondent is entitled to a credit of **TBD and any and all paid** under Section 8(j) of the Act, **pursuant to the stipulation of the parties.**

ORDER

Respondent shall pay the reasonable and necessary medical expenses outlined in Petitioner's Group Exhibit 1, directly to the medical providers per the Illinois medical fee schedule or PPO agreement, whichever is less, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall receive a credit for any and all medical bills paid through its group medical plan under Section 8(j) of the Act pursuant to the stipulation of the parties.

Respondent shall pay temporary total disability benefits of $**822.49**/week for the period **7/29/20 through 1/31/22**, representing **78-6/7th** weeks. The parties stipulate that all TTD benefits have been paid by Respondent and that Respondent is entitled to a credit for TTD benefits paid in the amount of $64,039.76, plus five service-connected days.

Respondent shall pay Petitioner further benefits of $**740.24**/week for **96.75** weeks, because the injuries sustained caused permanent partial disability to the extent of **45**% loss of use of the **right leg**, as provided in §8(e) of the Act.

Respondent shall pay Petitioner compensation that has accrued from 4/11/22 through 7/26/22, and shall pay the remainder of the award, if any, in weekly payments.

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.

OCTOBER 4, 2022

Arbitrator Linda J. Cantrell

STATE OF ILLINOIS)
) **SS**
COUNTY OF MADISON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

JACOB REYNOLDS,)
)
Employee/Petitioner,)
)
v.) Case No.: 20-WC-019941
)
STATE OF ILLINOIS/ILLINOIS)
DEPARTMENT OF TRANSPORTATION,)
)
Employer/Respondent.)

FINDINGS OF FACT

These claims came before Arbitrator Linda J. Cantrell for trial in Collinsville on July 26, 2022. On July 23, 2020, Petitioner filed an Application for Adjustment of Claim alleging injuries to his right hip, bilateral knees, and right ankle as a result of catching his toe on uneven concrete and falling down steps on June 9, 2020. (Case No. 20-WC-017420). On August 21, 2020, Petitioner filed an Application for Adjustment of Claim alleging injuries to his right knee and hip as a result of hooking a trailer to a truck and pushing tongue of trailer on July 28, 2020. (Case No. 20-WC-019941). The cases were consolidated on April 21, 2022.

The issues in dispute in Case No. 20-WC-019941 are causal connection, medical bills, temporary total disability benefits, and the nature and extent of Petitioner's injuries. The parties stipulate that Petitioner sustained accidental injuries on 7/28/20 that arose out of and in the course of his employment with Respondent. The parties stipulate that Respondent is entitled to a credit for any and all medical bills paid through its group medical plan and that if medical bills are awarded Respondent shall pay same directly to the medical providers pursuant to the Illinois medical fee schedule or PPO Agreement, whichever is less. Petitioner claims that all temporary total disability benefits have been paid from 7/28/20 through 1/31/22 and that Respondent is entitled to a credit for TTD benefits paid in the amount of $64,039.76, plus five service-connected days. The Arbitrator has simultaneously issued a separate Decision in Case No. 20-WC-017420.

TESTIMONY/ACCIDENT REPORTS

Petitioner was 43 years old, married, with no dependent children at the time of accident. Petitioner was employed by Respondent for approximately nine years and was a highway maintainer at the time of accident. Petitioner testified that on 6/9/20 he caught his toe on uneven concrete in the parking lot that caused him to trip and fall down steps. He stated that while he was falling, he took a long step to catch himself from going headfirst. His left knee struck a wall

causing him to spin around and land on his right foot. He felt immediate sharp pain in his right knee. Petitioner testified he reported the accident on 6/11/20.

On 6/11/20, a Form 45: Employer's First Report of Injury was completed. (RX1) Petitioner indicated he sustained injury to his right ankle, knee, hip, and lower back after his toe caught on uneven concrete, causing him to fall forward down the steps, hitting his left knee on the wall, and landing on the right leg and right side of his body. He reported that his right ankle, bilateral knees, right hip, and lower back were sore, and his left knee was bruised. It was noted that Petitioner would be going to SIH Workcare.

On 6/11/20, Petitioner completed an Employee Accident/Incident Report stating he tripped on uneven concrete, fell forward down the steps, hit his left knee on a concrete wall causing him to land on his right leg with all of his weight, and he hit the wall at the bottom of the steps. (RX1, PX15)

On 6/11/20, Petitioner completed a Workers' Compensation Employee's Notice of Injury form in which he described a consistent history of injury. (RX1) He reported there were no handrails to hold onto.

On 6/11/20, Petitioner's supervisor completed a Supervisor's Report of Injury or Illness. (RX1, PX15). He described Petitioner's accident to have occurred when he tripped on concrete going down the stairs to the truck barn, causing soreness to the left knee, right knee, hip, ankle, and lower back. (PX15).

On 6/11/20, Jesse Higgerson completed a Workers' Compensation Witness Report indicating he heard a thump on the side of the garage followed by a loud yelp/scream like someone was in pain. (PX15) He reported that Petitioner then stumbled into the garage a few seconds later complaining his knee and face hurt due to tripping over the outside step entrance. He stated that Petitioner took about five minutes inspecting his face and knee. (PX15)

Petitioner testified that between 6/9/20 and 6/11/20 he had knee pain and had difficulty moving. He stated that his supervisor noticed his injuries and "pushed" him to report the accident. Petitioner was examined at SIH Workcare where x-rays were taken. He stated he returned to work and was not allowed to drive or get in the truck. Petitioner treated with Dr. Paletta who referred him to Dr. Becton for injections. Petitioner testified he was not able to get an appointment and was referred to Dr. Bradley. Petitioner sustained a second work-related injury on 7/28/20 before he was examined by Dr. Bradley.

Petitioner testified that on 7/28/20 he was hooking up a message board to the back of his work truck and as he was lowering the trailer onto the hitch and pushing down sideways he felt three pops in his knee. He stated he laid over the side of his truck for quite a while and could not bear weight on his leg. He required assistance to get in his truck and he went to the doctor. Petitioner filled out an accident report and went to his primary care physician at Graham Family Medicine.

On 7/28/20, a Form 45: Employer's First Report of Injury was completed. (RX2) Petitioner reported he was hooking up a message board to a pick-up when he had a pop in his right knee and hip. He had pain in his right knee and hip and was unable to put weight on his entire right leg.

On 7/28/20, Petitioner completed a Workers' Compensation Employee's Notice of Injury form in which he reported he was attaching a message board to his work truck by pushing the tongue of the trailer over to lower it to the hitch when he felt a pop in his right knee. He felt immediate pain in his knee and hip, rendering him unable to bear weight. (RX2)

On 7/28/20, Petitioner's supervisor completed a Supervisor's Report of Injury or Illness. (RX2) He described Petitioner's accident to have occurred while hooking up a message board to his truck and he felt a pop in his right knee. Petitioner reported right knee soreness.

On 7/29/20, Petitioner completed an Employee Accident/Incident Report stating he was pushing the tongue of the trailer over to lower it to the hitch and felt a pop in his right knee. He reported he had immediate pain in his right knee and hip and was unable to bear weight.

Petitioner testified that he presented to Dr. Bradley on 8/3/20 and reported both of his work accidents. Dr. Bradley performed a right knee arthroscopic partial medial meniscectomy on 8/21/20 and ordered Petitioner off work. Petitioner testified that his knee felt good for approximately three weeks following surgery and then the pain and swelling returned. He stated he did not sustain any new injuries following surgery. Dr. Bradley administered a cortisone injection and ordered another MRI. Dr. Bradley recommended a knee replacement which was performed on 2/16/21. Petitioner testified that his knee condition improved following the second surgery and physical therapy.

Petitioner returned to full duty work without restrictions on 2/1/22. Petitioner testified that prior to 6/9/20 he did not have any problems or receive any treatment with respect to his right knee. Petitioner testified he is doing well since his second surgery. Since returning to full duty work, he has constant soreness, swelling, and pain in his knee. He has decreased range of motion. He cannot squat like he did prior to his accidents, and he cannot kneel on his knee. He has difficulty getting up off the floor. He has loss of strength with descending stairs. He takes over-the-counter Ibuprofen at least once per day. His knee gets stiff and swells down to his calf and shin at the end of the day. His symptoms have negatively affected his hobby of restoring old cars and motorcycles. He is not able to volunteer for the high school fishing team because he cannot stand on a boat.

On cross-examination, Petitioner testified he currently works in Respondent's lighting department and travels to 16 counties to maintain lights and traffic signals. Petitioner has not returned to Dr. Bradley since his last visit on 4/11/22. Petitioner testified that he told Dr. Bradley he was unable to fully squat, had decreased strength, and had swelling and soreness in his knee as of 4/11/22. Petitioner testified he is supposed to follow up with Dr. Bradley in 1 to 2 years, but not for his ongoing symptoms.

Marilyn Reynolds testified on behalf of Petitioner. Mrs. Reynolds has been married to Petitioner for 12 years and is a registered nurse. Mrs. Reynolds testified that Petitioner did well for a few weeks following his first knee surgery and then his knee started to decline with pain,

swelling, and stiffness. She testified that a short time after Petitioner's second surgery he experienced unbearable pain and she took him to the emergency room. Petitioner had a seizure on the way to the hospital and a second one at the hospital. Petitioner underwent testing for a potential blood clot which was negative. Mrs. Reynolds testified that Petitioner's leg was swollen and red and he had difficulty walking. Dr. Bradley drained ten vials of blood off his knee and Petitioner slowly improved.

MEDICAL HISTORY

On 6/11/20, Petitioner presented to SIH Workcare and reported bilateral knee, right hip, lower back, and right ankle pain after falling down stairs at work two days prior. (PX3) He stated his pain was worse with movement and rated it 6/10 in his hip/spine and bilateral knees, and 2/10 in his right ankle. X-rays of his bilateral knees and lumbar spine were negative for fracture. Physical examination showed pain with palpation and motion over the lumbar spine about the sacroiliac joint, bruising over the patellar area of the left knee, bilateral knee pain with motion and palpation, limited left and right knee range of motion and strength, and pain with motion and palpation over the right posterior knee. He was assessed with a left knee contusion, and sprain/strain of the right knee, right hip, right ankle/foot, and low back. Petitioner was instructed to apply ice/heat and was prescribed medication. He was placed on restrictions of no lifting greater than 10 pounds and no bending, kneeling, or squatting.

Petitioner continued to follow up at SIH Workcare through June 2020 and his symptoms and diagnoses remained unchanged. He advised that his left knee and back pain resolved, but he continued to have pain in his right hip and right leg/posterior knee with swelling. Physical examination of his right hip and knee continued to demonstrate discomfort. Physical therapy and over-the-counter pain medication were recommended. On 6/26/20, it was noted that Petitioner's diagnosis was not yet clear.

On 6/30/20, Petitioner was examined by Dr. George Paletta. (PX4) Petitioner reported taking a long step with his left knee to avoid falling down the steps. His left knee hit the wall which caused him to spin around and land on his right leg. Dr. Paletta noted that Petitioner did not fall to the ground and had persistent right knee pain and intermittent swelling, particularly at the end of the day. Petitioner reported he had been trying to work full duty and tolerate his condition. Physical examination of the right knee was positive for trace effusion and lateral compartment meniscal rotary signs with joint line pain. Dr. Paletta recommended an MRI and opined that Petitioner's condition was related to the work accident. He was allowed to return to work without restrictions.

The MRI was performed on 7/14/20 and revealed a complex tear of the medial meniscal body and posterior horn with a radial tear of the posterior horn and a horizontal oblique tear of the posterior horn extending to the superior surface, Grade IV chondral fissuring and probable chondral flap formation of the medial and lateral patellar facets with diffuse medial femoral condylar weight-bearing chondral thinning, and Grade III chondral fissuring of the weight-bearing lateral tibial plateau. (PX5)

On 7/15/20, Dr. Paletta diagnosed tricompartmental osteoarthritis and a medial meniscus tear. He recommended conservative treatment and referred Petitioner to Dr. Wendell Becton for injections and recommended physical therapy.

On 7/28/20, Petitioner presented to Graham Family Medicine and reported he injured himself at work that day when he was hooking up a construction sign to his truck. (PX6) He reported he bent down to push the tongue of the trailer and felt his right knee pop and crack. Petitioner advised that the knee pop caused more pain and swelling, and he reported a history of a prior torn meniscus. Petitioner could barely put pressure on his leg without terrible pain. He complained of significant swelling in his knee and lower leg that was "pitting", and he was wearing a knee brace. X-rays were normal. NP Summers expressed concern that his condition was worse than depicted on the MRI and prescribed Ketorolac for pain.

On 8/3/20, Petitioner was examined by Dr. Matthew Bradley. (PX7) Petitioner reported both of his work accidents and described the first accident as including a twisting-type injury. Dr. Bradley surmised that Petitioner tore his meniscus, with slightly more pain laterally than medially. He noted that Petitioner's knee had only improved to about 50% at the time he suffered his second work accident. Petitioner reported a new pain that was significantly increased compared to what it was before the second injury. Physical examination of Petitioner's right hip revealed only slight pain to palpation over the greater trochanter and lateral iliotibial area. Petitioner's right knee demonstrated reduced motion, moderate effusion, a significant amount of pain to palpation over multiple aspects of the knee, and positive McMurray and reverse McMurray testing.

Based on a review of the MRI dated 7/14/20 and his physical examination, Dr. Bradley believed that the second work accident worsened his knee condition. Dr. Bradley reviewed Dr. Paletta's records and noted consistent histories of injury and agreed with Dr. Paletta's radiology interpretations. Dr. Bradley opined that physical examination findings were consistent with a meniscal tear. He was concerned with Petitioner's symptoms of posterior fullness or tightness with full extension. He suspected that the medial meniscus tear shown on MRI had been significantly worsened into a full thickness tear with complete extrusion. Dr. Bradley noted some preexisting degenerative disease on the MRI but did not appreciate any bone-on-bone arthritis, significant osteophyte formation, or subchondral sclerosis. Dr. Bradley ordered Petitioner off work and ordered an MRI.

Petitioner returned to Dr. Bradley following the MRI who noted it showed significant worsening of the medial meniscus tear with fairly notable extrusion. Dr. Bradley opined that Petitioner was a candidate for a medial unicompartmental arthroplasty but preferred to avoid such a surgery given Petitioner's young age and high activity level. Dr. Bradley recommended a partial medial meniscectomy and chondroplasties and continued Petitioner off work.

On 8/21/20, Dr. Bradley performed an arthroscopic partial medial meniscectomy and chondroplasty of the patella. (PX7, 9) Intraoperatively, Dr. Bradley noted a fairly acute appearing tear with sharp edges, with no significant fraying or degenerative disease. Petitioner's lateral meniscus was notably pristine.

On 8/27/20, Dr. Bradley noted Petitioner's right knee was doing well and he had some quadriceps weakness. (PX7) Petitioner reported some left knee pain for which Dr. Bradley recommended home exercises.

On 9/22/20, Petitioner reported to Dr. Bradley he had clicking in his knee when he walked, which did not cause pain. Dr. Bradley believed it was likely secondary to adhesions and scar tissue formation. He recommended home exercises and possibly a corticosteroid injection if his symptoms continued. Petitioner's range of motion and strength were making excellent progress.

On 10/12/20, Dr. Bradley noted Petitioner's knee swelled and filled with fluid with sustained use. Petitioner had restricted motion, tightness, and discomfort. Petitioner denied any interval trauma. Dr. Bradley performed an intra-articular corticosteroid injection and encouraged Petitioner to continue his home exercises. Petitioner was placed on light duty restrictions.

On 11/2/20, Petitioner reported sharp, stabbing pain along the medial aspect of his knee, severe lateral-sided pain, and giving way. Dr. Bradley ordered an MRI that showed a large, full thickness tear to the medial meniscus, with Grade IV medial femoral condyle thinning and fissuring. Dr. Bradley diagnosed a recurrent, very large and likely full thickness meniscal tear. Dr. Bradley compared the MRI films and opined Petitioner was suffering from an acute acceleration of some degenerative disease and delamination of the articular cartilage. Dr. Bradley recommended a total knee replacement. He referred Petitioner to Dr. Paletta for a second opinion due to his young age. Petitioner remained off work.

On 12/23/20, Petitioner was examined by Dr. Michael Nogalski pursuant to Section 12 of the Act. (RX3) Dr. Nogalski believed that Petitioner suffered from a complex degenerative medial meniscal tear with chondromalacia of the patella and posterior aspect of the lateral tibial plateau and synovitis. He characterized Petitioner as "reticent and cryptic" and stated Petitioner's wife "embellished or enhanced his answers on several occasions." He found Petitioner's description of his injuries without the aid of his wife to be "relatively bland" and "relatively innocuous events." Dr. Nogalski opined that Petitioner's condition was not causally related to the 7/28/20 work accident. He opined that the accident might have or could have temporarily aggravated Petitioner's degenerative meniscal tear.

Dr. Nogalski opined that the MRI findings before and after Petitioner's second work accident were relatively unchanged, though he acknowledged he did not have a gadolinium MRI prior to the second accident to make a direct comparison. He stated that Petitioner's treatment did not appear to be reasonable and necessary and took special interest in Petitioner's care being transferred to Dr. Bradley. He opined that Petitioner should have undergone physical therapy following his second injury which played a role in his hip weakness and current clinical status. Dr. Nogalski opined Petitioner was not a candidate for knee replacement as he "did not identify any specific objective findings for these extensive and exaggerated MRI findings". He stated that Dr. Bradley was "leading [Petitioner] down the path to considering knee replacement by embellishing statements about Petitioner's knee and creating psychological 'fear of missing out' on further possible surgical treatment from a perceived work injury." Dr. Nogalski recommended

anti-inflammatory medication and opined Petitioner could work light duty with restrictions of no climbing more than 3 feet and no lifting greater than 20 pounds.

On 1/4/21, Petitioner returned to Dr. Bradley and reported his pain had almost entirely resolved, with the exception of intermittent episodes of catching or clicking which was not overly painful. (PX7) Petitioner reported his greatest pain was the aching in the front of his knee after prolonged sitting. Dr. Bradley noted the MRI findings dated 11/2/20 were significantly different from that visualized at the time of surgery. Petitioner denied any interval trauma or falls that would explain the significant change to the architecture on the inside of his knee. He recommended a repeat MRI with contrast at a different facility as he was concerned that the MRI was misread or he was given the results of a different patient, given Petitioner's very minimal if any symptoms or pains. Dr. Bradley placed Petitioner off work pending the MRI.

On 1/13/21, Petitioner underwent the MRI that revealed partial medial meniscectomy changes with high degree of suspicion of recurrent oblique/radial tear involving the truncated posterior horn remnant, medial tibiofemoral Grade IV chondrosis with Grade III/IV chondral fissuring along the lateral patellar facet, and a subtle lateral patellar drift. (PX10)

On 1/18/21, Dr. Bradley noted the MRI showed significant worsening of the chondrosis in the medial femoral condyle. He reported that the last two MRIs showed a fairly large area of full thickness loss of cartilage to the medial femoral condyle with some extrusion of the medial meniscus, a new tear or a propagation from his previous, and mild arthritic changes to the lateral joint line and patellofemoral joint. He noted Petitioner continued to have pain along the medial aspect of his knee that prevented him from completing all of his activities of daily living and job requirements. Dr. Bradley recommended a total knee arthroplasty versus a medial unicompartmental arthroplasty due to Petitioner's size and early lateral degenerative signs.

Petitioner underwent a right total knee arthroplasty and partial patellectomy on 2/16/21. (PX11) Intraoperative findings included full-thickness loss of cartilage over almost the entire aspect of the weight-bearing portion of the medial femoral condyle with a significant amount of delamination and loose fibril-type cartilage.

On 2/24/21, Petitioner presented to the emergency room at Heartland Regional Medical Center. (PX8) Petitioner's wife reported he passed out and had a seizure-type event on the way to the hospital. Testing was negative for pulmonary embolism, deep vein thrombosis, or infection. He was discharged the following day.

On 3/1/21, Petitioner returned to Dr. Bradley and reported severe swelling and pain in his right lower extremity which caused him to pass out. Dr. Bradley noted significant bruising and yellowing of Petitioner's skin from the tibial tubercle distally to the malleoli of the ankle. He aspirated 70 mL of blood from Petitioner's knee which provided significant improvement in Petitioner's pain and stiffness. Dr. Bradley believed Petitioner suffered from a post-operative intra-articular hematoma and hemarthrosis secondary to aspirin use since surgery. He prescribed physical therapy and kept Petitioner off work.

Petitioner attended 22 physical therapy visits at SIH Rehab through 4/20/21. (PX12) At his last visit, Petitioner reported 90-95% improvement with full range of motion, strength, joint mobility, gait pattern, balance, stair negotiation, and activity tolerance.

Follow-up visits with Dr. Bradley in March and May 2021 show Petitioner made much progress with rehabilitation, though he continued to have some stiffness due to swelling in his leg. (PX7) Dr. Bradley again noted slow, gradual progress in June, when Petitioner reported greater walking tolerance and substantial improvement in pain. Petitioner reported that after one hour of activity he developed significant swelling that resolved with elevation. Dr. Bradley recommended that Petitioner continue utilizing anti-inflammatory medication and a good home exercise program.

On 10/28/21, Petitioner reported he was doing well overall but continued to have some swelling and stiffness after prolonged standing. (PX7) Dr. Bradley encouraged Petitioner to continue working to increase his activity and endurance. He released Petitioner to desk work only and prescribed Diclofenac.

On 11/5/21, Dr. Nogalski authored an addendum report. (RX4) Dr. Nogalski reviewed additional records and stated they did not alter his opinions expressed in his previous report. He acknowledged that Petitioner may have ongoing symptoms from degenerative meniscal tissue and inflammation from chondromalacia based on his last two MRI studies. Dr. Nogalski opined there was no causal relationship between Petitioner's objective findings contained within his operative report and his work accident. He continued to believe that not all of Petitioner's treatment had been reasonable or necessary, and he strongly disagreed with a total knee replacement. He stated that Dr. Bradley's records and operative report did not contain enough findings to support proceeding with an aggressive knee replacement. He believed Petitioner was at MMI at the time of his election to have the total knee replacement.

On 11/22/21, Dr. Nogalski authored a second addendum report. (RX5) He stated that Petitioner may have sustained a contusion during his work accident but did not believe this created any acute injury appreciable on the July 2020 MRI. Dr. Nogalski stated that Dr. Bradley seemed to embellish or add a history of 'twisting' to the right knee relative to the work accident.

On 1/6/22, Petitioner continued to report improvement overall, though he continued to have some swelling and stiffness after prolonged standing or use of his right knee. Dr. Bradley released Petitioner to full duty work starting 2/1/22 and recommended home exercises.

On 4/11/22, Petitioner reported he was doing well with only occasional stiffness. Dr. Bradley noted Petitioner had excellent range of motion and placed Petitioner at MMI.

Dr. Michael Nogalski testified by way of deposition on 1/10/22. (RX6) He diagnosed Petitioner with chondromalacia of the patellofemoral joint and lateral tibial plateau, neither of which he said were caused by the work accidents. He explained that the MRI and operative findings were consistent with degenerative knee conditions. Dr. Nogalski testified that the tear was complex, consisting of many small pieces or shreddings, and the tissue was old, leading him to believe it was degenerative and not acute. He opined that the multiple imaging studies did not

reveal objective evidence of permanent injury. Dr. Nogalski believed Petitioner sustained a temporary aggravation of a degenerative condition or tear. In comparing the MRIs from July and August 2020 (before and after the second accident), Dr. Nogalski testified there were no changes in the findings, noting the use of Gadolium contrast for one and not the other may have accounted for the amount of detail shown in each. Dr. Nogalski indicated the mechanisms of injury did not support an injury to the knee outside of a contusion potentially caused by the first accident. He noted Dr. Bradley was the only physician to describe a twisting-type of injury.

Dr. Nogalski testified that the treatment Petitioner received as of the date of his initial IME in December 2020 had not been reasonable and necessary, including the arthroscopy. Dr. Nogalski testified that physical therapy would have been appropriate and would have helped Petitioner's hip weakness which could have been leading to the dysfunction in his knee. Dr. Nogalski reviewed the records of Dr. Paletta and noted he identified the existence of a meniscal tear but recommended only non-operative treatment. Though Dr. Nogalski agreed there were objective operative findings, he testified the findings were degenerative but not characterized as such by Dr. Bradley. Dr. Nogalski testified that the MRI images and reports support his position over that of Dr. Bradley's. Dr. Nogalski did not have the opportunity to review any intraoperative photographs as they were not provided.

When Dr. Nogalski authored his addendum IME reports in November of 2021, he said he was provided additional medical records, including the operative report for the total knee replacement. He opined that the total knee replacement was not reasonable and necessary or causally related to either work accident. He noted the presence of cartilage as identified on MRIs in August 2020, November 2020, and January 2021, followed by Dr. Bradley's intraoperative findings in February 2021 which indicate there was none. Dr. Nogalski also identified the contradictory information from Dr. Bradley's records following the first procedure wherein Petitioner reported he was doing well postoperatively with resolved pain. Despite this Dr. Bradley obtained more MRI scans and recommended a total knee replacement, a decision Dr. Nogalski disagreed with in light of Petitioner's age and lack of formal therapy at the time. Dr. Nogalski believed Petitioner would have reached MMI six to eight weeks after each injury and recommended therapy, which he found difficult to provide a specific date for in light of Dr. Bradley's treatment.

Dr. Nogalski admitted he did not have records to demonstrate Petitioner had symptoms predating his work accidents. Dr. Nogalski's understanding of Petitioner's job duties was similar to that of Dr. Bradley. Dr. Nogalski acknowledged that early x-rays of Petitioner's knee showed mild osteoarthritis. He acknowledged that the later MRI studies taken in November 2020 and January 2021 showed Grade III to IV changes with a possible full thickness area of cartilage loss in the lateral facet. He admitted that the MRI magnet at MRI Partners of Chesterfield was possibly the strongest available near his office. He acknowledged that both radiologists who performed the MRI studies were qualified. He acknowledged that his physical examination was positive for swelling, orthopedic signs, and pain with forward flexion. He admitted there was no indication of a subjective return of Petitioner's symptoms to baseline. Dr. Nogalski acknowledged that Petitioner's job required him to walk on uneven surfaces, climb in and out of trucks, use ladders, lift heavy objects, and operate heavy machinery such as jackhammers. He was unaware of any problems Petitioner had performing such activities prior to his accident on

6/9/20. Though Dr. Bradley noted in his operative report that Petitioner's tear had an acute appearance, Dr. Nogalski felt the findings were degenerative.

Dr. Matthew Bradley testified by way of deposition on 2/17/21. (PX14) After summarizing the history of Petitioner's work injuries and treatment records, Dr. Bradley stated that many patients have asymptomatic degenerative tears that are made symptomatic by traumatic events. He believed that Petitioner's MRI findings were consistent with his complaints and clinical presentation. Dr. Bradley noted that although Petitioner's MRIs before and after his second accident were similar in showing arthritis and meniscal tearing, the later MRI showed worsening of his meniscal tear. He believed that an arthroscopy was initially the best option to treat Petitioner's pain, knowing that it would not treat the arthritis and the large meniscus tears and extruded meniscus which would continue to be a problem. He testified that Petitioner had significant pain, inability to bear weight, and a large meniscus tear that was not appropriate for conservative treatment.

Dr. Bradley opined that both of Petitioner's work accidents contributed to the development of his symptomatic meniscus tear and exacerbated his underlying arthritis. He noted age-appropriate wear and tear of Petitioner's knee and early arthritis that was exacerbated by the work injuries and caused the medial meniscus tear. He opined that the arthroscopy was causally related and the natural sequela of the work injuries.

Dr. Bradley testified that during the arthroscopy he observed some thinning of the cartilage but no full-thickness loss of cartilage or bone-on-bone degeneration. He noted the tear was fairly acute with sharp edges without much fraying. He testified that Petitioner initially did well following surgery, with some weakness and left knee symptoms caused by an altered gait. He stated that as of October 2020, Petitioner began having substantial trouble with his right knee. Dr. Bradley testified that he initially believed Petitioner increased his activity level too quickly but repeat imaging showed substantial deterioration which were consistent with Petitioner's complaints and required a knee replacement. He stated that imaging showed a severe degree delaminated cartilage throughout Petitioner's knee and a new meniscus tear without new trauma. He opined that the work accident and arthroscopy significantly accelerated the arthritic condition in Petitioner's knee.

Dr. Bradley testified that intraoperatively he found delaminating cartilage no longer attached to the underlying bone. He testified that the overall findings were "almost identical" to the changes seen on the MRI. He opined that Petitioner's need for knee replacement was a combination of both work injuries. He testified that he did not recommend physical therapy following the arthroscopy as every patient does not require same and Petitioner was young, healthy, and performing home exercises

Dr. Bradley testified that during the second work accident, Petitioner had all of his weight on his knee while the trailer was pushing back and the force on his meniscus and twisting motion caused a tear. He testified that during the first work accident Petitioner suffered a direct impact to his left knee on the wall and twisted his right knee as he fell and struck the concrete.

CONCLUSIONS OF LAW

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

Causal connection between accident and claimant's condition may be established by chain of events including claimant's ability to perform manual duties before accident, decreased ability to still perform immediately after accident, and other circumstantial evidence. *Pulliam Masonry v. Indus. Comm'n*, 77 Ill. 2d 469, 397 N.E.2d 834 (1979). When a preexisting condition is present, a claimant must show that "a work-related accidental injury aggravated or accelerated the preexisting [condition] 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." *St. Elizabeth's Hospital v. Workers' Comp. Comm'n*, 864 N.E.2d 266, 272-273 (5th Dist. 2007).

The law holds that accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it is a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672 (2003). "Petitioner need only show that some act or phase of the employment was a causative factor of the resulting injury." *Fierke v. Industrial Commission*, 723 N.E.2d 846 (3d Dist. 2000). Allowing a claimant to recover under such circumstances is a corollary of the principle that employment need not be the sole or primary cause of a claimant's condition. *Land & Lakes Co. v. Indus. Comm'n*, 834 N.E.2d 583 (2d Dist. 2005). Employers are to take their employees as they find them. *A.C. & S. v. Industrial Comm'n*, 710 N.E.2d 837 (Ill. App. 1st Dist., 1999) citing *General Electric Co. v. Industrial Comm'n*, 433 N.E.2d 671, 672 (1982). If a preexisting condition is aggravated, exacerbated, or accelerated by an accidental injury, the employee is entitled to benefits. *Rock Road Constr. v. Indus. Comm'n*, 227 N.E.2d 65, 67-68 (Ill. 1967); see also *Illinois Valley Irrigation, Inc. v. Indus. Comm'n*, 362 N.E.2d 339 (Ill. 1977). Even where a claimant was a surgical candidate prior to a work injury, where the work injury accelerates the need for surgery, a claimant is entitled to benefits. *Schroeder v. Illinois Workers' Comp. Comm'n*, 2017 IL App (4th) 160192WC, 79 N.E.3d 833 (2017).

The Arbitrator places significant weight on the absence of any prior complaints or treatment for Petitioner's right knee condition prior to his work accidents in June and July 2020. Petitioner performed full duty work as a highway maintainer for nine years prior to 6/9/20. While objective studies show some evidence of degenerative changes in Petitioner's right knee, there is no evidence that his pre-existing condition was symptomatic or affected his ability to work or perform activities of daily living prior to 6/9/20.

Petitioner remained off work from 6/11/20 through 6/19/20 following his work accident on 6/9/20. He returned to full duty work and had continued complaints of knee pain and swelling. Conservative treatment in the form of physical therapy and over-the-counter medication was recommended. An MRI performed on 7/14/20 confirmed a complex tear of the medial meniscus and tricompartmental osteoarthritis. Dr. Paletta recommended physical therapy and injections. No surgical recommendation was made prior to Petitioner's work accident on 7/28/20 and Petitioner continued to work full duty from 6/20/20 through 7/28/20.

The evidence supports that Petitioner's right knee condition substantially changed following his July 2020 work accident which resulted in a surgical recommendation and required him to remain off work. Petitioner reported a new pain that was significantly increased compared to what it was before the second injury. Dr. Bradley's examination showed reduced motion, moderate effusion, a significant amount of pain to palpation over multiple aspects of the knee, and positive McMurray and reverse McMurray testing. Dr. Bradley noted that the MRIs showed worsening of the meniscal tear after Petitioner's 7/28/20 accident, specifically a full thickness tear with complete extrusion. He performed an arthroscopic partial medial meniscectomy and chondroplasty of the patella and noted a fairly acute appearing tear with sharp edges, with no significant fraying or degenerative disease. Petitioner's lateral meniscus was notably pristine.

Petitioner's condition dramatically worsened following the arthroscopy. Dr. Bradley testified he was surprised by the severe and rapid deterioration of Petitioner's knee, though he has seen similar cases in medical research. Dr. Bradley testified that the arthroscopic procedure progressed Petitioner's arthritic knee condition to the extent he required a total knee replacement.

"Every natural consequence that flows from an injury that arose out of and in the course of the claimant's employment is compensable unless caused by an independent intervening accident that breaks the chain of causation between a work-related injury and an ensuing disability or injury." *Vogel v. Indus. Comm'n,* 821 N.E.2d 807, 813 (2d dist. 2005). Where the second injury occurs due to treatment for the first, there is no break in the causal chain. *See Int'l Harvester Co. v. Indus. Comm'n*, 263 N.E.2d 49 (Ill. 1970); *Shell Oil v. Indus. Comm'n*, 119 N.E.2d 224 (Ill. 1954); *Harper v. Indus. Comm'n*, 180 N.E.2d 480 (Ill. 1962); *Tee Pak, Inc. v. Indus. Comm'n*, 490 N.E.2d 170 (Ill. 1986).

The Arbitrator finds the opinions of Dr. Bradley more persuasive than those of Dr. Nogalski. Dr. Nogalski acknowledged there was no evidence that Petitioner had any symptoms or treatment with respect to his right knee prior to his work accidents. Dr. Nogalski challenged the validity of the MRI scans that showed progression of Petitioner's degenerative pathology which was corroborated by a separate MRI scan performed at a different facility. He testified that he "did not identify any specific objective findings for these extensive and exaggerated MRI findings".

Dr. Nogalski appears to take issue with Petitioner, Petitioner's wife, and Dr. Bradley. He accused Dr. Bradley of embellishing the history of Petitioner's accidents and adding a twisting-type component to the mechanism. He stated that Dr. Bradley was "leading [Petitioner] down the path to considering knee replacement by embellishing statements about Petitioner's knee and creating psychological 'fear of missing out' on further possible surgical treatment from a perceived work injury". Dr. Nogalski characterized Petitioner as "reticent and cryptic" and stated Petitioner's wife "embellished or enhanced his answers on several occasions." He found Petitioner's description of his injuries without the aid of his wife to be "relatively bland" and "relatively innocuous events."

The Arbitrator notes that Petitioner's descriptions of injury were consistent on all accident reports and medical records, and by all accounts not "bland". Petitioner reported that on 6/9/20 he tripped on uneven concrete, fell forward down the steps, hit his left knee on a concrete wall causing

him to spin around and land with all his weight on his right leg. He hit the wall at the bottom of the steps. A witness stated he heard a thump on the side of the garage followed by a loud yelp/scream like someone was in pain. He reported that Petitioner then stumbled into the garage a few seconds later complaining his knee and face hurt due to tripping over the outside step entrance. Petitioner reported that on 7/28/20 he was hooking up a message board to the back of his work truck and as he was lowering the trailer onto the hitch and pushing down sideways he felt three pops in his knee. He stated he laid over the side of his truck for quite a while and could not bear weight on his leg. He required assistance to get in his truck.

As of Dr. Nogalski's Section 12 examination on 12/23/20, five months after Petitioner's second work accident, he recommended anti-inflammatory medication and light duty restrictions of no climbing more than 3 feet and no lifting greater than 20 pounds. Dr. Nogalski testified that the work accidents could have temporarily aggravated Petitioner's conditions, but he did not acknowledge that Petitioner's unabated symptoms were provoked by his work injuries.

Dr. Bradley found Petitioner's clinical findings were supported by objective evidence. Intraoperative findings were consistent with imaging studies and clinical presentation. Dr. Bradley opined that both of Petitioner's work accidents contributed to the development of his symptomatic meniscus tear and exacerbated his underlying arthritis. He noted age-appropriate wear and tear of Petitioner's knee and early arthritis that was exacerbated by the work injuries and caused the medial meniscus tear. He opined that the arthroscopy was causally related and the natural sequela of the work injuries.

Dr. Bradley testified that during the arthroscopy he observed some thinning of the cartilage but no full-thickness loss of cartilage or bone-on-bone degeneration. He noted the tear was fairly acute with sharp edges without much fraying. Additional imaging was necessary due to Petitioner's failure to improve following the arthroscopy which showed substantial deterioration that Dr. Bradley found was consistent with Petitioner's complaints. He testified that the post-arthroscopic MRI showed a severe degree of delaminated cartilage throughout Petitioner's knee and a new meniscus tear without new trauma. He opined that the work accident and arthroscopy significantly accelerated the arthritic condition in Petitioner's knee.

Intraoperatively, Dr. Bradley found delaminating cartilage no longer attached to the underlying bone, which was not appreciated during the arthroscopy. He testified that the overall findings were "almost identical" to the changes seen on the MRI. He opined that Petitioner's need for knee replacement was a combination of both work injuries. Dr. Bradley testified that during the second work accident, Petitioner had all of his weight on his knee while the trailer was pushing back and the force on his meniscus and twisting motion caused a tear. He testified that during the first work accident Petitioner suffered a direct impact to his left knee on the wall and twisted his right knee as he fell and struck the concrete.

Based on the foregoing evidence, the Arbitrator finds that Petitioner's current condition of ill-being in his right knee is causally connected to his work accidents.

Issue (J): Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

Based on the above finding as to causal connection, Respondent shall pay the reasonable and necessary medical expenses outlined in Petitioner's Group Exhibit 1, directly to the medical providers per the Illinois medical fee schedule or PPO agreement, whichever is less, as provided in Section 8(a) and Section 8.2 of the Act. Respondent shall receive a credit for any and all medical bills paid through its group medical plan under Section 8(j) of the Act pursuant to the stipulation of the parties.

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

The Arbitrator finds that Petitioner is entitled to temporary total disability benefits from 7/29/20 through 1/31/22 when he was released to full duty work by Dr. Bradley, representing 78-6/7th weeks. The parties stipulate that all TTD benefits have been paid and that Respondent is entitled to a credit for TTD benefits paid in the amount of $64,039.76, plus five service-connected days.

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

Pursuant to §8.1b of the Act, permanent partial disability from injuries that occur after September 1, 2011, are to be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of the Act; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b. The Act provides that, "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b)(v).

(i) **Level of Impairment**: Neither party submitted an AMA rating. The Arbitrator places no weight on this factor.

(ii) **Occupation**: Petitioner returned to work without restrictions. He currently works in Respondent's lighting department which requires him to travel to 16 counties to maintain lights and traffic signals. Petitioner testified that his knee gets stiff and swells down to his calf and shin at the end of the workday. The Arbitrator places some weight on this factor.

(iii) **Age**: Petitioner was 43 years old at the time of his injuries. He is young and must live and work with an artificial knee for a significant number of years. The Arbitrator places greater weight on this factor.

(iv) **Earning Capacity**: There is no direct evidence of reduced earning capacity contained in the record. The Commission addressed this issue in *McDonald v. Zurich North America*, 26 ILWCLB 107 (Ill. W.C. Comm. 2018). In *McDonald,* the arbitrator erroneously gave no weight to the factor of future earning capacity

because no evidence of a *negative* impact on Petitioner's future earning capacity was submitted at trial. In reversing the Arbitrator, the Commission reasoned that if an employee is able to return to his job and has no difficulty performing his job duties, such a situation would constitute competent evidence that the injury did not diminish his future earning capacity. Therefore, the Arbitrator places some weight on this factor.

(v) **Disability**: As a result of the work accidents, Petitioner suffered an aggravation of the pre-existing arthritic conditions in his right knee and an acute complex tear of the right medial meniscus. Petitioner underwent an arthroscopic partial medial meniscectomy and chondroplasty of the patella, and a right total knee replacement. Petitioner testified he has difficulty bending his knee completely and he is unable to squat or kneel. Petitioner has difficulty getting up from the floor and decreased strength with descending stairs. He develops stiffness and swelling down his shin and calf over the course of the day. His hobbies of vehicle restoration and volunteering for the high school fishing team have been adversely affected. He controls his symptoms with over-the-counter Ibuprofen. The Arbitrator places greater weight on this factor.

Based upon the foregoing evidence and factors, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 45% loss of use of his right leg.

Respondent shall pay Petitioner compensation that has accrued from 4/11/22 through 7/26/22, and shall pay the remainder of the award, if any, in weekly payments.

Arbitrator Linda J. Cantrell DATED:

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC037113
Case Name	Matthew Johnson v. State of Illinois - Department of Corrections
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0354
Number of Pages of Decision	10
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Stephen Stone
Respondent Attorney	Nicole Werner

DATE FILED: 8/15/2023

/s/Carolyn Doherty, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF WILLIAMSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MATTHEW JOHNSON,
Petitioner,

vs. NO: 19 WC 37113

STATE OF ILLINOIS -
ILLINOIS DEPARTMENT OF CORRECTIONS,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of nature and extent, 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 24, 2023 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.

Pursuant to §19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review. Therefore, no appeal bond is set in this case.

August 15, 2023

D: 08/10/23
CMD/ma
045

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

/s/ *Marc Parker*
Marc Parker

/s/ *Christopher A. Harris*
Christopher A. Harris

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC037113
Case Name	Matthew Johnson v. State of Illinois - Department of Corrections
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	8
Decision Issued By	Maureen Pulia, Arbitrator

Petitioner Attorney	Stephen Stone
Respondent Attorney	Nicole Werner

DATE FILED: 1/24/2023

THE INTEREST RATE FOR THE WEEK OF JANUARY 24, 2023 4.68%

/s/ Maureen Pulia, Arbitrator
Signature

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

January 24, 2023

/s/ Michele Kowalski

Michele Kowalski, Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF **WILLIAMSON**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

MATTHEW JOHNSON,
Employee/Petitioner

v.

STATE OF ILLINOIS-DEPARTMENT OF CORRECTIONS,
Employer/Respondent

Case # **19** WC **37113**

Consolidated cases: _____

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Maureen Pulia**, Arbitrator of the Commission, in the city of **Herrin**, on **1/10/23**. By stipulation, the parties agree:

On the date of accident, **1/3/19**, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $**$73,067.28**, and the average weekly wage was $**$1,405.14**.

At the time of injury, Petitioner was **46** years of age, ***married*** with **3** dependent children.

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

Necessary medical services have or will be paid by respondent.

Respondent shall be given a credit of $**00.00** for TTD, $**00.00** for TPD, $**00.00** for maintenance, and $**00.00** for other benefits, for a total credit of $**00.00**.

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

ORDER

Respondent shall pay Petitioner the sum of $**836.69**/week for a further period of **15.375** weeks, as provided in Section **8(e)** of the Act, because the injuries sustained caused **petitioner a 7.5% loss of use of the left hand**.

Respondent shall pay Petitioner compensation that has accrued from **10/3/19** through **1/10/23**, and shall pay the remainder of the award, if any, in weekly payments.

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

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

Maureen Pulia

JANUARY 24, 2023

Signature of Arbitrator

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 46 year old Correctional Lieutenant, sustained an accidental injury to his left hand that arose out of and in the course of his employment by respondent on 10/3/19. Petitioner's duties for respondent include supervising sergeants and correctional officers in Zone 1. Petitioner is left hand dominant.

On 10/3/19 petitioner was in the R5 Segregation Unit sending the line for chow when he received a distress code that he responded to. The respond code was for a combative inmate. Petitioner and another officer attempted to secure the combative inmate, and in the process, they fell to the ground, and petitioner 's left hand landed hard on the ground.

Later that day petitioner presented to Heartland Regional Medical Center complaining of a left hand injury. He provided a consistent history of the accident. Following an examination and diagnostic tests, petitioner was diagnosed with a displaced fracture of the base of the fifth metacarpal bone of the left hand. Petitioner was given a wrist splint. Petitioner was instructed to follow-up with Dr. Kevin Koth.

Petitioner completed the Employee's Notice of Injury on 10/7/19.

On 10/8/19 petitioner presented to Dr. Koth. He provided a consistent history of the accident. Petitioner reported that his fifth finger felt tight. He denied any numbness or tingling in the hand. Petitioner presented with swelling and stiffness of the left finger joints; dorsal left hand pain, worse with lifting; and, weak left hand grip. Dr. Koth reviewed the x-rays from the emergency room, and assessed a displaced fifth metacarpal head fracture that is shortened, with an apex dorsal angulation of 35 degrees. Dr. Koth told petitioner that if his apex dorsal angulation was greater than 40 degrees he would have recommended surgery. He noted no rotational deformity. Dr. Koth placed petitioner into correct position in an ulnar gutter Fast Form Cast. Prior to the cast setting up, a gentle manipulation procedure was done at the 5th metacarpal head to ensure that the degrees of angulation did not continue to slip. Petitioner was given a script for Tylenol #3. Dr. Koth released him to work with no inmate contact, no heavy pushing, and no pulling or lifting with the left upper extremity.

On 10/17/19 the Supervisor's Report of Injury was completed.

On 11/21/19 petitioner followed-up with Dr. Koth. Petitioner reported that he had removed the cast last night because he felt his fingers were very tight and starting to go numb. He then reapplied it that morning. He reported that his only discomfort was at night when the 4th and 5th fingers swell and ache. Repeat x-rays were taken. The results revealed the start of healing at the fracture site; three cortices of callus; and a visible fracture line. Dr. Koth recommended physical therapy and discontinued use of the cast. Dr. Koth also recommended petitioner work on motion. Dr. Koth released petitioner to return to work with no direct inmate contact.

Petitioner began a course of physical therapy at Athletico on 12/2/19.

On 12/19/19 petitioner returned to Dr. Koth. He reported occasional pain on the ulnar side of the wrist, that was at times sharp and shooting, and at other times achy. Petitioner also reported occasional swelling. Following an examination and updated x-rays, Dr. Koth instructed petitioner to finish his physical therapy, specifically as it related to strengthening. Dr. Koth also released petitioner to full duty work with no restrictions. Dr. Koth released petitioner from his care, and instructed him to return to as needed. He instructed petitioner to continue to work on his exercises at home.

On 1/20/20 petitioner returned to Dr. Koth. Petitioner reported that despite finishing his therapy, when he tries to grip a door handle and turn it with his left hand he experiences a pulling sensation and pain. He also reported that making a fist causes pain. Petitioner had swelling and tenderness at the fracture sight. Dr. Koth examined petitioner and recommended additional therapy with ultrasound and anti-inflammatories. Dr. Koth told petitioner that there was a possibility that his injury area may not return to prefracture status as the bone anatomy was now changed. Dr. Koth told petitioner to continue his home exercises. Petitioner's work status remained the same.

Petitioner last attended physical therapy at Athletico on 3/13/20. Petitioner attended 19 appointments and canceled twice. On 3/13/20 petitioner reported no pain and improved ability with exercise and grip. All of petitioner's short and long terms goals were achieved but 2. The first goal not yet achieved was full range of motion of the left hand within normal limits. The second goal not achieved was inmate altercation on the left side occasionally. The plan that day was to progress functional strength as able. Petitioner called on 3/16/20 stating that he did not want to continue in physical therapy at that time due to Covid-19. As a result, petitioner was discharged from therapy.

On 4/21/20 petitioner last followed up with Dr. Koth. Petitioner reported that he still had 3 physical therapy sessions left, but due to Covid-19 precautions he stopped going. Petitioner stated that he had been working on motion at home. He reported that a lot of activity with his left hand caused a painful ache in his left hand. Following an examination, Dr. Koth told petitioner to finish his three remaining physical therapy sessions. He also instructed petitioner to continue to work on his motion. Dr. Koth was of the opinion that petitioner had reached maximum medical improvement, and could return to work without restrictions. He told petitioner to use ice and elevation if increased activity caused his left hand to swell. Dr. Koth again released petitioner from his care on an as needed basis.

On 3/16/22 petitioner underwent a Section 12 examination with Dr. William Feinstein at Orthopedic Associates, at the request of the respondent. Petitioner provided a consistent history of the accident and treatment to date. He reported occasional left hand numbness about once a month, and increased numbness with increased use of the left upper extremity. Petitioner reported a boxer's fracture to his left hand 25 years ago for

which he underwent an open reduction with internal fixation. Petitioner reported that outside of work he hangs sheet rock, works on engines, and lifts weights.

Following his examination and record review, Dr. Feinstein noted no significant tenderness along the left 5th little finger; full range of motion of the left little finger and other digits; no malrotation or angulation; and, no triggering. Petitioner described some paresthesias in the small little finger with median nerve compression test. Dr. Feinstein's assessment was a nondisplaced fracture of the neck of the 5th metacarpal of the left hand, with residual pain and paresthesias in the left hand. Dr. Feinstein opined that there is a causal connection between petitioner's reported injury and his current findings, but found petitioner's current symptoms relatively mild, as they were only occurring about once a month. He also noted that the petitioner had been able to work unrestricted since 1/3/20. Dr. Feinstein recommended 4-6 more weeks of occupational or physical therapy.

On 4/12/22 petitioner presented to Phillip Erthall, PA, at The Orthopedic Institute of Southern Illinois (OISI), complaining of numbness in the left ring and little fingers. He denied any pain. He reported that while he is driving or using his left hand, the ring and little fingers go numb. Erthall assessed left cubital tunnel syndrome and ordered an NCV/EMG of the left upper extremity. Petitioner was prescribed a splint for his left hand. He also released petitioner to full duty work without restrictions.

On 5/2/22 petitioner underwent an NCV/EMG of his left upper extremity due to a history of numbness in his left hand/fingers for the past 2 years. The impression was that the nerve conduction studies were within normal limits.

On 5/10/22 petitioner followed up at OSIS and was seen by Dr. Steven Young. Petitioner reported that his left hand numbness wakes him up at night intermittently; that overuse of the left hand and driving tend to make his symptoms worse; and, that the numbness in the left hand was slowly getting better. Following an examination and review of the NCV/EMG test, Dr. Young assessed left cubital tunnel syndrome. He released petitioner without restrictions, and told him to follow-up for his left cubital tunnel syndrome.

On 7/7/22 petitioner returned to Dr. Young after his negative NCV/EMG. Petitioner was still reporting occasional numbness and tingling of the left ring and little fingers since his fracture in 2019. He reported that overall he was improved. Dr. Young noted that petitioner was not compliant with his brace. Following an examination, Dr. Young released petitioner from his care. He placed him at maximum medical improvement.

Petitioner testified that currently he experiences pain and stiffness in his left hand in the morning, for which it takes 20-30 minutes to loosen up with massage. He also reported that driving can cause stiffness and numbness in his left hand if drives for too long. With any heavy repetitive task petitioner testified that his left

hand and left ring and little fingers stiffen up, and he has to work it out by massaging it. Petitioner testified that the cold weather also causes his left hand to become stiff and ache. Warming his hands improves this. Petitioner is no longer wearing a splint, and is not taking any medications for his symptoms.

On examination, during the trial, the arbitrator noted swelling in the web between the left ring and left little finger on the left hand. The arbitrator noted that the normal indentation between the ring and left fingers at the knuckles when the petitioner made a fist with his left hand was missing, as compared to his right hand.

WHAT IS THE NATURE AND EXTENT OF THE INJURY?

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

Neither party submitted an AMA rating pursuant to Section 8.1b of the Act into evidence. For this reason, the arbitrator gives no weight to this factor.

With respect to factor (ii), the occupation of the injured employee, the petitioner was a correctional lieutenant for respondent. On 12/19/19 petitioner was released to return to full duty work without restrictions. Since that date, despite additional treatment, petitioner's work status remained full duty, without restrictions. As of the trial date, petitioner continued to work full duty without restrictions for respondent. For these reasons, the arbitrator gives lesser weight to this factor.

With respect to factor (iii), the age of the employee. Petitioner was 46 years old on the date of injury, and has a potential work life expectancy of up to nearly 20 years. For these reasons, the Arbitrator gives greater weight to this factor.

With respect to factor (iv), the future earnings of the petitioner, no testimony or evidence was offered with respect to this issue. For this reason, the arbitrator gives no weight to this factor.

With respect to factor (v), evidence of disability corroborated by the treating medical records, the Arbitrator finds that as a result of the accident on 10/3/19 petitioner sustained a displaced fifth metacarpal head fracture that is shortened, with an apex dorsal angulation of 35 degrees. Dr. Koth told petitioner that if his apex dorsal angulation was greater than 40 degrees he would have recommended surgery. He noted no rotational deformity. Petitioner's treatment consisted of conservative treatment in the form of physical therapy and doctor follow-ups.

When petitioner treated on 4/21/20 he reported that a lot of activity with his left hand caused a painful ache in his left hand. Dr. Koth told petitioner to use ice and elevation if increased activity caused his left hand to swell. Dr. Koth again released petitioner from his care on an as needed basis.

On 3/16/22 petitioner reported occasional left hand numbness about once a month, as well as increased numbness with increased use of the left upper extremity. Dr. Feinstein's assessment was a nondisplaced fracture of the neck of the 5th metacarpal of the left hand, with residual pain and paresthesias in the left hand. Dr. Feinstein found petitioner's symptoms relatively mild, as they were only occurring about once a month. On 4/12/22 petitioner complained of numbness in the left right and little fingers. He denied any pain. He reported that while he is driving or using his left hand, the ring and little fingers go numb. On 5/10/22 petitioner complained that numbness in his left hand wakes him up at night intermittently; that overuse of the left hand and driving tends to make his symptoms worse; and, that the numbness was slowly getting better. On 7/7/22 petitioner was still reporting occasional numbness and tingling of the left ring and little fingers since his fracture in 2019, but also stated that overall he was improved.

Petitioner testified that he currently experiences pain and stiffness in his left hand in the morning, for which it takes 20-30 minutes to loosen up with massage. He also reported that driving can cause stiffness and numbness in his left hand if drives for too long. With any heavy repetitive task petitioner testified that his left hand and left ring and little fingers stiffen up, and he has to work it out by massaging it. Petitioner testified that the cold weather also causes his hand to become stiff and ache. Warming his hands improves this. Petitioner is no longer wearing a splint, and is not taking any medications for his symptoms. Petitioner is left hand dominant. For these reasons, the Arbitrator gives greater weight to this factor.

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner sustained a 7.5% loss of use of his right hand pursuant to Section 8(e) of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC014317
Case Name	Michael Charleston v. State of Illinois - Shawnee Correctional Center
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0355
Number of Pages of Decision	16
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Thomas C Rich
Respondent Attorney	Nicole Werner

DATE FILED: 8/15/2023

/s/Marc Parker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Michael Charleton,

Petitioner,

vs. NO: 21 WC 14317

State of Illinois
Shawnee Correctional Center,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, and prospective medical care, and being advised of the facts and law, modifies the Arbitrator's award of prospective medical care as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Arbitrator ordered Respondent to "authorize and pay for prospective medical treatment, including, but not limited to, a two-level disc replacement at C5-6 and C6-7 recommended by Dr. Rutz, *and post-operative care until Petitioner reaches maximum medical improvement."* (Emphasis added.) The Commission modifies the award and orders Respondent to authorize and pay for the two-level disc replacement surgery at C5-6 and C6-7 and all reasonable and necessary attendant care.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 24, 2022, is modified as stated herein. The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for the two-level disc replacement surgery at C5-6 and C6-7 recommended by Dr. Rutz and all reasonable and necessary attendant care.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision.

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.

Pursuant to §19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review. Therefore, no appeal bond is set in this case.

August 15, 2023

MP:yl
o 8/10/23
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/s/ *Marc Parker*
Marc Parker

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

/s/ *Christopher A. Harris*
Christopher A. Harris

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC014317
Case Name	CHARLESTON, MICHAEL v. STATE OF ILLINOIS/SHAWNEE CORRECTIONAL CENTER
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	13
Decision Issued By	Linda Cantrell, Arbitrator

Petitioner Attorney	Thomas Rich
Respondent Attorney	Nicole Werner

DATE FILED: 5/24/2022

THE INTEREST RATE FOR THE WEEK OF MAY 24, 2022 1.53%

/s/ Linda Cantrell, Arbitrator
Signature

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

May 24, 2022

/s/ Michele Kowalski

Michele Kowalski, Secretary

Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF WILLIAMSON))

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

MICHAEL CHARLETON
Employee/Petitioner

v.

STATE OF ILLINOIS/SHAWNEE CORRECTIONAL CENTER
Employer/Respondent

Case # **21** WC **014317**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Linda J. Cantrell**, Arbitrator of the Commission, in the city of **Herrin** on **March 24, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **5/10/2021**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**58,900.35**; the average weekly wage was $**1,132.70**.

On the date of accident, Petitioner was **35** years of age, ***married*** with **2** dependent children.

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

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and **$0** for other benefits, for a total credit of **$0**. The parties stipulate that all TTD benefits have been paid.

Respondent is entitled to a credit of **$Any Paid** under Section 8(j) of the Act for any medical expenses paid through Respondent's group medical plan.

ORDER

Respondent shall pay the reasonable and necessary medical expenses outlined in Petitioner's Group Exhibit 1, directly to the medical providers per the Illinois medical fee schedule or PPO agreement, whichever is less, as provided in Section 8(a) and Section 8.2 of the Act. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits. The parties stipulate that Respondent shall receive credit allowed under Section 8(j) of the Act for any medical expenses paid through Respondent's group medical plan.

Respondent shall authorize and pay for prospective medical treatment, including, but not limited to, a two-level disc replacement at C5-6 and C6-7 recommended by Dr. Rutz, and post-operative care until Petitioner reaches maximum medical improvement.

This award shall in no instance be a bar to further hearing and determination of any additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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

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

MAY 24, 2022

Arbitrator Linda J. Cantrell

STATE OF ILLINOIS)
) SS
COUNTY OF WILLIAMSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

MICHAEL CHARLETON,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	Case No.: 21-WC-014317
	)	
STATE OF ILLINOIS/	)	
SHAWNEE CORRECTIONAL CENTER,	)	
	)	
Employer/Respondent.	)	

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Herrin on March 24, 2022 pursuant to Section 19(b) of the Act. The parties stipulated that on May 10, 2021, Petitioner sustained accidental injuries that arose out of and in the course of his employment with Respondent. The issues in dispute are causal connection, medical expenses, and prospective medical care. All other issues have been stipulated.

TESTIMONY

Petitioner was 35 years old, married, with two dependent children at the time of accident. Petitioner has been employed by Respondent as a correctional officer for five years. On 5/10/21, Petitioner was restraining a combative inmate when he injured his low back, neck, and right cheek. Petitioner testified he had prior back surgery in 2013 while serving in the military as a result of an explosion in Iraq. Petitioner stated his back improved following surgery, and he had some minor pain or soreness every now and then.

Petitioner began his employment with the Illinois Department of Corrections in 2017 and testified he took a pre-employment physical prior to beginning work. Prior to the accident he had no symptoms or workers' compensation claims related to his neck. Petitioner underwent an L5-S1 fusion performed by Dr. Rutz. He testified that prior to his lumbar surgery he was miserable and in pain every day. The L5-S1 fusion helped him tremendously.

Petitioner testified that his neck and shoulders hurt every day, and he has a constant headache located in both sides of his head. His symptoms increase with movement. Petitioner returned to full duty work three months following his lumbar surgery. Dr. Rutz recommends a multi-level cervical disc replacement which Petitioner desires to undergo.

Petitioner testified he disagrees with Dr. Bernardi's comment that his injuries could not have been caused by the altercation with the inmate. Petitioner stated he was struck by his right eye where there is scarring. Petitioner testified it took three officers and himself to wrestle the inmate to the ground.

Petitioner testified he did not complete the Notice of Injury and stated it was prepared by the nurse at his direction. (RX1) Petitioner agreed he did not indicate he fell to the ground during the assault. He stated he was receiving medical attention while the form was being prepared. He signed the Notice of Injury the day after the accident. Petitioner testified he does not dispute the information contained in the incident reports submitted by the other correctional officers involved in the incident. Petitioner stated he has not seen Dr. Rutz since 11/30/21.

A Notice of Injury was signed by Petitioner on 5/11/21. (RX1) The report indicates Petitioner was assaulted by an inmate and sustained injuries to his head, neck, and right face with a 3 cm laceration. A Supervisor's Report of Injury or Illness was prepared on 5/11/21 that states Petitioner was struck in the face by an offender resulting in a cut on his right cheek. (RX2) On 5/10/21, an Employee Injury report was prepared by K. Freeman, LPN, that states Petitioner reported, "I was punched in the face by an inmate while responding to a altercation". (RX3) On 5/11/21, an Incident Report was prepared by LPN Freeman that stated Petitioner sustained a 1-inch laceration under his right eye. Steri-strips were applied, and Petitioner was sent to the emergency room for evaluation and stitches. She noted Petitioner was dizzy and had a headache. (RX4) On 5/10/21, an Incident Report was prepared by Petitioner wherein he reported a resisting inmate swung and struck him in the face. Responding staff arrived, and he was removed and escorted to healthcare. (RX4)

An Incident Report prepared by Correctional Officer Allison Stout states the inmate became combative, swinging, hitting Petitioner on his right cheekbone. (RX4) CO Stout reported she grabbed the inmate by the waist and brought him to the ground while Petitioner continued to attempt to restrain the inmate. The Incident Report submitted by Correctional Officer Moore states the inmate was taken to the ground and refused to stop resisting. CO Miles responded and ultimately maced the inmate. (RX4)

The reports of Correctional Officers Miles, Hunter, and Merriman also describe an inmate who was resisting and combative towards staff. The inmate attempted to bite and scratch the officers and continually resisted until he was pepper sprayed. (RX4) The officers sustained a minor cut on the right shoulder, a knee injury, a right hand injury, and one officer's eyeglasses were knocked off his face and damaged.

MEDICAL HISTORY

Petitioner presented to the emergency room at Harrisburg Medical Center immediately following the assault. (PX3) Petitioner provided a history of injury and complained of pain in the right side of his face and jaw. Examination revealed full range of motion in Petitioner's back with no tenderness. A CT scan of the cervical spine was taken showing a small central broad based disc protrusion at C5-6. (PX3, p. 18) CT scans of the head and facial bones were normal.

Petitioner's facial laceration was cleaned and closed with six sutures. He was discharged with medication and ordered to follow up with a physician if his pain persisted.

On 5/20/21, Petitioner saw Dr. Kevin Rutz. Petitioner completed a Patient Questionnaire and indicated sharp, achy, moderate low back and neck pain. (PX4, p. 16) He had left foot numbness/pain and weakness in his shoulder. The Questionnaire asked whether Petitioner's injuries were severe enough that they required surgery and Petitioner replied, "Yes". Petitioner indicated he underwent low back surgery while he was in the military. Dr. Rutz took the history of the assault and noted Petitioner began experiencing discomfort in his neck with radiation towards his left shoulder shortly after the incident. (PX4, p. 8) Petitioner stated that one week ago he began to experience discomfort in his lumbar region over the midline greater on the left. The pain radiated towards his left hip and lateral thigh with paresthesia in the great toe on the left foot. (PX4, p. 8) Petitioner reported his symptoms somewhat improved with the medication prescribed in the emergency room. He reported his symptoms were worsening.

Dr. Rutz noted no prior history of neck symptoms. (PX4, p. 8) X-rays of the cervical spine showed mild levoscoliosis of the upper thoracic spine with no instability in the neck. X-rays of the lumbar spine were free of any significant degenerative changes or instability. (PX4, p. 9) Examination of Petitioner's low back produced pain on flexion along with absent patella and Achilles reflexes. (PX4, p. 10) Cervical examination showed pain with flexion and extension with limited cervical rotation. Petitioner's biceps, triceps, and brachial radiolysis reflexes were absent. (PX4, p. 10) Dr. Rutz assessed neck pain with cervical radiculopathy and low back pain with lumbar radiculopathy. (PX4, p. 10) Dr. Rutz ordered MRIs of the cervical and lumbar spine and prescribed Medrol Dosepak, Neurontin, and Ultram. Petitioner was placed off work.

On 5/20/21, a cervical MRI revealed left paracentral-foraminal and right foraminal protrusions at C5-6 resulting in ventral cord flattening, mild central canal stenosis, and mild-to-moderate bilateral foraminal stenosis; bilateral foraminal protrusions at C3-4 resulting in moderate bilateral foraminal stenosis; bilateral foraminal protrusions at C4-5 with left-sided facet arthropathy, left-sided facet anterior spurring, resulting in severe left greater than right foraminal stenosis with no canal stenosis; and C6-7 right paracentral and small left foraminal protrusions resulting in mild left foraminal stenosis with no central canal or right foraminal stenosis. (PX6, p. 5)

A lumbar MRI revealed a right paracentral broad-based protrusion with an annular tear/fissure at L5-S1 measuring up to 5.5 mm in thickness; bilateral lateral recess stenosis with impingement of the traversing S1 roots bilaterally in the lateral recesses; and mild bilateral foraminal stenosis with no central canal stenosis. (PX6, p. 8)

On 5/24/21, Petitioner underwent a left C6 selective nerve root block and a left L5-S1 transforaminal epidural steroid injection. (PX6, p.12-13)

On 6/1/21, Petitioner returned to Dr. Rutz and reported pain in his neck with radiation into the left greater than right shoulder and pain in his back with radiation into the left leg. Dr. Rutz noted the MRI finding and that Petitioner was only three weeks out from his injury. He advised Petitioner to give it time to see if his cervical disc herniations improved on their own.

Dr. Rutz noted some chronic lumbar problems with an uptick in symptoms as a result of the work incident. He noted Petitioner's symptoms did not improve following the injection. Dr. Rutz recommended an L5-S1 microdiscectomy and fusion which was performed on 6/11/21. (PX4, p.3) Intraoperatively, Dr. Rutz noted a previous microdiscectomy at L5-S1 and herniated disc fragments which were removed via discectomy followed by fusion.

On 6/29/21, Petitioner reported significant improvement in his leg pain. (PX4, p. 49) Dr. Rutz noted ongoing neck discomfort and again recommended Petitioner give it time to heal.

On 7/27/21, Petitioner reported to Dr. Rutz his leg pain completely resolved. (PX4, p. 54) Petitioner was off all medications and made dramatic improvement. Dr. Rutz released Petitioner to sedentary duty and return in two months to consider full duty work.

On 9/21/21, Petitioner returned to Dr. Rutz and reported ongoing discomfort in his left leg and left lateral thigh. He stated he was only occasionally taking Ibuprofen. (PX4, p. 58) Petitioner complained of neck pain with posterior headaches and radiation into his bilateral trapezius muscles. Dr. Rutz prescribed Medrol Dosepak and Mobic for a flareup of Petitioner's lower extremity and ordered physical therapy for his neck and low back.

On 10/12/21, Dr. Rutz noted Petitioner still had some soreness in his left lower back with occasional numbness and tingling in his left leg. (PX4, p. 62) Petitioner's neck pain was unchanged. Dr. Rutz recommended continued conditioning and therapy for Petitioner's low back and radiculopathy. He continued Petitioner on light duty restrictions. Dr. Rutz noted it had been more than four months and Petitioner's neck symptoms persisted. He recommended continued physical therapy prior to considering surgery. (PX4, p. 63)

On 11/30/21, Petitioner reported that therapy helped his low back pain quite a bit but aggravated his neck pain. (PX4, p. 66) Dr. Rutz recommended disc arthroplasty at C5-6 and C6-7. (PX4, p. 67)

On 9/28/21, Petitioner was examined by Dr. Robert Bernardi pursuant to Section 12 of the Act. (RX5) Dr. Bernardi noted Petitioner's prior back surgery in 2013 and his pre-operative pain was confined to his lumbar spine and did not radiate. Dr. Bernardi reported that Petitioner did well post-operatively until the work injury. Petitioner denied any previous episodes of significance or sustained neck pain.

Dr. Bernardi reviewed the employee injury report indicating Petitioner had been punched in the right side of his face. There is no reference to witness reports. Dr. Bernardi reviewed records of Dr. Winkleman and Dr. Rutz and noted that Dr. Rutz saw Petitioner on 5/20/21 and reported that one week ago Petitioner began noticing low back pain a little worse on the left radiating to his hip and lateral thigh. Dr. Bernardi noted Petitioner made dramatic improvement following surgery at L5-S1.

Dr. Bernardi's exam showed full range of motion in Petitioner's neck and shoulders with lumbar range of motion provoking symptoms of right low back pain. Flexion and external

rotation of Petitioner's left hip provoked symptoms along the lateral aspect of the proximal left thigh. Dr. Bernardi did not have any imaging studies to review.

With regard to Petitioner's cervical spine, Dr. Bernardi diagnosed C5-6 and C7 disc disease and neck pain of uncertain etiology, and status post L5-S1 fusion and revision decompression with low back and left leg pain of certain etiology. He believed Petitioner's cervical symptoms appeared to be work related but that he needed no further treatment. He opined Petitioner's low back complaints were not causally related to the work incident.

On 12/31/21, Dr. Bernardi was supplied with additional records and imaging studies. After review, he did not believe that Petitioner's low back complaints or any of the testing or treatment was causally connected to the 5/10/21 assault. Dr. Bernardi believed Petitioner had reached MMI for his low back and neck condition and was not in need of cervical surgery. (RX6, p. 4-5)

On 1/21/22, Dr. Bernardi testified by way of evidence deposition. (RX7) He testified consistently with his reports. He opined that none of Petitioner's lumbar spine diagnoses were related to the work incident. He opined that Petitioner's symptoms remained chronic since his operation in 2013 and that surgery should not have been offered one month post-accident. He testified that Petitioner was merely punched in the face, and while that could cause a head or neck injury, it would not cause a low back injury. He believed Petitioner had inadequate conservative treatment to determine whether any flare up of his symptoms were going to resolve on their own. Dr. Bernardi testified that Petitioner's acute neck pain after the accident was work related and that he suffered a muscular injury which should have been self-limiting. He opined that surgery was not indicated because Petitioner did not have symptomatic spinal cord or nerve root compression/myelopathy. He believed Petitioner was at MMI and could work full duty.

On cross-examination, Dr. Bernardi agreed it was uncommon for a cervical sprain/strain to last seven months. Dr. Bernardi opined that a cervical fusion and disc replacement should be avoided if no neurological components were present. Dr. Bernardi acknowledged that if Petitioner was still symptomatic today, he had not reached his preinjury baseline with regard to his cervical spine. Dr. Bernardi testified that the mechanism of injury did not produce symptoms or pathology in Petitioner's lumbar spine because there was no indication in the records he reviewed that suggested Petitioner wrestled with the inmate. He stated he could not recall if he discussed the specifics about the incident with Petitioner.

Dr. Bernardi testified that in his practice he encounters temporal delay between the onset of symptoms and an accident. However, he believed that was not what Petitioner was reporting and that there could be a delay of hours between herniating a disc and the onset of symptoms. He testified it is difficult to imagine any kind of trauma that is going to take ten days to manifest itself, and even a delay of three days is "stretching it."

Dr. Bernardi believed there were only minimal findings on the imaging studies, but acknowledged there was loss of disc height, disc hydration, slight bulging and slight displacement of the left S1 nerve root. He agreed the pathology at L5-S1 could cause painful symptoms. Dr. Bernardi acknowledged that Petitioner reported to him he received a good

outcome from the 2013 lumbar surgery, and he began to experience an increase in low back symptoms following the work accident. Dr. Bernardi was not aware of any treatment that Petitioner had to his lumbar or cervical spine in the days, months, or years prior to the work accident. He agreed that pathology or findings observed on an MRI could cause pain without causing neurological deficits. He testified that an individual can have an increase in symptoms without a change in pathology and that asymptomatic pathology can be caused to become symptomatic. He admitted that the protrusions in Petitioner's cervical spine could be traumatic but "he had no sound explanation for how [Petitioner] could still be having this degree of neck pain."

Dr. Bernardi reviewed Dr. Rutz's operative report and noted that Petitioner underwent a redo L5-S1 decompression, coupled with posteriorly instrumented posterior and transformainal interbody fusions. Dr. Bernardi does not perform the cervical surgery recommended by Dr. Rutz.

Dr. Kevin Rutz testified by way of evidence deposition on 1/12/22. (PX8) Dr. Rutz testified that shortly after the work accident Petitioner began experiencing discomfort in his neck that radiated to his left shoulder, and about one week prior to his initial examination Petitioner began experiencing discomfort in his lower back which radiated to his left hip, lateral thigh, with paresthesia into his left foot. Dr. Rutz testified that he was aware Petitioner had undergone a lumbar microdiscectomy in 2013 and had some intermittent back pain. Dr. Rutz's exam showed pain with lumbar flexion and tenderness to palpation in the midline of the lumbar spine, and pain with forward and backward flexion in the cervical spine. X-rays showed no degeneration in Petitioner's cervical spine and no significant progressive degenerative condition in Petitioner's lumbar spine.

Dr. Rutz testified the MRIs showed a small to moderate central disc herniation at C5-6, a broad bilobular disc herniation at C6-7, and a small to moderate size left S1 recurrent disc herniation. He testified the epidural injections resulted in short term improvement and Petitioner's symptoms returned. He noted the left C6 nerve root block provided Petitioner relief for several hours. Dr. Rutz diagnosed cervical disc herniations at C5-6 and C6-7 with recurrent disc herniation at L5-S1. He testified that people that have a recurrent disc herniation that do not improve with injections have a poor prognosis for improving without surgery.

Dr. Rutz testified that intraoperatively he observed some scarring in the pathway to L5-S1 from the previous surgery, and herniated fragments underneath the nerve roots that were removed. Dr. Rutz removed the disc and completed the fusion. Dr. Rutz testified Petitioner had risk factors for recurrent disc herniation, but he felt the recurrent disc herniation was secondary to Petitioner's work accident due to the marked increase in pain that occurred very quickly after being assaulted. He testified it is common for it to take a little time for inflammation to build up and cause an increase in pain, particularly when a patient has a distracting injury that needs addressed. Dr. Rutz testified Petitioner could not have performed his job duties as a correctional office with the type of symptoms he had when he first met him.

Dr. Rutz recommends a two-level disc replacement at C5-6 and C6-7. He testified that the surgery allows Petitioner to maintain motion and there is no concern of a nonunion or increased stress at other levels. Dr. Rutz opined that Petitioner's lumbar and cervical conditions

and the need for treatment, including surgery, were directly related to the work accident. He testified that Petitioner would be able to return to work full duty as a correctional officer following surgery.

On cross-examination, Dr. Rutz testified he did not recommend extended conservative treatment for Petitioner's lumbar spine because he had a recurrent disc herniation with a new onset of pain in his leg that responded poorly to an injection. His decision to operate was due to the severity of Petitioner's symptoms, expectations of nonoperative care, and that recurrent herniations typically do not improve over time. Dr. Rutz testified that with regard to Petitioner's neck, he had no history of prior problems and sustained acute disc herniations that can improve without surgery. Dr. Rutz testified that conservative treatment did not improve Petitioner's symptoms and surgery was appropriate.

Petitioner introduced into evidence a form from Respondent's workers' compensation carrier, Tristar, which Dr. Rutz received with regard to Petitioner's low back. (PX9) The form states, "The following services are authorized: evaluation and treatment."

CONCLUSIONS OF LAW

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

Circumstantial evidence, especially when entirely in favor of the Petitioner, is sufficient to prove a causal nexus between an accident and the resulting injury, such as a chain of events showing a claimant's ability to perform manual duties before accident but decreased ability to still perform immediately after accident. *Pulliam Masonry v. Indus. Comm'n*, 77 Ill. 2d 469, 397 N.E.2d 834 (1979); *Gano Electric Contracting v. Indus. Comm'n*, 260 Ill.App.3d 92, 96–97, 631 N.E.2d 724 (1994); *International Harvester v. Indus. Comm'n*, 93 Ill.2d 59, 442 N.E.2d 908 (1982).

The law holds that accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it is a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill. 2d 193, 205, 797 N.E.2d 665, 672-673 (2003). [Emphasis added]. "Petitioner need only show that some act or phase of the employment was a causative factor of the resulting injury." *Fierke v. Industrial Commission*, 309 Ill. App. 3d 1037, 723 N.E.2d 846 (2000). Employers are to take their employees as they find them. *A.C. & S. v. Industrial Comm'n*, 304 Ill. App. 3d 875, 710 N.E.2d 837 (1999) citing *General Electric Co. v. Industrial Comm'n*, 89 Ill. 2d 432, 434, 433 N.E.2d 671, 672 (1982). If a preexisting condition is aggravated, exacerbated, or accelerated by an accidental injury, the employee is entitled to benefits. *Rock Road Constr. v. Indus. Comm'n*, 227 N.E.2d 65, 67-68 (Ill. 1967), 37 Ill. 2d 123; see also *Illinois Valley Irrigation, Inc. v. Indus. Comm'n*, 66 Ill. 2d 234, 362 N.E.2d 339 (1977).

The Arbitrator finds that Petitioner sustained his burden in establishing that his current condition of ill-being with respect to his cervical and lumbar spine are causally connected to his undisputed work accident on 5/10/21. Petitioner took a preemployment physical when he was hired by Respondent in 2017. He had no history of cervical problems and underwent an L5-S1 microdiscectomy in 2013 without evidence of treatment or symptoms in the years preceding his

work accident. Petitioner was working full duty as a correctional officer at the time of accident. Petitioner's symptoms coincided temporally with his work accident and objective diagnostic studies revealed evidence of pathology consistent with his complaints, namely a central disc herniation at C5-6, a broad bilobular disc herniation at C6-7, and a recurrent disc herniation at left L5-S1. Objective intraoperative findings evidenced herniated disc fragments underneath the nerve roots at L5-S1. Given the circumstantial and objective medical evidence, the Arbitrator finds Dr. Rutz's testimony that Petitioner's cervical spine and low back symptoms were related to the work accident persuasive, particularly with Petitioner's marked improvement following lumbar surgery.

Dr. Bernardi's understanding of the mechanism of injury was limited to his knowledge that Petitioner was struck in the face. He did not review witness statements to the accident and testified he did not obtain specifics of Petitioner's accident. Petitioner testified it took three officers and himself to wrestle the inmate to the ground. An Incident Report prepared by CO Allison Stout states the inmate became combative, swinging, hitting Petitioner on his right cheekbone. (RX4) CO Stout reported she grabbed the inmate by the waist and brought him to the ground while Petitioner continued to attempt to restrain the inmate. The Incident Report submitted by CO Moore states the inmate was taken to the ground and refused to stop resisting.

Dr. Bernardi testified he understood Petitioner did not have a good outcome from the 2013 low back surgery and was still symptomatic up to the time of the work accident. Petitioner testified he had occasional achiness in his low back and there is no evidence he received treatment in the years prior to the accident. Petitioner and Dr. Rutz both testified that Petitioner received a good outcome from the 2013 microdiscectomy and that Petitioner was capable of working full duty without issue up to the date of the accident.

Dr. Bernardi opined that the temporal delay in the onset of Petitioner's low back symptoms was too long to support a causal connection. However, Petitioner reported to Dr. Rutz he had an onset of low back symptoms with radiculopathy one week ago, approximately three days following the accident. Dr. Rutz testified that not all patients have the same immediate response to traumatic accidents and that it can take time for inflammation to build up and cause pain. Moreover, he testified that distracting injuries could also play a part in the delay of a patient realizing they are symptomatic. Petitioner injured multiple body parts as a result of the accident, including his head, neck, and face. Petitioner testified that while the LPN filled out the accident report he was simultaneously receiving medical attention to address the one-inch laceration to his right cheek. Dr. Rutz's explanation of distracting injuries is a reasonable explanation in the case at hand, particularly when Petitioner's lumbar spine required surgery and his low back symptoms developed within three days of the accident. Dr. Rutz opined that surgery was appropriate because a recurrent disc herniation does not typically heal on its own and Petitioner did not improve with an injection. Having treated like or similar patients, Dr. Rutz believed the only option to relieve Petitioner from his symptoms was to move forward with surgery. When Dr. Rutz ultimately performed surgery, he found multiple disc herniations at L5-S1 that could account for Petitioner's symptoms, and when removed, Petitioner recuperated "tremendously." Dr. Bernardi, on the other hand, never commented on the intraoperative findings and merely glossed over the procedure performed by Dr. Rutz in his report.

With respect to Petitioner's cervical spine, Dr. Bernardi acknowledged Petitioner suffered an injury to his neck on 5/10/21, that the pathology observed on the MRI could cause painful symptoms, and that the mechanism of injury could cause a disc injury, but he had no explanation for Petitioner's ongoing cervical symptoms and did not causally relate them to the work accident. The Arbitrator does not find this opinion credible in light of the aforementioned medical evidence. Dr. Bernardi provided no credible explanation as to why Petitioner continued to suffer from painful symptoms immediately following the accident despite his explanation that an injury such as Petitioner's could cause a cervical disc injury. Dr. Rutz opined that Petitioner's cervical spine symptoms were causally related to the work accident and Petitioner could benefit from additional treatment, particularly surgery.

Based upon the foregoing, the Arbitrator finds the opinions of Dr. Rutz more credible and persuasive than the opinions of Dr. Bernardi and that Petitioner's current condition of ill-being in his lumbar and cervical spine is causally connected to his work accident on 5/10/21.

Issue (J): **Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?**

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

The right to be compensated for medical costs associated with work-related injuries is at the very heart of the Workers' Compensation Act. *Hagene v. Derek Polling Const*., 388 Ill. App. 3d 380, 383, 902 N.E.2d 1269, 1273 (2009). Upon establishing causal connection and the reasonableness and the necessity of recommended medical treatment, employers are responsible for necessary prospective medical care required by their employees. *Plantation Mfg. Co. v. Indus. Comm'n*, 294 Ill.App.3d 705, 691 N.E.2d. 13 (1997). This includes treatment required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 325 Ill. App. 3d 527, 758 N.E.2d 18 (2001).

The Arbitrator finds that the medical treatment rendered to Petitioner was reasonable and necessary to treat his work-related injuries. Dr. Rutz testified that Petitioner's care and treatment, including surgery, was reasonable and necessary to treat his lumbar condition, and further opined that Petitioner would not have improved absent same. Petitioner similarly testified that the lumbar spine surgery helped him tremendously and allowed him to return to full duty work with respect to his low back. Petitioner attempted to resolve his cervical symptoms conservatively with activity modification, a cortisone injection, and over-the-counter NSAIDs. Despite this treatment, Petitioner's symptoms persisted and Dr. Rutz recommends a two-level disc replacement at C5-6 and C6-7.

Therefore, Respondent shall pay the reasonable and necessary medical expenses outlined in Petitioner's Group Exhibit 1, directly to the medical providers per the Illinois medical fee schedule or PPO agreement, whichever is less, as provided in Section 8(a) and Section 8.2 of the Act. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits. The parties stipulate that Respondent shall receive credit allowed under Section 8(j) of the Act for any medical expenses paid through Respondent's group medical plan.

The Arbitrator further finds Petitioner is entitled to receive the additional care recommended by Dr. Rutz. Therefore, Respondent shall authorize and pay for prospective medical treatment, including, but not limited to, a two-level disc replacement at C5-6 and C6-7 and post-operative care until Petitioner reaches maximum medical improvement.

This award shall in no instance be a bar to further hearing and determination of any additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

Arbitrator Linda J. Cantrell DATE

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC000365
Case Name	Christopher Brownlow v. State of Illinois – Illinois Department of Transportation
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0356
Number of Pages of Decision	18
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Sarah Noll
Respondent Attorney	Chelsea Grubb

DATE FILED: 8/15/2023

/s/Carolyn Doherty, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)
)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CHRISTOPHER BROWNLOW,

Petitioner,

vs. NO: 21 WC 000365

ILLINIOIS DEPARTMENT OF TRANSPORTATION,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, temporary total disability, medical expenses, prospective medical care, permanent partial disability, as well as Petitioner's first amended motion to supplement the record or re-open the proofs, and Respondent's motion to strike Petitioner's statement of exceptions and quash Petitioner's motion to supplement the record, 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. Petitioner's first amended motion to supplement the record or re-open the proofs is denied. Respondent's motion to strike Petitioner's statement of exceptions and quash Petitioner's motion to supplement the record is denied. The Commission issues no decision in 22 WC 5806, a consolidated case which was not tried with the instant matter and which remains pending before the Arbitrator. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill. 2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 6, 2022, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's first amended motion to supplement the record or re-open the proofs is denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent's motion to strike Petitioner's statement of exceptions and quash Petitioner's motion to supplement the record is denied.

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

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

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

Pursuant to §19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review. Therefore, no appeal bond is set in this case.

August 15, 2023

O: 08/10/23
CMD/kcb
045

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

/s/ *Marc Parker*
Marc Parker

/s/ *Christopher A. Harris*
Christopher A. Harris

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC000365
Case Name	Christopher Brownlow v. Illinois Department of Transportation
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	15
Decision Issued By	Dennis OBrien, Arbitrator

Petitioner Attorney	Sarah Noll
Respondent Attorney	Chelsea Grubb

DATE FILED: 7/6/2022

THE INTEREST RATE FOR THE WEEK OF JULY 6, 2022 2.50%

/s/ Dennis OBrien, Arbitrator
Signature

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

July 6, 2022

/s/ Michele Kowalski

Michele Kowalski, Secretary

Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF **SANGAMON**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

CHRISTOPHER BROWNLOW
Employee/Petitioner

v.

ILLINOIS DEPARTMENT OF TRANSPORTATION
Employer/Respondent

Case # **21** WC **000365**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Dennis O'Brien**, Arbitrator of the Commission, in the city of **Springfield**, on **April 27, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **July 27, 2020**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

On the date of accident, Petitioner was **55** years of age, ***married*** with **no** dependent children.

Respondent shall be given a credit of $**24,594.36** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**24,594.36**.

Respondent is entitled to a credit for all amounts paid by its group health insurer under Section 8(j) of the Act.

ORDER

Petitioner suffered an accident on July 27, 2020, which arose out of and in the course of his employment by Respondent.

Petitioner's medical conditions, a partial to full thickness tear of the rotator cuff, supraspinatus and infraspinatus tendons, and a tear of the labrum are causally related to the accident of July 27, 2020.

Petitioner's average weekly wage while working for Respondent in the year prior to his accident was $1,284.72, resulting in an annual earnings of $66,805.42.

Petitioner was temporarily totally disabled as a result of the accident of July 27, 2020, from August 5, 2020 through February 21, 2021, a period of 28 4/7 weeks, and not thereafter.

The medical bills introduced into evidence in Petitioner Exhibit 9 are related to Petitioner's right shoulder injury, are reasonable and were necessitated to treat or cure Petitioner's injuries suffered in this accident, and Respondent is entitled to credit for all payments which it has made on account of said treatments.

Petitioner is entitled to prospective medical treatment as recommended by Dr. Greatting, to wit, right shoulder surgery including a repair of the rotator cuff, the supraspinatus and infraspinatus tendons and the labrum.

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

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

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

Signature of Arbitrator

JULY 6, 2022

ICArbDec19(b)

STATEMENT OF THE CASE

The Arbitrator notes this is a 19(b) hearing on a consolidated case. This hearing was originally commenced on March 17, 2022 for a 19(b) on case number 21 WC 000365. In this case Petitioner is seeking authorization of a right rotator cuff repair surgery. Prior to the hearing Respondent had asked for a continuance due to Petitioner suffering another injury to Petitioner's right shoulder. The Arbitrator denied Respondent's request because, at the time, there had been no case filed for the second injury. At the time of Arbitration, and after beginning the hearing, Petitioner's counsel informed the Arbitrator that the second case had since been filed. That case number is 22 WC 005806. At this time the hearing was postponed to afford Respondent the opportunity to file a motion to consolidate the cases. Respondent's Motion to Consolidate was granted on March 23, 2022. After the consolidation, the bifurcated hearing was resumed on April 27, 2022. The hearing is only in regards to the right rotator cuff injury alleged to have occurred on July 27, 2020, as it is heard pursuant to a petition under Section 8(a) of the Act, seeking prospective medical treatment for injuries alleged to be the result of this accident, and nature and extent of injury is not at issue at this time..

FINDINGS OF FACT:

TESTIMONY AT ARBITRATION

Petitioner

Petitioner testified he was currently employed with the Illinois Department of Transportation (IDOT) in Decatur, Illinois at the Macon County Yard and had so been employed full-time since February 2013. Petitioner testified that on July 27th of 2020, he suffered an accident at work, he was with the mowing crew as a lead worker and, on the day of the accident, he went out after lunch to get on a mower to help stay caught up on the mowing. He said he was in a large IDOT truck, and as he went to step out he lost his balance, slipped, and fell out of the truck. He said he was holding on with his right arm when he fell, and at which time he pulled his shoulder. Petitioner testified he had a very sharp pain in the front part of his shoulder. Petitioner testified he did not report the injury that day, or that evening because he thought he could go home, ice it, and see what happened. Petitioner testified that the next morning he reported it to his, lead worker, John Brownlee, who told him to call the 800 number, and he also reported it to another supervisor, Jeff Wood.

In regard to previous shoulder issues, Petitioner testified that on May 1, 2020, approximately three months prior to this accident, he had an appointment with Dr. Greatting's nurse because he was experiencing some pain in the back part of his shoulder. Petitioner testified that prior to his work injury he was experiencing what felt was muscle pain in the back part of his shoulder. Petitioner testified he was prescribed medication on that date, but that medication did not give him any relief and he therefore returned on the nurse on May 29, 2020, and received an injection in the shoulder. Petitioner testified he noticed an improvement within three days, and had no pain whatsoever left in my shoulder within a week. Petitioner further testified that the steroid injection relieved all the inflammation in his shoulder. Petitioner testified he did not go to his follow up appointment on June 30 because he was better and he did not want to spend the money and take time off work when his shoulder was back to a normal state.

Petitioner testified that after his July 27, 2020, fall his pain was in a totally different location, in the front and radiating down the front part of his arm. Petitioner testified he told Dr. Greatting's nurse that the new onset of symptoms was in a totally different location, the front shoulder down to the middle part of his arm versus the back of the shoulder where the prior pain had been. The Arbitrator noted on the record that Petitioner visually indicated the pain went down to the mid bicep area. Petitioner testified he was sent to physical therapy, the physical therapy was not helpful, and he returned to Dr. Greatting's office on August 25, 2020, where he received another injection in the back part of the shoulder from Dr. Greatting's nurse. Petitioner testified that after the injection he still had issues trying to raise his arm and if he tried to reach out, the front part of his shoulder hurt really bad. Petitioner testified that he had an MRI performed and the MRI showed a partial to full thickness tear of the rotator cuff. Petitioner said that he was probably off work for six months and the pain eased up a bit when he was not using it. Petitioner testified that on February 26, 2021, he returned to Dr. Greatting and requested he be allowed to return to work.

Petitioner testified that after attending an IME, he needed to go back to work because IDOT started making him use his sick time and he would not have a paycheck after all of his time was used. Petitioner testified he had about 16 days of sick time available on that date. Petitioner also testified that at the time he returned to work he was feeling quite a bit better.

Petitioner was asked about his job duties of lifting 51 to 75 pounds approximately 10 times a day but not every day, and Petitioner testified that after returning to work he was using his shoulder very cautiously, being very careful, and getting help from co-workers. Petitioner said he would reach above shoulder level occasionally, but not with a lot of weight. Petitioner testified that other job duties that were intensive in regard to his shoulder after returning to work were shoveling coal patch and filling potholes. He said that after being back at work doing things, he began aching, and having weakness. Petitioner said that he felt his injections the first time helped his shoulder because he had been performing tedious work which irritated his shoulder. He testified after he fell the pain was totally different. He testified prior to the accident the pain was kind of a dull ache, like a sore muscle, but after the injury the pain was intense immediately.

Petitioner testified he still wanted to have the rotator cuff surgery recommended by Dr. Greatting as he feels that is the only way he will ever get better.

Petitioner testified that IDOT has a policy that requires an employee to report an injury, even if you do not seek medical attention.

On cross-examination Petitioner was asked about his treatment on April 17, 2020, with Dr. Rademacher, and Petitioner testified he was treating at that time for his sciatic nerve. Petitioner was asked if he recalled treating for his right shoulder on that date also, and Petitioner indicated that he did not recall, but that may have been when his inflammation started. Petitioner was asked when he started to notice the pain in his right shoulder that eventually led him to seek treatment in April of 2020, and Petitioner said it probably was around April, and he could have been seen for the hip, too, as they both were sore. Petitioner was asked at trial to elaborate on the issues he reported he was having with his daily tasks at the visit on May 1, 2020, and Petitioner said he was still doing his job. Petitioner was asked about the note in his records that indicated that he reported first noticing pain in his shoulder when weightlifting and Petitioner testified that he was not weightlifting. Petitioner testified that the gyms were closed and he did no weightlifting after February of 2020. Petitioner was asked if he followed the recommendations Dr. Rademacher made on May 22, 2020, for Petitioner to talk with the trainer at the gym for proper ergonomic moving and lifting techniques and Petitioner testified that he did

not. Petitioner was asked if he declined the physical therapy that Dr. Rademacher suggested on May 22, 2020, and Petitioner said he did not remember that conversation. Petitioner testified that despite his medical records indicating that he told the physical therapist he was back to working out, he did not remember working out. Petitioner testified he did not treat from September 29, 2020, until February 26, 2021.

On redirect Petitioner testified that prior to the work injury he was still lifting things at work, specifically, shovels of patch. When asked again why Petitioner declined physical therapy prior to his work injury, Petitioner testified he did not feel he needed the therapy as he was still using his shoulder fine, but he decided to go forward after the work injury, as prior to the work injury it was inflamed, but he still had his strength and he could do his work and chores around the house. He said that after he fell the pain was so severe that the next day he was not able to lift my arm and he was having extreme difficulty reaching out and lifting anything. He therefore decided physical therapy could possibly help him.

Teresa Michele Brownlow

Petitioner's spouse, Teresa Michele Brownlow, was called to testify on behalf of the Petitioner. Mrs. Brownlow testified that she became aware of the injury when Petitioner came home from work and told her. Mrs. Brownlow said that before the injury her husband could clean the pool, carry the water in, mow, and weed whack, but after the injury she was required to do it all. Mrs. Brownlow said that after her husband was returned to work in March of 2021 he was more careful about what he did and how he did it. Mrs. Brownlow was asked if Petitioner was still having trouble reaching up and out and she said she knew he was better. Mrs. Brownlow said Petitioner was not currently all the way back to where he was prior to the injury in July of 2020.

MEDICAL EVIDENCE

Pre-July 27, 2020 Medical

On April 17, 2020 Petitioner was seen by Dr. Rademacher with complaints of right hip and right shoulder pain, as well as other general medical problems. No history of trauma is noted in these records. Physical examination found pain with range of motion of the right shoulder on abduction with internal and external rotation and tenderness to palpation over the head of the right biceps. X-rays suggested possible impingement or rotator cuff disease. Physical therapy was discussed and it was noted that if the right shoulder problem persisted a referral to Dr. Greatting, who had previously treated Petitioner's left shoulder, would be considered. (RX 2 p.4,6)

Petitioner was seen by Nurse Practitioner (NP) Naughton, on May 1, 2020 with right shoulder complaints. He said the complaints had progressively worsened in the past several weeks. He said the pain initially started with weight lifting, but he denied any known injury. The pain was principally in the anterior shoulder and could get as high as 10/10, though only achy at rest. He said he had been doing a home exercise program suggested to him by his brother-in-law, an orthopedic surgeon. Physical examination did not reveal any muscle atrophy compared to the left shoulder. Petitioner had pain at the endpoints of all ranges of motion and other than Hawkins impingement and cross adduction tests, all other tests were negative. The X-rays from April 1, 2020 were reviewed and felt to show mild degenerative changes. He was prescribed medication and told to return in 4 weeks for re-evaluation. He saw NP Naughton again on May 29, 2020, advising her that the

medication prescribed was not as effective as Ibuprofen. His physical findings remained the same. A subacromial injection to the right shoulder was provided. Petitioner said he wanted to hold off on physical therapy at that time. He was to return in four weeks. (PX 5 p.1,2,6; RX 2 p.15,16,21)

Post-July 27, 2020 Medical

Petitioner saw NP Naughton on July 29, 2020, two days after this incident occurred. The history of the incident she received at that time was consistent with his testimony at arbitration. He said the arm was achy at rest but had sharp pain with abduction and overhead activities. She said X-rays of that date did not reveal any acute osseous abnormalities. It was too soon to give him another corticosteroid injection so he was to received physical therapy and return in a month, with a possible additional injection at that time if he had not improved. Prednisone was prescribed. He was given restrictions of not driving large trucks or equipment, climbing ladders, operating jackhammers, holding stop /slow paddles for up to 4 hours, or doing janitorial work. (PX 5 p.10,11,15; RX 6 p.1,2,6; RX 8 p.1)

Petitioner received right shoulder physical therapy at Decatur Memorial Hospital from August 4, 2020 through September 2, 2020. He noted his right shoulder getting sore in March and his getting a shot and then working out and the shoulder doing great, with no pain in his right shoulder until he slipped out of his truck at work with his hand on the steering wheel. He reported the incident the next day and then went to a nurse who put him on prednisone. He described his pain as being primarily in the back of the shoulder. He was found to have decreased range of motion and strength, and he was voicing an inability to perform activities of daily living or work tasks. On September 2, 2020 he was still voicing pain of 6-7/10, noting he had been sore since receiving an injection. (PX 7 p.15; RX 3 p.4,5,7,12; RX 6 p.8-12)

NP Naughton again saw Petitioner on August 25, 2020. Petitioner reported having significant pain with physical therapy. Physical examination revealed mild tenderness over the posterior aspect of the glenohumeral joint, good muscle strength and positive cross arm abduction, Hawkins impingement, O'Brien's, Speed's and empty can tests. Another subacromial corticosteroid injection to the right shoulder was performed and his work restrictions were continued. (PX 5 p.17; RX 6 p.17,21)

An MRI of the right shoulder was performed on September 17, 2020. It revealed a partial to near full-thickness tear involving the supraspinatuous and infraspinatous tendons, which might even be focal full-thickness tear, given the fluid signal within the subacromial/subdeltoid bursa. A small tear was seen of the posterior labrum, as were moderate degenerative changes of the AC joint. (PX 6 p.1,2; RX 6 p.24,25)

An X-ray arthrogram injection of the right shoulder was performed on September 17, 2020. (RX 6 p.26,27)

On September 29, 2020 Petitioner was seen by NP Naughton and she noted that none of the treatments Petitioner had received had caused him to improve. His physical examination remained the same, and her interpretation of the MRI images was the same as the radiologist's impressions. Operative treatment options were discussed and Petitioner wished to proceed with surgery. Work restrictions were continued. (PX 5 p.21; RX 6 p.28,32; RX 8 p.2)

Petitioner was examined by Dr. Williams at Respondent's request on January 25, 2021. His examination findings are described in his deposition testimony summary, below. (RX 1 Exh. 2)

Petitioner returned to see NP Naughton on February 26, 2021. He told her he was feeling very good at that time, and his range of motion and muscle strength had improved significantly. Petitioner was found to have no focal tenderness and near full range of motion and good muscle strength, along with all tests being negative. Petitioner told NP Naughton that he was feeling very well and requested he be released to return to work, and from care on an as needed basis. (PX 5 p.25; PX 8p.1,2; RX 6 p.34,38,39; RX 8 p.4,5)

On March 18, 2021, Dr. Greatting saw Petitioner and in his office note of that date he summarized Petitioner's history of accident and treatment as well as his condition on that date. He noted that on physical examination of the right shoulder Petitioner had significant pain at 90 degrees throughout the impingement arc and with resisting forward flexion. Pain was also noted with resisting abduction and mild weakness was found on abduction. He had slightly decreased internal rotation. He was also found to have positive Speed and empty can tests. Dr. Greatting felt Petitioner's symptoms were related to his rotator cuff. He recommended a right shoulder arthroscopy for rotator cuff repair. He felt Petitioner's right shoulder problems were related to the incident of July 27, 2020 based on his having a marked increase in his shoulder pain and difficulties with range of motion and weakness following that injury. He said while it was possible he had a rotator cuff tear prior to that accident date, if he did it was either exacerbated or torn by the incident. (PX 4 p.1,2)

DEPOSITION TESTIMONY OF DR. MARK D. GREATTING

Dr. Greatting was deposed as a witness for Petitioner on September 28, 2021. He is an orthopedic surgeon. It is noted that while Dr. Greatting's curriculum vitae is attached to Petitioner's Exhibit 3, it was not marked, mentioned, offered, or admitted as an exhibit at the deposition, so it's contents were not considered in this case. Dr. Greatting said Mirjam Naughton, his nurse practitioner, initially evaluated Petitioner and he subsequently treated Petitioner. The history and examination finding testimony of Dr. Greatting was consistent with the medical record summary above, and he explained the significance of the different tests Petitioner tested positive for and how they changed from visit to visit based upon the July 27, 2020 incident. (PX 3 p. 6,7,11-14,31)

Dr. Greatting said that the mechanism of the July 27, 2020 injury could have made his pre-existing condition worse or it could have caused a new injury to the rotator cuff or labrum. He said the MRI Arthrogram performed on September 17, 2020 showed a partial to full thickness tear of the rotator cuff, supraspinatus and infraspinatus tendons, with fluid in the bursa area which meant the tear could be full thickness. It also showed a small tear of the labrum and degenerative findings in the AC joint. He said it was not possible to tell whether a rotator cuff tear is old or new, other than through the symptoms, but that with Petitioner's significant injury it could have caused a new tear or it could have made an existing tear worse. (PX 3 p.14,16,17)

Dr. Greatting said surgery for tears of this sort was necessary and reasonable to perform if the symptoms of the patient were serious enough. (PX 3 p.18)

Dr. Greatting released Petitioner to return to work on February 26, 2021 as he was feeling better, but when Petitioner was seen next on March 18, 2021, he was having significant symptoms in his shoulder. When Petitioner's job duties were described to him, Dr. Greatting said he felt that type of work would aggravate

rotator cuff or labral tears, that stressing those areas would make it symptomatic. He said that on that date he reviewed Petitioner's history and his current complaints as well as his problems with range of motion, he performed a physical examination, and he recommended rotator cuff surgery. He felt the surgery would make Petitioner better and reduce or eliminate his pain, improving his range of motion and strength. (PX 3 p.19-22)

On cross-examination Dr. Greatting said his interpretation of NP Naughton's pre-accident diagnosis and post-accident diagnosis on July 29, 2020 was that the latter showed dysfunction of the right rotator cuff, right shoulder injury and subacromial bursitis, it was more significant rotator cuff pathology than she felt he had in May, though there were no changes in the x-rays. (PX 3 p.22-24)

DEPOSITION TESTIMONY OF DR. JOSEPH L. WILLIAMS

Dr. Williams was deposed as a witness for Petitioner on July 21, 2021. He testified that he was a board certified orthopedic surgeon and he saw Petitioner on January 21, 2021 at TriStar's request for an independent medical examination. He said he performed a physical examination of Petitioner's right shoulder, found him to have limited forward flexion with pain at the end of the range, limited abduction without any pain, no atrophy or swelling, weakness with abduction at 90 degrees, and weakness with empty can testing. Based on the history, complaints and physical examination findings, Dr. Williams was of the opinion that Petitioner had a right rotator cuff tear, on the bursal side, which was partial thickness and possibly full thickness. He felt Petitioner had thinning of the right rotator cuff tendon, impingement syndrome (which had been diagnosed May 29, 2020), and arthritis of the acromioclavicular joint. He noted Petitioner had a history of chronic right shoulder pain and of degenerative changes in the glenohumeral joint. (RX 1 p.6-9,11)

Based on the history of work accident and a review of the medical records as well as his evaluation of Petitioner, Dr. Williams felt the accident of July 27, 2020 had likely just flared Petitioner's pre-existing symptoms. He agreed that it was too soon to give Petitioner another cortisone shot, and he felt Petitioner's treatment thus far had been reasonable and necessary. He felt Petitioner would ultimately be a candidate for an arthroscopic subacromial decompression with possible rotator cuff repair, depending on what was found during the surgery. (RX 1 p.9,10)

On cross-examination Dr. Williams agreed that since he saw Petitioner about six months after the injury he would not expect to see any residual erythema, abrasions, or swelling. HE said the positive empty can test, the Speed test, and the O'Brien's test were to assess the integrity of the supraspinatus tendon, the biceps tendon and labrum, and the glenohumeral joint labral or SLAP tears, respectively. He said that based on those test results he agreed that Petitioner probably had a rotator cuff tear or dysfunction. He said the MRI findings also supported that. Dr. Williams also agreed that Petitioner's July 27, 2020 injury may have caused his pre-existing condition to "flare." He said Dr. Greatting's office would be in the best position to describe the nature and extent of the aggravation as they saw Petitioner in both May and July of 2020. (RX 1 p.11-15)

Dr. Williams acknowledged that the empty can, liftoff, drop arm, belly-press and O'Brien's tests were all negative when Petitioner was seen on May 29, 2020. He said while Petitioner's forward flexion on May 29, 2020 was 160 degrees, it was only 90 degrees when he examined him six months later. Similarly, on May 29, 2020 Petitioner's abduction was 160 degrees, but it was reduced to 85 degrees when Dr. Williams examined him. (RX 1 p.15-17)

Dr. Williams agreed that NP Naughton saw Petitioner on May 29, 2020 and then again on July 29, 2020, and that on that latter date she added rotator cuff dysfunction to her assessment as well as subacromial bursitis, and on that date she found Petitioner's Speed and O'Brien's tests to be positive. He said the deposition of Dr. Greatting or NP Naughton would need to be taken to determine why the additional diagnosis was added in July of 2020. (RX 1 p.18)

On redirect examination Dr. Williams said he was not sure of the significance of the difference in examination findings as they are subjective and patient effort reliant. He said none of the MRI findings in his opinion were acute, they were all chronic. (RX 1 p.19,20)

ARBITRATOR CREDIBILITY ASSESSMENT

Petitioner answered all questions posed to him on direct and cross examination in the same manner, with no apparent attempt to evade questions or argue with the questioning attorney. He did not appear to exaggerate his complaints or problems in working with is injury. His testimony was consistent with the medical records introduced into evidence in regard to history of accident and pre-accident and post-accident complaints. Numerous questions were asked about references to weightlifting contained in medical reports and Petitioner denied going to the gym or doing weightlifting after February of 2020 as the gyms had been closed by Governor Pritzker, presumably due to Covid-19 restrictions, an explanation which appears logical. The Arbitrator finds Petitioner to have been a credible witness.

Mrs. Brownlow's testimony also appeared to be straightforward, both in regard to Petitioner's reporting his injury to her and with his pre-injury and post-injury activities at home, with no obvious attempt to exaggerate Petitioner's problems. Mrs. Brownlow appeared to be a credible witness.

Both Dr. Greatting and Dr. Williams also appeared to be cooperative witnesses, again answering all questions asked of them by the attorneys. While their opinions were different, they both appeared to be credible witnesses.

CONCLUSIONS OF LAW:

In support of the Arbitrator's decision relating to whether an accident occurred which arose out of and in the course of Petitioner's employment by Respondent on July 27, 2020, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of medical evidence and deposition testimony, above, are incorporated herein

The credibility assessments, above, are incorporated herein.

Petitioner's testimony as to the events of July 27, 2020, was not contradicted by testimonial or documentary evidence. Petitioner was in the midst of his work day and was performing tasks to fulfill his work for Respondent at the time he was exiting the large Illinois Department of Transportation and lost his balance while stepping out of the truck, slipping and falling out of the truck. Petitioner said he was holding on with my right arm when he fell, and at when he fell he pulled his shoulder. Petitioner said that at that time it felt like he

pulled his shoulder completely, and he immediately had a very sharp pain in the front part of his shoulder. Petitioner reported the accident within 24 hours to other employees of Respondent who were in supervisory positions. Respondent's adjusting company, TriStar, received notice of the accident on the day following the accident and the statement made to that company representative on July 28, 2020 was consistent with his arbitration testimony and he provided that representative with the name of a witness, Tim Foster. (PX 1)

The Arbitrator finds that Petitioner suffered an accident on July 27, 2020, which arose out of and in the course of his employment by Respondent.

In support of the Arbitrator's decision relating to whether Petitioner's current conditions of ill-being, a partial to full thickness tear of the rotator cuff, supraspinatus and infraspinatus tendons, and a tear of the labrum, are causally related to the accident of July 27, 2020, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of medical evidence and deposition testimony, above, are incorporated herein.

The credibility assessments, above, are incorporated herein.

The findings in regard to accident, above, are incorporated herein.

Respondent's examining physician. Dr. Williams, testified that Petitioner suffered a "flare up" of a previously existing injury. Dr. Greatting testified that Petitioner likely sustained a torn rotator cuff through a traction-type mechanism of injury during the fall of July 27, 2020

Petitioner had right shoulder complaints and medical treatment prior to the date of this accident. On April 17, 2020 Petitioner was seen by Dr. Rademacher with complaints of right hip and right shoulder pain. No history of trauma is noted in these records. X-rays suggested possible impingement or rotator cuff disease. Physical therapy was discussed and it was noted that if the right shoulder problem persisted a referral to Dr. Greatting, who had previously treated Petitioner's left shoulder, would be considered. Petitioner was subsequently seen by Dr. Greatting's nurse, NP Naughton, on May 1, 2020 with right shoulder complaints which had progressively worsened in the past several weeks. Petitioner denied any known injury. The pain was principally in the anterior shoulder, could get as high as 10/10, but was only achy at rest. Physical examination revealed Petitioner had pain at the endpoints of all ranges of motion and other than Hawkins impingement and cross adduction tests, all other tests were negative. was prescribed medication and told to return in 4 weeks for re-evaluation. He saw NP Naughton again on May 29, 2020, advising her that the medication prescribed was not as effective as Ibuprofen. His physical findings remained the same. A subacromial injection to the right shoulder was provided. Petitioner said he wanted to hold off on physical therapy at that time. He was to return in four weeks. Petitioner testified he did not go to his follow up appointment on June 30 because he was better and he did not want to spend the money and take time off work when his shoulder was back to a normal state. Petitioner had not been restricted from work by in April or May of 2020 by Dr. Rademacher or NP Naughton.

Both Petitioner and his wife testified that while Petitioner slowly healed following the July 27, 2020 injury, Petitioner never regained the functional status that he exhibited prior to that work injury. No contrary evidence was submitted at arbitration.

Petitioner was off work after this accident for a period of approximately six-and-a-half months, and he testified that at the end of that period of rest he requested a release to return to work without restrictions and he was allowed to return to work without restrictions. Petitioner testified that after being back at work doing things, he again began aching, and having weakness.

Both Dr. Greatting and Dr. Williams advised that surgical repair of the tear was necessary in order for Petitioner to heal. This arbitrator finds that Dr. Greatting's testimony is more credible based upon his superior knowledge of Petitioner's condition through multiple examinations by both himself and his nurse, NP Naughton. Even Dr. Williams testimony supports a causal connection finding, as Dr. Williams testified that a "flare up" occurred due to the July 27, 2020 injury.

The Arbitrator finds that Petitioner's medical conditions, a partial to full thickness tear of the rotator cuff, supraspinatus and infraspinatus tendons, and a tear of the labrum are causally related to the accident of July 27, 2020. This finding is based upon the medical records of Dr. Rademacher, NP Naughton and Dr. Greatting, as well as the testimony of Dr. Greatting, all of which are summarized above.

The Arbitrator further finds that the chain-of-events also support a finding of causal connection. This finding is based upon Petitioner's unrebutted testimony to a pre-accident state of an improved right shoulder which allowed him to work without restrictions and which had not caused him to be temporarily totally disabled in the months prior to this July 27, 2020 accident, his having an accident on July 27, 2020, his immediately after said accident having sudden pain, immediate medical treatment, immediate inability to perform his regular work and new diagnoses based on diagnostic testing and physical examinations. Certi-Serve, Inc. vs. Industrial Commission, 101 Ill.2d 236,244 (1984)

In support of the Arbitrator's decision relating to Petitioner's earnings in the year preceding July 27, 2020, the Arbitrator makes the following findings:

Petitioner claimed an average weekly wage of $1,298.86. Respondent claimed an average weekly wage of $1,284.62. (Arb.Exh. 1)

Petitioner introduced a wage statement showing Petitioner earned $66,805.42 in regular earnings in the year preceding the accident and $1,104.91 in overtime pay during that same year for overtime worked in four of the twenty six pay periods, in three different months.

No witness testified to the circumstances surrounding the overtime, the straight time earnings which would have been payable, and whether the work was required or voluntary. While Petitioner's job description was introduced into evidence, and it does note that overtime can be required, no proof of its having been required in these instances was introduced.

Dividing Petitioner's annual regular earnings in the year preceding the accident, $66,805.42, by 52, the manner required by Section 10 of the Act, an average weekly wage would be $1,284.72. Unless certain conditions are met, overtime earnings are to be excluded. Those conditions have not been proven in this case.

The Arbitrator finds that Petitioner's average weekly wage while working for Respondent in the year prior to his accident was $1,284.72, resulting in annual earnings of $66,805.42. This finding is based upon the wage statement introduced into evidence as Petitioner Exhibit 10.

In support of the Arbitrator's decision relating to what temporary benefits Petitioner is entitled to as a result of the accident of July 27, 2020, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of medical evidence and deposition testimony, above, are incorporated herein.

The credibility assessments, above, are incorporated herein.

The findings in regard to accident, above, are incorporated herein.

The findings in regard to average weekly wage, above, are incorporated herein.

The parties stipulated that Petitioner was temporarily totally disabled from August 5, 2020 through February 21, 2021, a period of 28 4/7 weeks. The parties stipulated that Respondent paid $24,594.36 in temporary total disability benefits, and would be credited for that amount.

Applying the average weekly wage of $1,284.72, the applicable temporary total disability rate would be $865.48. 28 4/7 weeks of temporary total disability paid at $856.48 would be $24,470.86.

The Arbitrator finds that Petitioner was temporarily totally disabled as a result of the accident of July 27, 2020, from August 5, 2020 through February 21, 2021, a period of 28 4/7 weeks, and not thereafter. This finding is based upon the evidence noted above. Petitioner sought an award of future temporary total disability for the period Petitioner was recovering from the surgery sought as prospective medical care. That period of time is unknown and any award would be speculative and unsupported by the medical records currently in evidence. Should Petitioner have said surgery and temporary total disability is claimed but not paid, a subsequent hearing on that issue can be requested.

In support of the Arbitrator's decision relating to whether the medical services that were provided to Petitioner were reasonable and necessary as a result of the Accident of July 27, 2020, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of medical evidence and deposition testimony, above, are incorporated herein.

The credibility assessments, above, are incorporated herein.

The findings in regard to accident, above, are incorporated herein.

Petitioner Exhibit 9 lists a number of bills which are claimed to be causally related to this accident and are reasonable and necessary. While it noted physical therapy charges from Decatur Memorial Hospital were pending, no physical therapy bill was introduced into evidence.

Respondent submitted a ledger showing all medical payments it had made on account of this accident, also noting discounts it received, presumably due to the Medical Fee Schedule.

All of the medical bills claimed by Petitioner have been paid in full after application of the Medical Fee Schedule, including all bills noted as pending on Petitioner's Exhibit 9.

The Arbitrator finds that the medical bills introduced into evidence in Petitioner Exhibit 9 are related to Petitioner's right shoulder injury, are reasonable and were necessitated to treat or cure Petitioner's injuries suffered in this accident, and further finds that Respondent is entitled to credit for all payments which it has made on account of said treatments. This finding is based upon the medical records introduced into evidence and the medical payments ledger introduced by Respondent.

In support of the Arbitrator's decision relating to whether Petitioner is entitled to any prospective medical treatment, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of medical evidence and deposition testimony, above, are incorporated herein.

The credibility assessments, above, are incorporated herein.

The findings in regard to accident, above, are incorporated herein.

The medical records introduced at arbitration show Petitioner to have a partial to full thickness tear of the rotator cuff, supraspinatus and infraspinatus tendons, and a small tear of the labrum. Both Dr. Williams and Dr. Greatting testified that Petitioner is in need of surgical repair to his shoulder.

The Arbitrator finds that Petitioner is entitled to prospective medical treatment as recommended by Dr. Greatting, to wit, right shoulder surgery including a repair of the rotator cuff, the supraspinatus and infraspinatus tendons and the labrum. This finding is based upon the medical records and the testimony of Dr. Dr. Greatting and Dr. Williams.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC031715
Case Name	Tiffany Tedrick v. McDonald's
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0357
Number of Pages of Decision	22
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Daniel Keefe
Respondent Attorney	Julie Schum

DATE FILED: 8/15/2023

/s/Carolyn Doherty, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF JEFFERSON)
)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TIFFANY TEDRICK,

Petitioner,

vs. NO: 19 WC 031715

MCDONALD'S,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, temporary total disability, medical expenses, prospective medical care, permanent partial disability, and evidentiary issues, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission corrects the Decision of the Arbitrator to award the medical expenses directly to Petitioner, pursuant to §8 of the Act. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill. 2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 16, 2022, is hereby affirmed and adopted. The medical expenses are awarded directly to Petitioner, pursuant to §8 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired

without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $24,300.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

August 15, 2023

O: 08/10/23
CMD/kcb
045

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

/s/ *Marc Parker*
Marc Parker

/s/ *Christopher A. Harris*
Christopher A. Harris

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC031715
Case Name	TEDRICK, TIFFANY v. MCDONALD'S
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	19
Decision Issued By	Linda Cantrell, Arbitrator

Petitioner Attorney	Daniel Keefe
Respondent Attorney	Dana Benedetti

DATE FILED: 5/16/2022

/s/Linda Cantrell, Arbitrator

Signature

INTEREST RATE WEEK OF MAY 10, 2022 1.38%

STATE OF ILLINOIS)
)SS.
COUNTY OF **JEFFERSON**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

TIFFANY TEDRICK
Employee/Petitioner

Case # **19-WC-031715**

v.

Consolidated cases:

MCDONALD'S
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Linda J. Cantrell**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **2/17/22**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **12/7/18**, Respondent was operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**15,361.61**; the average weekly wage was $**295.42**.

On the date of accident, Petitioner was **31** years of age, **single** with **2** dependent children.

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

Respondent shall be given a credit of $**4,144.73** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** in other benefits, for a total credit of $**4,144.73.**

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

ORDER

Respondent shall pay the medical expenses outlined in Petitioner's Exhibits 5, 6 (from 2/18/19 through 6/9/21), and 7, as provided in Section 8(a) and Section 8.2 of the Act, directly to the medical providers and pursuant to the medical fee schedule. Respondent is not liable for Dr. Dossett's medical expenses incurred prior to 2/18/19 or for charges incurred on 6/22/21, 8/26/21, 10/7/21, 10/25/21 and 10/29/21 as such charges are not supported by corresponding medical records. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits and shall hold Petitioner harmless for any amounts in which Respondent receives such credit.

The Arbitrator finds Petitioner has not reached maximum medical improvement. Respondent shall authorize and pay for prospective medical treatment as recommended by Dr. Hagan and Dr. Dossett, including, but not limited to, occipital nerve surgery and conservative treatment related to the aggravation of Petitioner's anxiety and panic attacks, until such time Petitioner reaches maximum medical improvement.

Respondent shall pay Petitioner temporary total disability benefits of $**286.00 (Min. rate)**/week for **63-1/7th** weeks, representing the period **11/1/19 through 1/15/21**, as provided in Section 8(b) of the Act. Respondent shall receive credit of $**4,144.73** in TTD benefits paid.

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

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

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

Arbitrator Linda J. Cantrell

May 16, 2022

ICArbDec19(b)

STATE OF ILLINOIS)
) SS
COUNTY OF JEFFERSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

TIFFANY TEDRICK,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	Case No.: 19-WC-031715
	)	
MCDONALD'S,	)	
	)	
Employer/Respondent.	)	

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Mt. Vernon on February 17, 2022, pursuant to Section 19(b) of the Act. The issues in dispute are causal connection, average weekly wage, medical bills, temporary total disability benefits, prospective medical care, and the nature and extent of Petitioner's injuries if the Arbitrator finds Petitioner has reached maximum medical improvement. All other issues have been stipulated.

TESTIMONY

Petitioner was 31 years old, single, with two dependent children. Petitioner worked for McDonald's for approximately 16 years. On the date of accident, Petitioner was a crew trainer and worked 40 hours per week, Monday through Friday. Her job duties including training staff and working the front counter, grill, and drive through. She described her job as fast paced and stressful. Petitioner testified she stopped working for Respondent in March 2019 because Dr. Dossett told her she could not return to employment due to the fast paced and stressful nature of her job duties. Petitioner began working for Casey's as a cashier on 1/16/21. She works 35 hours per week and states her job is not physically or mentally tasking.

Petitioner testified that on 12/7/18 she was working the drive through when a utility truck struck the drive through speaker. The manager on duty told her to take pictures of the damage and as she exited the building she stepped down and her feet slipped on black ice. Petitioner fell backward and struck her head. She felt dizzy when she stood up and reported the accident to her manager when she reentered the building.

Petitioner testified she did not seek immediate medical treatment until two and a half weeks later. She went to her primary care physician Dr. Brian Dossett, who she has seen since 1994. She stated Dr. Dossett diagnosed her with a severe concussion, prescribed medication,

ordered a CT scan, and referred her to physical therapy for her neck. Petitioner stated therapy improved her neck symptoms, but she could no longer received the treatment after mid-2021 because she exhausted her benefits under Medicaid. Petitioner testified that Dr. Dossett recommended she see a counselor for PTSD, and she is currently taking medication for anxiety, panic attacks, and neck pain. Petitioner underwent eight injections by Dr. Hagan in the back of her head and neck bilaterally that did not provide long-term relief of her concussive symptoms. Dr. Hagan recommends surgery which Petitioner desires to undergo. Her last visit with Dr. Hagan was on 3/26/20.

Petitioner testified she has sharp, constant pain in her head. She has constantly pressure in her head that feels like she is wearing a tight hat. Her symptoms do not resolve with medication and increase when she bends over or turns her head. Petitioner stated the pain is in her neck and head. Her symptoms negatively affect her sleep, and she has difficulty with balance. She cannot play sports with her son or sit through karate tournaments like she did prior to the accident. Petitioner testified her symptoms have remained the same since her accident.

Petitioner testified she never had panic attacks prior to the accident. She stated that after her son was born, she was prescribed medication for postpartum, but she does not believe it was for anxiety. She testified her symptoms resolved within two weeks. Petitioner testified she would not dispute if Dr. Dossett's medical records reflect she was diagnosed with anxiety and associated neck pain in 2002, or that she had neck pain dating back to 1994. She also would not dispute if Dr. Dossett's records reflect a prior diagnosis of stress and anxiety which manifested as neck pain for which Zoloft and Paxil were recommended. She would not dispute that in 2008 she was diagnosed with anxiety and panic attacks with chest pain.

Petitioner testified she continued to work her regular schedule of 40 hours per week following the accident, with no lost time, through February 2019. She testified that she saw a nurse practitioner two weeks after the accident and could not get an appointment with Dr. Dossett until 2/18/19. Petitioner stated the nurse practitioner suspected a thyroid disorder and ordered tests that demonstrated irregular findings. She was placed on thyroid medication. Petitioner did not recall reporting to Dr. Dossett in March 2019 that she was having panic attacks and fearing a relapse due to the thyroid medication she started on 3/1/19.

Petitioner stopped working from 4/1/19 through 5/5/19 and then returned to light duty work for Respondent through 9/30/19. Petitioner did not recall applying for employment with Casey's during the time she was off work with Respondent in April and May 2019. Petitioner testified that when she started working for Casey's in January 2021 she was hired as a team member working part-time. In March 2021, Petitioner applied for a promotion as a team leader for Casey's which increased her hours, and she began working full-time.

Randy Fiscus testified on behalf of Respondent. Mr. Fiscus has worked for Respondent for 35 years and has been the General Manager for 16 years. Mr. Fiscus testified he arrived at the store approximately one hour after Petitioner's accident. He stated he did not speak to Petitioner for a long period of time that morning. He asked Petitioner if she was okay as he walked past her, and she responded "yes", so he went about his way to address the damaged speaker.

Mr. Fiscus identified Wage and Earnings Statements of Petitioner's earnings from 2017 through 2019. (RX5, RX6) Mr. Fiscus identified a statement reflecting hours worked by Petitioner from November 2018 through September 2019. (RX7) Mr. Fiscus testified he worked from approximately 8:00 a.m. to 5:00 p.m. three weekdays and every weekend in December 2018. He worked with Petitioner during the three weekdays. He stated that Petitioner did not make any complaints about her symptoms from the date of her accident through April 2019. He was not aware she sought medical treatment related to her fall in 2018. Mr. Fiscus testified that Petitioner requested information about her accident when she was taken off work in early April 2019. He stated Petitioner worked light duty from early May 2019 through 9/30/19. He stated Petitioner provided him with a doctor's note in early October 2019 that stated she could no longer work for Respondent.

Mr. Fiscus testified that most of the work-related injuries he has encountered at Respondent's facility have been minor and did not require surgery or being placed off work for over a year. He testified he viewed a video of the truck strike the speaker box approximately four hours after the accident when the police requested a copy. Mr. Fiscus stated he did not review video footage of Petitioner's fall which would have been captured by a different camera. He stated there were approximately 22 cameras in 2018 that were set on a 60-day loop recording device. He testified he did not view or save the video footage of Petitioner's fall because it was never brought to his attention that her fall was serious.

MEDICAL HISTORY

Petitioner's medical records pre-dating her work accident were admitted into evidence. (PX1). In November 1994, Dr. Dossett noted Petitioner complained of left-sided neck pain due to wrestling with her sister and x-rays were obtained. Petitioner complained of neck soreness and dizziness in August 2002 with associated anxiety issues. It was noted at that time that Petitioner's neck muscles were very tight. She complained of persistent headaches at the base of her skull and was diagnosed with depression. Petitioner underwent several weeks of physical therapy. Petitioner's complaints of neck pain persisted through April 2003. Dr. Dossett noted on 3/11/03 the possibility of Petitioner's stress and anxiety was causing muscle tightness and pain in her neck.

In September 2008, Petitioner was diagnosed with chest wall pain and panic attack versus anxiety and was prescribed Ativan. On 12/10/08, Dr. Dossett documented Petitioner's anxiety and panic attack diagnosis and related chest pain. She continued taking Ativan. In January 2009, Dr. Dossett prescribed Paxil and increased the dosage of Ativan. Dr. Dossett continued to diagnose Petitioner with panic attacks through March 2009. (PX1) Dr. Dossett recommended Petitioner continue anti-anxiety medication in August 2009. He noted cervical motion tenderness in February 2011. In July 2011, Petitioner was diagnosed with depression and medication was prescribed. On 7/14/11, Dr. Dossett again diagnosed panic attacks and prescribed medication.

The first visit following Petitioner's work accident was on 2/18/19. Petitioner reported to Dr. Dossett's office and was examined by a nurse practitioner. Petitioner complained of dizziness and sinus congestion with no other complaints. Petitioner had been taking Sudafed for a few days. Flonase was prescribed and bloodwork was ordered due to dizziness. Physical

examination revealed Petitioner's neck was soft and supple. There is no mention of Petitioner's work accident at this visit.

Petitioner's lab work was abnormal with respect to her thyroid, and she returned to Dr. Dossett's office on 3/1/19. Petitioner reported fatigue. Nurse Practitioner Kim Niebrugge performed a physical examination that showed Petitioner's neck was soft and supple. She was diagnosed with hypothyroidism and started on medication. There is no mention of Petitioner's work accident at this visit.

Petitioner returned to Dr. Dossett on 3/11/19 and reported she had been sick for one week with headache pressure in the front of her head with yellow nasal discharge. She had decreased hearing in her left ear and dizziness with fast head movement. Physical examination showed tenderness to palpation of the frontal sinuses, and pharynx with redness and discharge. She was prescribed Claritin. No mention was made of Petitioner's work accident.

On 3/25/19, Petitioner reported she was very concerned she was having a relapse of panic attacks. Dr. Dossett noted Petitioner was first diagnosed with panic attacks in 2008 and she had done very well until she started taking thyroid medication on 3/1/19. She reported a sense of doom with chest pain and difficulty breathing that affected her sleep. Dr. Dossett diagnosed a severe panic attack and discontinued her thyroid medication. There was no mention of Petitioner's work accident on this date.

On 4/1/19, Petitioner reported no improvement in her panic attacks and admitted she had not started the medication. Petitioner reported she fell on ice at work and struck her head in late December or early January that made her feel discombobulated for four days. Dr. Dossett noted Petitioner now has neck pain and Petitioner thinks the anxiety attacks are not related to the thyroid medication as initially thought. Physical examination revealed full forward flexion of the cervical spine, with extreme tightness posteriorly near the scalp and tenderness around the trapezius. Dr. Dossett diagnosed severe neck pain, ordered physical therapy, and prescribed Flexeril. Dr. Dossett advised Petitioner to start taking medication for panic attacks and placed her off work until follow up in one week.

Petitioner underwent cervical spine x-rays on 4/1/19 that revealed no abnormalities. (PX2) She participated in 18 physical therapy visits from 4/8/19 through 8/1/19. (PX2)

On 4/10/19, Petitioner returned to Dr. Dossett's office and reported her anxiety and panic attacks were not controlled by Ativan. Petitioner was agreeable to trying Zoloft again. Physical examination revealed tight cervical paraspinous muscles to her shoulders with spasms. She was advised to continue therapy and Flexeril and was placed off work for two weeks. (PX1)

On 4/22/19, Petitioner submitted an application for employment with Casey's. (RX4) Petitioner answered pre-screen application questions and stated she was able to perform the essential functions of the job for which she was applying for with or without accommodations.

On 4/24/19, Petitioner returned to Dr. Dossett's office and complained of ongoing neck pain and spasm and improved panic attacks. Physical examination and diagnosis remained

unchanged. She was prescribed Relafen and ordered to follow up in two weeks. There was no mention of a work status at this visit. (PX1)

On 4/25/19, Petitioner called Dr. Dossett's office requesting an order to obtain a CT scan of her neck and head. Dr. Dossett refused Petitioner's request because cervical x-rays were normal, and she did not have any numbness or tingling in her limbs.

On 4/30/19, Petitioner presented to Dr. Dossett's office and requested a light duty release to return to work for 3 to 4 hours per day. She advised that the physical therapist said she should limit lifting and bending over. Petitioner was released to work with a 3 to 4 hour-shift limitation. It was noted that Petitioner's muscle discomfort in her shoulders and neck were improving.

On 5/14/19, Dr. Dossett noted Petitioner returned to work today and worked a 4-hour shift. Medication helped with her symptoms. Dr. Dossett stated "we tried Zoloft because of her panic attacks being triggered by this whole incident which began with a fall in December of last year. She was not seen in the office until 2/18/19 for dizziness. It then seemed that symptoms out of control with her history of panic attacks diagnosed in 2008. She began having significant neck pain." Dr. Dossett noted Petitioner was feeling better on her present regimen and she had to stop Zoloft due to weird thinking and dreams. Physical examination revealed much softer neck muscles, with pain where the muscles insert to the occipital area. Dr. Dossett diagnosed improving neck pain and dizziness triggering panic attacks. She was ordered to continued taking Ativan and Flexeril. Dr. Dossett continued her light duty restrictions for two weeks and provided an off work slip for the month of April as Petitioner missed work due to a combination of neck pain which triggered panic and anxiety attacks.

On 5/28/19, Petitioner reported doing well with physical therapy and about three hours into her shift she started experiencing pain in her neck and head. Physical therapy recommended she continue to limit her work shifts to 3 to 4 hours per day. Petitioner felt she still needed medication to control anxiety and panic attacks. Petitioner was prescribed Effexor, Ativan, Flexeril, and Relafen. She was ordered to return in one month.

On 6/27/19, Petitioner reported to Dr. Dossett she was feeling better and was no longer in "a dark place". She wanted to increase her work hours to 5.5 hours per shift. She reported riding longer distances in a car and was doing better in social settings. She had a panic attack one week ago with chest tightness. Her neck pain was improving with physical therapy. Medications were continued and she was instructed to follow up in one month.

On 7/26/19, Dr. Dossett noted Petitioner's symptoms were improving with less panic attacks, but she was not able to decrease Ativan. Petitioner stated physical therapy was helping her neck and she was tolerating working 5.5 hours per day well.

On 8/6/19, Petitioner was examined by neurologist Dr. Todd Silverman pursuant to Section 12 of the Act. (RX1). Petitioner provided a consistent history of her work injury. Petitioner reported panic attacks that were severe from March through May 2019 and constant neck pain, more severe on the right that radiated to the trapezius muscles bilaterally. She rated her average pain at 7/10. Dr. Silverman performed an examination with subjective finding of

tenderness to palpation over the bilateral occipital regions. There was no Tinel over the occipital nerves and TMJs were normal bilaterally. Petitioner had full range of motion in the neck in all directions and no tenderness to palpation over the posterior spinal elements or paraspinal muscles. Dr. Silverman noted Petitioner's mental status was full and alert and she was able to recite a full, detailed history from her memory, but mood was sad and affect restricted. Petitioner's motor and sensory exams and coordination were normal, and she had a steady gait.

Dr. Silverman reviewed Dr. Dossett's medical records from March through May 2019. He did not have access to Petitioner's medical records prior to her work accident. Dr. Silverman noted Petitioner told him she had no previous history of panic attacks or neck pain and stated they were new symptoms since the work accident. Dr. Silverman opined Petitioner more likely than not suffered a mild traumatic brain injury or concussion and a cervical strain. He noted all possible TBI symptoms had completely resolved, and her neurologic exam was normal.

Dr. Silverman diagnosed a cervical strain/neck pain with associated bilateral occipital tenderness. He opined the cervical strain and occipital tenderness is an exacerbation of a pre-existing 13-year history of chronic neck pain and tightness. He opined that Petitioner's current symptoms were partly due to the work accident and due to some exacerbating factors that began in February 2019. Dr. Silverman opined Petitioner's panic disorder was wholly pre-existing and unrelated to the work accident. He found no objective neurologic findings on examination. He opined that Petitioner's neck complaints and occipital tenderness were at least partially causally related to her work accident and recommended a brief course of steroids, such as Medrol Dosepak and if that failed, bilateral occipital nerve blocks. Dr. Silverman opined that only a home exercise program was reasonable, and no diagnostic studies were warranted.

Dr. Silverman recommended that Petitioner continue to work 25 hours per week, 4 to 5 hours per shift, with no lifting greater than 10 pounds. He opined Petitioner was not at MMI, but it should be considered at the one-year mark from the injury.

On 8/23/19, Petitioner returned to Dr. Dossett's office and reported no change in her pain. She stated Ibuprofen helped more than Relafen. Petitioner reported she was going to be released from therapy due to exhausting her coverage under Medicaid. Physical examination revealed normal range of motion in the cervical spine. She was ordered to continue Ativan and start Naproxen. If pain medication did not control her symptoms, the nurse practitioner recommended a neurology or orthopedic referral. Petitioner again requested an MRI which was denied as she had no neurologic symptoms. She was ordered to return in one month.

On 9/30/19, Dr. Dossett prepared a narrative report in conjunction with Petitioner's office visit. Dr. Dossett stated, "Today will be officially be charged to Workmen's Compensation. Patient fell backward on black ice while working at McDonald's on 12/7/18. She hit her head hard. Apparently there was a video which was quite dramatic with this video is no longer available. We saw her on 2/18/19 for complaints of dizziness. At that time the work-related injury was not discussed and we felt that she had bilateral Eustachian tube dysfunction and we started her on Flonase". Dr. Dossett summarized Petitioner's treatment with his office since the date of accident and stated it was not until 4/1/19 that Petitioner mentioned her work accident. He noted Petitioner has had intermittent neck pain since the work accident and Petitioner feels

she has returned to work too quickly and needs to take some time off work to heal. He stated Petitioner gets disoriented while driving and gets a headache sensation across her temples and eyes that radiates to the back of her head. She feels like she has vertigo with quick movements. Dr. Dossett noted full range of motion in Petitioner's cervical spine with tightness posteriorly and in the trapezius area. Dr. Dossett suspected concussion syndrome and ordered a CT scan of Petitioner's head. He placed Petitioner off work for one month to "rest her brain". He prescribed Naproxen and ordered physical therapy. He felt the upper extremity activity was aggravating a cervical ligament strain or muscle tear. Dr. Dossett stated it is unclear why Petitioner's panic attacks did not start until 3/25/19 but they seem to be related to a combination of her fall, concussion, and persistent neck pain which have triggered a panic attack cycle.

Petitioner underwent a CT scan of her head on 10/7/19 that demonstrated no evidence of an acute intracranial process. (PX2) Petitioner underwent nine physical therapy sessions from 10/7/19 through 11/5/19. (PX2)

On 10/31/19, Petitioner returned to Dr. Dossett with significant neck pain despite physical therapy. She rated her pain at 7-8/10. Petitioner reported insomnia with loss of balance, depression, anxiety, and panic attacks with headaches that worsen with light. Petitioner's mother attended the visit and acknowledged that Petitioner gets stressed very easily and stated "it would be impossible for Petitioner to return to work with all these issues." No examination was performed. Dr. Dossett recommended continued physical therapy, increased Petitioner's panic attack medications, and placed her off work. Petitioner's symptoms remained unchanged at her follow up appointment on 12/2/19 and she was continued off work.

On 12/23/19, Dr. Dossett noted a nurse case manager attended the appointment. Petitioner took Medrol Dosepak as recommended by Dr. Silverman and it provided relief of pressure in her head for 2.5 hours. Dr. Dossett recommended a referral for neuropsychologic and psychiatrist evaluation and occipital nerve blocks with Dr. Hagan. She was continued off work. Petitioner continued to follow up with Dr. Dossett and her symptoms remained unchanged.

On 2/17/20, Petitioner was examined by Dr. Robert Hagan for blockade and steroid injections at C2-3 bilateral nerves and LON bilaterally. The pre- and post-operative diagnoses were chronic headaches, cervicalgia, and occipital neuralgia. Petitioner reported a consistent history of accident and stated she had no history of headaches prior to the accident. Her headache pain radiated down her neck into her shoulders. She was scheduled to see Michael Oliveri, a neuropsychologist, in a couple of weeks. Her pre-injection pain was constant and averaged 8/10 and post-injection pain was 0/10. Petitioner was ordered to return on 3/26/20. (PX3)

On 2/25/20, Petitioner saw Dr. Michael Oliveri, Ph.D. for a neuropsychological examination pursuant to Section 12 of the Act. (RX2) Dr. Oliveri reviewed records dating back to 1992. He noted that on 10/9/99 Petitioner was seen for a sports physical to discuss possible ADD (difficulty with concentrating and completing work, difficulty sitting still, unable to finish one task without beginning another, easily angered, failing grades, reference to a prior evaluation in fourth grade where she was found to have a 'learning disability,' etc.). Records between 10/25/99 through 8/15/11 revealed an extensive history of treatment and medication for ADD, anxiety, depression, panic attacks, and eating behaviors.

Dr. Oliveri noted Petitioner continued to have neck pain and that since her work accident she complained of uncharacteristic levels of anxiety and panic-like symptoms. Petitioner reported her head felt funny when she got panic attacks, which lasted 30-40 minutes, followed by mental fog. Petitioner reported problems with attention and concentration at times. She provided an example of talking on the phone and being concerned she forgot where she put her phone while using it. She felt off-balance at times. Petitioner's boyfriend was interviewed, and he corroborated the ongoing pain and anxiety complaints. Petitioner reported the pain injections were helpful for several hours, but then it came back. She dropped out of school in the 9th grade but later received her high school diploma at "Sereno" Academy. (RX2)

During examination Dr. Oliveri noted Petitioner became more dramatic expressing exasperation even with items that were less challenging, showing inconsistent item difficulty. Dr. Oliveri noted gross discrepancies from expected norms. He stated that on certain tasks, Petitioner's performance fell below expectations for patients with validated chronic mild traumatic brain injuries. As a result, her results may not fully represent her ability levels. Due to her reading level being at a 5th grade-rating, a comprehensive personality assessment inventory was not administered as her reading recognition skills fell below recommendations for administration. On a self-report memory complaints inventory, Petitioner generated a highly elevated level of subjective memory complaints on a subscale associated with pain interfering with memory. Her level of memory symptom complaints exceeded somewhat neurologic reference groups. On a self-report rating scale, Petitioner had a severe level of anxiety-related symptoms.

In terms of validity, Petitioner's level of psychological defensiveness was unusually low, seen in less than 11% of patients. In some circumstances, this low level of defensiveness may reflect symptom over-endorsement and in some cases symptom magnification. Her somatic symptoms were high (higher than 87% of patients); pain complaints were average with extreme peak pain; functional complaints (self-perceived disability) were very high (higher than 95% of patients); depression was moderately high; and anxiety was high (higher than 86% of patients).

Dr. Oliveri found no valid indications of residual acquired neurocognitive disorder related to the work accident. He opined that the neuropsychological evaluation was of atypical/suboptimal validity and found in association with gross discrepancies from expected norms for patients with residual PCS, brain-injury sequelae. He determined Petitioner exhibited a nonspecific disorder of attention/concentration and she had ongoing marked anxiety-related symptomatology and in all probability, her anxiety symptoms adversely affect cognition. He diagnosed Somatic symptom disorder where psychological factors are contributing to the development, maintenance, and/or exacerbation of perceived somatic symptoms. Dr. Oliveri noted ADD/ADHD symptoms by history that were pre-existing.

Dr. Oliveri opined that Petitioner's psychological factors were contributing to her symptom perception. He opined Petitioner's subjective cognitive and emotional symptoms were not directly referable to the alleged work injury. The time course of symptom development and symptom expression was unusual for post-concussive syndrome. He noted that limited pre-existing psychological resources for dealing with stress, illness, and injury have supported her

symptom development and perception. Her subjective cognitive symptoms were likely due to the interference of longstanding anxious coping and pre-existing attentional limitations. He opined that from a neuropsychological perspective, there were no valid indications of acquired limiting cognitive or emotional dysfunction that precludes work-related activities.

On 3/3/20, Petitioner returned to Dr. Dossett who noted the injections completely resolved Petitioner's pain for about 90 minutes. Petitioner claimed the pain returned and was very intense and she almost went to the ER. Petitioner felt the injections improved her condition 10-15%. Dr. Dossett continued Petitioner off work pending review of Dr. Oliveri's report.

On 3/26/20, Dr. Hagan noted the block lasted three hours before Petitioner's symptoms returned to baseline, with an overall 25% decrease in pain. Petitioner reported her headaches could reach 10/10 pain. She had difficulty concentrating and intermittent blurry vision. Physical examination revealed limits or guarded range of motion in the neck with soreness with rotating to the right or left, tenderness over the occipital nerves with slight improvement post injection. Dr. Hagan diagnosed bilateral medial and lateral occipital nerve syndrome and chronic daily headache and cervicalgia. Based on the longevity and severity of her chronic headaches, Dr. Hagan recommended an occipital nerve surgery. He noted Petitioner responded greatly to the diagnostic component of the occipital injections but had only marginal benefit from the therapeutic component. He stated that if it was only six months since the injury and Petitioner had 50% or greater maintained benefit from the injection, we would repeat the injection.

On 3/30/20, Petitioner returned to Dr. Dossett and reporting feeling off-balance when driving or walking. He noted Dr. Hagan's surgical recommendation. He continued Petitioner off work for another month. It was noted Dr. Oliveri did not seem impressed by the diagnosis of post-concussive syndrome. Dr. Dossett felt that "a lot of this is related to [the] concussion that occurred at the time of her injury. He felt that her lack of focus and ability to concentrate was hindered by anxiety and panic attacks which were triggered by her fall. He acknowledged that panic attacks and anxiety were a chronic problem for Petitioner, but stated they were under control until her work accident.

On 4/27/20, Dr. Silverman reviewed additional medical records and prepared an addendum to his Section 12 report. (RX3) He opined Petitioner suffered a mild concussion and cervical strain as a result of the injury on 12/7/18. At the time of his examination on 8/6/19, he noted Petitioner was not complaining of headaches, dizziness, light sensitivity, or cognitive dysfunction. He opined the panic attacks and anxiety were pre-existing and not causally related to her work accident. The characteristics of the occipital pain (pressure and tightness, sometimes in a band-like distribution) were more consistent with pain radiating from the neck or with tension headache than with occipital neuralgia. He felt Petitioner did not meet the criteria for the diagnosis of occipital neuralgia and is not confident the surgery would be beneficial and recommended against it. Dr. Silverman stated it was only after his examination that Dr. Dossett began to endorse a diagnosis of post-concussion syndrome. Dr. Silverman was not sure if the nerve blocks had a placebo effect on Petitioner. He did not recommend cervical traction or any further physical therapy. He did not consider the headaches per se to be part of the workers' compensation claim. He opined the treatment up until 4/30/19 was reasonable and necessary. After that, her panic attacks and emotional symptoms predominate and became conflated with

physical symptoms to such a degree that any causative connection to the work accident was obscure and lost. He opined that Petitioner had reached MMI and could return to full duty work with no restrictions. He opined that Petitioner's anxiety, panic attacks, and somatoform coping style were not work-related and should be managed by a competent mental health professional.

On 5/11/20, Petitioner returned to Dr. Dossett and was continued off work for another month. Petitioner felt unable to return to work due to residual neck pain, disequilibrium, and panic attacks. Petitioner stated she wanted to undergo surgery recommended by Dr. Hagan. Dr. Dossett recommended CRC for panic attacks and more physical therapy. Petitioner underwent 58 physical therapy sessions from 6/2/20 through 2/9/21.

Petitioner continued to follow up monthly with Dr. Dossett. On 11/17/20, Petitioner told Dr. Dossett "there is no chance that she can return to work at McDonald's." Dr. Dossett sated Petitioner could try a different job at Discount Tobacco (which she apparently had applied for) and Dr. Dossett would release her to work if she was accepted for the job. He recommended she continue physical therapy and medications. On 12/22/20, Petitioner reported an increase in panic attacks due to looking at flashing Christmas lights. She advised the job did not work out due to the pandemic and Dr. Dossett continued her off work.

On 1/20/21, Petitioner advised Dr. Dossett's nurse practitioner she just started a job at Casey's working 2 to 3 days per week and she was doing okay. She claimed to be under the care of Dr. Hagan. Dr. Dossett advised Petitioner could work as tolerated. On 2/23/21, Petitioner advised Dr. Dossett she was doing fine at work and was contemplating increasing her work hours. Petitioner claimed the work was less stressful and less fast-paced. Her panic attack medications were continued. Petitioner was essentially the same at each additional follow up appointment through 7/12/21.

Petitioner applied for employment with Casey's on 4/22/19 and advised she was available to work every day or evening except Fridays and she had no limitations to prevent her from performing the functions of the job. (RX4). Petitioner began working at Casey's on 1/16/21 as a part-time team member. On 3/2/21, Petitioner applied for a promotion as a shift leader and began working in that position on a full-time basis on 3/14/21. She averages 75-78 hours every two weeks.

CONCLUSIONS OF LAW

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

In addition to or aside from expert medical testimony, circumstantial evidence may also be used to prove a causal nexus between an accident and the resulting injury. *Gano Electric Contracting v. Indus. Comm'n*, 260 Ill.App.3d 92, 631 N.E.2d 724 (1994); *International Harvester v. Indus. Comm'n*, 93 Ill.2d 59, 442 N.E.2d 908 (1982). A chain of events showing a claimant's ability to perform manual duties before accident but decreased ability to still perform immediately after accident is sufficient to satisfy the claimant's burden. *Pulliam Masonry v. Indus. Comm'n*, 77 Ill. 2d 469, 397 N.E.2d 834 (1979); *Gano Electric Contracting v. Indus.*

Comm'n, 260 Ill.App.3d 92, 96–97, 631 N.E.2d 724 (1994); *International Harvester v. Indus. Comm'n*, 93 Ill.2d 59, 442 N.E.2d 908 (1982).

When a preexisting is present, a claimant must show that "a work-related accidental injury aggravated or accelerated the preexisting [condition] 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". St. Elizabeth's Hospital v. Workers' Comp. Comm'n, 864 N.E.2d 266, 272-273 (5th Dist. 2007). Accidental injury need only be a causative factor in the resulting condition of ill-being. Sisbro, Inc. v. Indus. Comm'n, 797 N.E.2d 665, 672 (Ill. 2003) (emphasis added). Even when a preexisting condition exists, recovery may be had if a claimant's employment is a causative factor in his or her current condition of ill-being. Sisbro, Inc. v. Indus. Comm'n, 797 N.E.2d 665 (Ill. 2003).

Allowing a claimant to recover under such circumstances is a corollary of the principle that employment need not be the sole or primary cause of a claimant's condition. Land & Lakes Co. v. Indus. Comm'n, 834 N.E.2d 583 (2d Dist. 2005). Employers are to take their employees as they find them. A.C.& S. v. Industrial Comm'n, 710 N.E.2d 837 (Ill. App. 1st Dist. 1999) citing General Electric Co. v. Industrial Comm'n, 433 N.E.2d 671, 672 (1982). The law is clear that if a preexisting condition is aggravated, exacerbated, or accelerated by an accidental injury, the employee is entitled to benefits. Rock Road Constr. v. Indus. Comm'n, 227 N.E.2d 65, 67-68 (Ill. 1967); see also Illinois Valley Irrigation, Inc. v. Indus. Comm'n, 362 N.E.2d 339 (Ill. 1977).

The parties stipulated that Petitioner sustained accidental injuries that arose out of and in the course of her employment with Respondent on 12/7/18 when she slipped and struck the back of her head on the ground. Petitioner's pre-accident medical records were admitted into evidence that date back to 1994. Petitioner is currently 34 years old. In the ten years preceding Petitioner's work accident, she was diagnosed with depression, anxiety, and panic attacks with related chest pain, for which she was prescribed various medications and frequently followed up with her primary care physician. The only mention of cervical issues in the ten years prior to Petitioner's work accident was in February 2011 when she reported cervical tenderness with movement. No treatment or diagnostic tests were recommended.

Petitioner testified and the records reflect that she continued to work her regular shift following the accident with no time off until Dr. Dossett placed her off work on 4/1/19. Petitioner's first medical examination was on 2/18/19 at which time she reported dizziness and sinus congestion. Thyroid disorder was suspected, and bloodwork was ordered that confirmed hypothyroidism. On 3/11/19, Petitioner complained of a headache with pressure in the front of her head, decreased hearing in her left ear, and dizziness with fast head movement. Petitioner's primary care physician continued to treat her for sinus related issues and hypothyroidism. On 3/25/19, Petitioner reported panic attacks. Dr. Dossett noted Petitioner was first diagnosed with panic attacks in 2008 and stated she had done very well since then. Petitioner thought the panic attacks were related to the thyroid medication and the medication was discontinued.

On 4/1/19, Petitioner reported no improvement in her panic attacks and reported she fell on ice at work and struck her head in late December or early January. She stated she felt

discombobulated for four days. Dr. Dossett noted Petitioner complained of neck pain and physical examination revealed extreme tightness in the cervical spine posteriorly near the scalp and tenderness around the trapezius. Dr. Dossett diagnosed severe neck pain and ordered physical therapy and prescribed Flexeril. Dr. Dossett placed Petitioner of work. Respondent paid temporary total disability benefits from 4/1/19 through 5/6/19.

On 8/6/19, Dr. Silverman reviewed Petitioner's post-accident medical records and opined Petitioner more likely than not suffered a mild traumatic brain injury or concussion and a cervical strain as a result of the work accident. He noted all possible TBI symptoms had completely resolved, and her neurologic exam was normal. Dr. Silverman diagnosed a cervical strain/neck pain with associated bilateral occipital tenderness. He opined the cervical strain and occipital tenderness is an exacerbation of a pre-existing 13-year history of chronic neck pain and tightness. He opined that Petitioner's current symptoms were partly due to the work accident and due to some exacerbating factors that began in February 2019. Dr. Silverman opined Petitioner's panic disorder was wholly pre-existing and unrelated to the work accident. He recommended a brief course of steroids, such as Medrol Dosepak and if that failed, bilateral occipital nerve blocks. He agreed light duty restrictions were appropriate and Petitioner was not at MMI as it related to the work accident.

On 2/17/20, Dr. Hagan administered blockade and steroid injections at the C2-3 bilateral nerves and lesser occipital nerves bilaterally. The pre- and post-operative diagnoses were chronic headaches, cervicalgia, and occipital neuralgia. Dr. Hagan noted the block lasted three hours before Petitioner's symptoms returned to baseline, with an overall 25% decrease in pain. Physical examination revealed limits or guarded range of motion in the neck with soreness with rotating to the right or left, tenderness over the occipital nerves with slight improvement post injection. Dr. Hagan diagnosed bilateral medial and lateral occipital nerve syndrome and chronic daily headache and cervicalgia. Based on the longevity and severity of her chronic headaches, Dr. Hagan recommended an occipital nerve surgery.

On 4/27/20, Dr. Silverman reviewed additional medical records and prepared an addendum to his Section 12 report. (RX3) He opined Petitioner suffered a mild concussion and cervical strain as a result of the injury on 12/7/18. He opined the panic attacks and anxiety were pre-existing and not causally related to her work accident. He opined that the characteristics of the occipital pain (pressure and tightness, sometimes in a band-like distribution) were more consistent with pain radiating from the neck or with tension headache than with occipital neuralgia. He felt Petitioner did not meet the criteria for the diagnosis of occipital neuralgia and felt surgery would not be beneficial. He did not consider the headaches "per se" to be part of the workers' compensation claim. He opined the treatment up until 4/30/19 was reasonable and necessary. He opined that Petitioner had reached MMI and could return to full duty work with no restrictions.

None of Petitioner's medical providers or Respondent's Section 12 examiners testified by way of evidence deposition. The Arbitrator notes that Dr. Dossett opined in his treatment records that Petitioner's current condition of ill-being was connected to the work accident. There is no dispute Petitioner suffered years of depression, anxiety, and panic attacks prior to her accident which was controlled with medication. There is no significant history of neck pain, dizziness,

concussive type symptoms, or headaches prior to the work accident. The only mention of cervical issues in the ten years prior to Petitioner's work accident was in February 2011 when she reported cervical tenderness with movement. No treatment or diagnostic tests were recommended. Dr. Dossett stated Petitioner's anxiety and panic attacks were well controlled prior to the work accident, which is consistent with the pre-accident medical records. Dr. Dossett diagnosed concussion syndrome as a result of Petitioner's persistent symptoms following her work accident.

Although Dr. Hagan did not provide a causation opinion in his treatment records, the Arbitrator notes he was treating Petitioner for headaches status post-concussion following Petitioner striking her head on the concrete. (PX3) He noted no previous history of headaches. Since the accident Petitioner complained of headaches that originate in the back of her head and radiate around to her forehead into her shoulders, with a band sensation around her head. Dr. Hagan noted Petitioner responded greatly to the diagnostic component of the occipital injections, but due to the marginal benefit from the therapeutic component and longevity of Petitioner's symptoms, he recommends an occipital nerve surgery. Dr. Silverman likewise diagnosed a mild traumatic brain injury or concussion and a cervical strain he opined was related to Petitioner's work accident. He noted Petitioner had neck pain with associated bilateral occipital tenderness which was an exacerbation of a pre-existing condition. Dr. Silverman opined that further treatment was appropriate in the form of Medrol Dosepak and possible bilateral occipital nerve blocks. Dr. Silverman subsequently believed that the characteristics of Petitioner's occipital pain (pressure and tightness, sometimes in a band-like distribution) were more consistent with pain radiating from the neck or with tension headache than with occipital neuralgia. He felt Petitioner did not meet the criteria for the diagnosis of occipital neuralgia and was not confident the surgery would be beneficial.

Based on the foregoing evidence, the Arbitrator finds that Petitioner's current condition of ill-being in her head, neck, occipital nerves, and aggravation of pre-existing anxiety and panic attacks are causally connected to her work accident that occurred on 12/7/18.

Issue (G): What were Petitioner's earnings?

Petitioner alleges her earnings during the year preceding the injury were $23,088.00, with an average weekly wage of $444.00. Respondent alleges Petitioner's annual earnings during the year preceding the injury were $15,361.61, with an average weekly wage of $295.42.

The only evidence of Petitioner's earnings was submitted by Respondent which reflects earnings during the 52-week period prior to Petitioner's accident of $15,361.61, representing bi-weekly paychecks issued from 12/14/17 through 11/29/18. (RX5) The Arbitrator notes that during the 52-week period, Petitioner worked only one hour of overtime which is not included in the calculation pursuant to Section 10 of the Act. The Arbitrator finds Petitioner's average weekly wage is $295.42 with a TTD rate at the statutory minimum of $286.00.

Issue (J): Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

Issue (K): Is Petitioner entitled to prospective medical care?
Issue (O): Has Petitioner reached maximum medical improvement?

Upon establishing causal connection and the reasonableness and the necessity of recommended medical treatment, employers are responsible for necessary prospective medical care required by their employees. *Plantation Mfg. Co. v. Indus. Comm'n*, 294 Ill.App.3d 705, 691 N.E.2d. 13 (1997). This includes treatment required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 325 Ill. App. 3d 527, 758 N.E.2d 18 (2001).

Based upon the above findings as to causal connection, the Arbitrator finds that the care and treatment Petitioner received has been reasonable and necessary. Dr. Silverman opined that as of the date of his examination on 8/6/19, Petitioner had not reached MMI and he recommended a brief course of steroids, such as Medrol Dosepak and if that failed, bilateral occipital nerve blocks. On 4/27/20, Dr. Silverman opined that only treatment up until 4/30/19 was reasonable and necessary, though he diagnosed a mild concussion and cervical strain as a result of the injury on 12/7/18. Dr. Dossett and Dr. Hagan continue to treat Petitioner for injuries sustained as a result of the work accident.

Respondent shall therefore pay the medical expenses outlined in Petitioner's Exhibits 5, 6 (from 2/18/19 through 6/9/21), and 7, as provided in Section 8(a) and Section 8.2 of the Act, directly to the medical providers and pursuant to the medical fee schedule. Respondent is not liable for Dr. Dossett's medical expenses incurred prior to 2/18/19 or for charges incurred on 6/22/21, 8/26/21, 10/7/21, 10/25/21 and 10/29/21 as such charges are not supported by corresponding medical records. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits and shall hold Petitioner harmless for any amounts in which Respondent receives such credit.

The Arbitrator finds Petitioner has not reached maximum medical improvement. Respondent shall authorize and pay for prospective medical treatment as recommended by Dr. Hagan and Dr. Dossett, including, but not limited to, occipital nerve surgery and conservative treatment related to the aggravation of Petitioner's anxiety and panic attacks, until such time Petitioner reaches maximum medical improvement.

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

Petitioner claims entitlement to TTD benefits from 11/1/19 through 1/18/21. Respondent admits liability for TTD benefits from 4/2/19 through 5/5/19. Respondent paid TTD benefits from 4/1/19 through 5/6/19, 8/6/19, and 9/29/19 through 11/9/19, and TPD benefits from 5/30/19 through 9/5/19 and 9/15/19 through 9/28/19. (RX8)

Dr. Dossett placed Petitioner off work on 4/1/19 through 4/30/19, at which time Petitioner requested to return to light duty work. Respondent paid TTD benefits from 4/1/19 through 5/6/19. Petitioner returned to work with restrictions and was paid TPD benefits through 9/28/19. On 6/27/19, Petitioner requested that Dr. Dossett increase her light duty restrictions to 5.5 hours per week. On 7/26/19, Petitioner reported doing well

working the increased 5.5 hour per day work schedule. On 8/6/19, Dr. Silverman agreed that light duty work of 25 hours per week was appropriate. On 9/30/19, Dr. Dossett placed Petitioner back off work. He noted Petitioner's ongoing symptoms and suspected concussion syndrome and ordered a CT scan of Petitioner's head. He prescribed Naproxen and ordered physical therapy. Respondent paid TTD benefits from 9/29/19 through 11/9/19. Petitioner remained off work until she obtained employment with Casey's on 1/16/21. Petitioner testified that her current employment with Casey's is not as fast-paced or stressful. Petitioner claims entitlement to TTD benefits from 11/1/19 through 1/18/21.

The Arbitrator finds that Petitioner is entitled to temporary total disability benefits beginning on 11/1/19 through 1/15/21, representing 63-1/7th weeks, at the minimum TTD rate of $286.00/week. The parties stipulate that Respondent shall receive a credit under Section 8(j) of the Act for $4,144.73 in TTD benefits paid.

This award shall in no instance be a bar to further hearing and determination of any additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

Arbitrator Linda J. Cantrell

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC005856
Case Name	Ciera Evans v. Chicago Transit Authority
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0358
Number of Pages of Decision	16
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Al Koritsaris
Respondent Attorney	Elizabeth Meyer

DATE FILED: 8/15/2023

/s/Stephen Mathis, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Ciera Evans,

Petitioner,

vs. NO. 20WC 005856

CTA,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19b having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue(s) of accident, medical expenses, prospective medical care, causal connection, temporary total disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 1, 2022 is hereby affirmed and adopted.

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

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.

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

August 15, 2023

SJM/sj
o-7/12/2023
44

/s/ *Stephen J. Mathis*
Stephen J. Mathis

/s/ *Deborah J. Baker*
Deborah J. Baker

/s/ *Deborah L. Simpson*
Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC005856
Case Name	EVANS, CIERA v. CTA
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	13
Decision Issued By	Jacqueline Hickey, Arbitrator

Petitioner Attorney	Al Koritsaris
Respondent Attorney	Elizabeth Meyer

DATE FILED: 9/1/2022

THE INTEREST RATE FOR THE WEEK OF AUGUST 30, 2022 3.23%

/s/ Jacqueline Hickey, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF **Cook**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Ciera Evans
Employee/Petitioner

v.

CTA
Employer/Respondent

Case # **20** WC **5856**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jacqueline Hickey**, Arbitrator of the Commission, in the city of **Chicago, Illinois**, on **April 20, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **February 25, 2020**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**20,673.67**; the average weekly wage was $**738.35**.

On the date of accident, Petitioner was **33** years of age, ***single*** with **3** dependent children.

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

Respondent shall be given a credit of $**47,113.30** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**47,113.30.**

ORDER

Prospective Medical
Respondent shall authorize the remaining treatment recommended by Dr. Lipov, both a consultation with a spine surgeon and the Functional Capacity Evaluation. In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

Medical Bills
Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, for the following providers: Illinois Orthopedic Network $18,282.26 outstanding, Midwest Specialty Pharmacy $7,560.71 outstanding, ATI Physical Therapy $13,492.14 outstanding, Premier Healthcare Services $13,054.64 outstanding, and Metro Anesthesia Consultants $2,715.44 outstanding, as provided in Sections 8(a) and 8.2 of the Act. Respondent must only pay those medical providers' bills which have not already been paid and only pay those dates of service post the initial June 2020 19(B) hearing.

Temporary Total Disability
Respondent shall pay Petitioner temporary total disability benefits of $492.23/week for 111 6/7 weeks, commencing February 26, 2020 through April 20, 2022, as provided in Section 8(b) of the Act. The Arbitrator notes that an award of TTD from 2/28/2020 – 6/16/2020 was made at the initial 19(b) hearing in June 2020 and that Respondent shall be given a credit of $**47,113.30** for TTD already paid.

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.

SEPTEMBER 1, 2022

Jacqueline C. Hickey

Signature of Arbitrator

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

CIERA EVANS,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	Case No.: 20 WC 5856
	)	
CTA,	)	
	)	
Employer/Respondent.	)	

FINDINGS OF FACT

This matter proceeded to hearing on April 20, 2022 in Chicago, Illinois before Arbitrator Jacqueline Hickey on Petitioner's Petition for Immediate Hearing under Sections 19(b)/8(a). Issues in dispute include Accident, Causation, Medical Bills, Prospective Medical Care and Temporary Total Disability. See Arbitrator's Exhibit "Ax" 1. (Ax1)

The parties are in agreement that on February 25, 2020, Petitioner Ciera Evans was an employed by the Respondent as a bus operator and that she gave notice of an accident injury in a timely manner.

This case was previously tried and a decision was rendered by the Honorable Arbitrator Molly Mason on July 7, 2020, which is now the law of the case. (Ax2) Arbitrator Mason found that the Petitioner suffered an accidental injury that arose out of her employment with the CTA on February 25, 2020. Further, as of July 7, 2020, the Petitioner's condition of ill-being was causally related to the work injury sustained on February 25, 2020. Prior to the first 19(b) trial Respondent did not elect to send the Petitioner to a Section 12 examination. Further, per Arbitrator Mason's trial decision, "The Arbitrator awards prospective care in the form of additional physical therapy, as prescribed by Dr. Lipov, and such other treatment as Dr. Lipov recommends for Petitioner's lower back condition."

Petitioner testified that following the first trial, her symptoms remained the same and she returned to see Dr. Lipov. The medical record from June 24, 2020 indicates that Ms. Evans returned complaining of persistent lower back pain with radicular symptoms into the right lower extremity. (Px1) Dr. Lipov continued to recommend an L5-S1 lumbar steroid epidural injection and kept the Petitioner off work. *Id*. Further, the note indicated that the Petitioner was to continue with physical therapy. The Petitioner testified that she followed Dr. Lipov's recommendation and proceeded with the steroid injection. The medical chart indicates that Dr. Lipov performed the injection on July 29, 2020. (Px1, p. 9). Petitioner testified that following

the injection, she had significant relief with the numbness and tingling symptoms but that her back pain was unchanged. On August 12, 2020, the Petitioner had a telephonic follow-up visit and reported a 60% improvement of her pain. (Px1, p. 13). Petitioner testified that this visit was telephonic due to the Covid-19 pandemic. Further, she testified that the relief that she experienced was temporary and that her symptoms returned.

On September 16, 2020, she returned to see Dr. Lipov for an in-person follow-up visit. (Px1, p. 17). The record note that Ms. Evans reported consistent history of improvement following the injection but also states that the relief was temporary. *Id*. The record notes complaints of lower back pain with associated right leg numbness and tingling and also notes a positive straight leg raise test on the right side. *Id*. At this time a second injection was recommended due to the efficacy of the previous injection. *Id*. She was kept of work at this time. *Id*. She testified that she was receiving disability compensation at this time and that she agreed to proceed with a second injection. On September 21, 2020, Dr. Lipov performed a second L5-S1 lumbar epidural injection. (Px1, p. 21). Ms. Evans testified that she had significant relief after the second injection but similarly the relief was temporary. On October 21, 2020, she returned for follow-up after the injection. (Px1, p. 25). The record corroborates her testimony and states that she had an excellent response to the injection but that it only lasted a few weeks. *Id*. On examination, she had a positive straight leg raise test on the right side. *Id*. Dr. Lipov kept her off work at this time and ordered an EMG diagnostic test. *Id*.

On November 13, 2020, Ms. Evans underwent an EMG test. (Px1, p. 30-32). The record from the EMG test revealed positive findings and an abnormal test. (Px1, p. 32). The right peroneus longus muscle was noted as abnormal with polyphasia and reduced recruitment. *Id*. Further the EMG report notes that there is electrodiagnostic evidence of a right L5 lumbar spine radiculopathy. *Id*. On December 2, 2020, she returned to see Dr. Lipov for a follow-up appointment. (Px1, p. 41). The record notes continued complaints of low back pain with numbness and tingling down her right leg. *Id*. Given the positive EMG, Dr. Lipov ordered a third lumbar epidural injection. *Id*. On January 11, 2021, Ms. Evans underwent the third lumbar steroid epidural injection, this time being transforaminal. (Px1, p. 47). Petitioner testified that she again experienced significant relief of her radicular symptoms following the third injection and that the relief lasted much longer but eventually returned. She also testified that her low back pain remained constant. Dr. Lipov ordered a bilateral L4-S1 medial branch block injection to address her localized back pain and kept Ms. Evans off work at this time. *Id.* Further, he instructed her to continue with physical therapy and she testified that she in fact continued doing therapy. *Id.*

On February 10, 2021, she underwent the recommended lumbar facet medial branch injection at L4-5 and L5-S1. (Px1, p. 55). On March 24, 2021, she returned for follow-up with Dr. Lipov and reported continued relief of her radicular symptoms at this time but no relief in her lower back pain following the facet branch block injections. (Px1, p. 59). At this time, Dr. Lipov ordered a right sided SI joint injection to address the localized back pain. *Id*. The Petitioner was also kept off work at this time. (Px1, p. 60). On April 5, 2021, the Petitioner underwent the right sided sacroiliac joint injection, performed by Dr. Lipov. (Px1, p. 65).

Petitioner testified that the injection did not improve her local back pain and also her radicular symptoms started to return around this time as well. On April 28, 2021, she returned to Dr. Lipov for follow-up. (Px1, p. 69). The medical record corroborates her testimony and notes that she reported significant amount of right leg numbness and pain. *Id*. Further, on examination, a positive straight leg raise test was noted on the right side. *Id.* Dr. Lipov ordered continued physical therapy at this time and referred the Petitioner for a spine surgery consult. *Id*. Further, she was kept of work at this time. (Px 1, p. 70). She returned to see Dr. Lipov again on May 20, 2021 with no improvement of her symptoms. (Px1, p. 79). Dr. Lipov continued to recommend a spinal surgery consultation. *Id*. The Petitioner returned to see Dr. Lipov again for another follow-up on July 13, 2021 and August 6, 2021 with no improvement of her symptoms. (Px1, p. 83, 86). She was kept off work following both appointments and the records note that spinal surgery consult continues to be recommended and is pending approval. (Px1, p. 83-87).

Petitioner saw Dr. Daniel Troy at the request of the Respondent for a Section 12 examination on 8/30/2021. (Rx1) After his examination and review of records, along with a history from Petitioner including her present complaints, it was Dr. Troy's opinion Petitioner had suffered subjectively based pain to the low back, none of which was supported by objective findings. Dr. Troy noted the findings of the EMG test being positive for lumbar radiculopathy but did not include the fact that it was right sided radiculopathy. He felt she had overall excessive treatment, and if she had suffered a lumbar sprain, this should had resolved after 12 weeks. He felt she needed no further care for her back and stated she was able to return to full duty work. (Rx1 at 11-12) When asked if he felt Petitioner was at MMI, he stated that MMI "implies a work injury actually occurred on February 25, 2020…there are no traumatically induced objective findings to support her subjective complaints, both clinically or radiographically. If one did suffer a strain to her lumbar spine, one would expect the strain to be resolved after a 12-week period." (Rx1 at 11-12)

Following the Section 12 examination, Ms. Evans testified that she stopped receiving disability benefits. Further, she testified that her low back pain and numbness and tingling symptoms persisted. On March 29, 2022, she returned to see Dr. Lipov for a follow-up visit, wherein the notes reflect persistent low back pain complaints with radicular symptoms into the right lower extremity. (Px 8, p. 1). The record also states that a surgical consult is still being recommended and that if she is not a surgical candidate then she would be considered at MMI and a FCE would be ordered. *Id*. The Petitioner was also kept off work at this time. *Id*. The Petitioner returned to see Dr. Lipov again on April 12, 2022. (Px8 8, p. 6). The record notes that Petitioner's symptoms are unchanged. *Id*. The record also notes that a FCE has been ordered since the spine surgery consult has not been authorized in close to a year. *Id*. At the time of trial, the Petitioner testified that the FCE has been scheduled. Finally, the Petitioner testified that she has in no way re-injured her lower back since the February 25, 2020 work related injury.

CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law set forth below. Section 1(b)3(d) of the Act provides that, in order to obtain compensation under the Act, the employee bears the burden of showing, by a preponderance of the evidence, that he

or she has sustained accidental injuries arising out of and in the course of the employment. *820 ILCS 305/1(b)3(d)*. To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of his claim *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253 (1980) including that there is some causal relationship between his employment and his injury. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 63 (1989) It is well established that the Act is a humane law of remedial nature and is to be liberally construed to effect the purpose of the Act - that the burdens of caring for the casualties of industry should be borne by industry and not by the individuals whose misfortunes arise out of the industry, nor by the public. *Shell Oil v. Industrial Comm'n,* 2 Ill.2nd 590, 603 (1954).

Decisions of an arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e). The Arbitrator, as the trier of fact in this case, has the responsibility to observe the witnesses testify, judge their credibility, and determine how much weight to afford their testimony and the other evidence presented. *Walker v. Chicago Housing Authority*, 2015 IL App (1st) 133788, ¶ 47. Credibility is the quality of a witness which renders his evidence worthy of belief. The Arbitrator, whose province it is to evaluate witness credibility, evaluates the demeanor of the witness and any external inconsistencies with his/her testimony. Where a claimant's testimony is inconsistent with his/her actual behavior and conduct, the Commission has held that an award cannot stand. *McDonald v. Industrial Commission,* 39 Ill. 2d 396 (1968); *Swift v. Industrial Commission,* 52 Ill. 2d 490 (1972).

In the case at hand, the Arbitrator observed Petitioner during the hearing and finds her be a credible witness. The Arbitrator compared Petitioner's testimony with the totality of the evidence submitted and did not find material contradictions that would deem the witness unreliable. The arbitrator notes that none of the physicians who treated or examined her noted any symptom magnification. The Arbitrator finds Petitioner's testimony to be straight forward, truthful, and consistent with the records as a whole. She does not appear to be a sophisticated individual and any inconsistencies in her testimony are not attributed to an attempt to deceive the finder of fact. Respondent witness' testimony and exhibits, via Dr. Troy and the Utilization Review reports among other exhibits, for reasons stated below did not persuade the Arbitrator.

Issue C, whether the accident arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds as follows:

It is well established that the Petitioner bears the burden of proof by a preponderance of the evidence that his injury arose out of and in the course of his employment. *First Cash Financial Services v. Industrial Commission*, 367 Ill. App.3d 102, 105, 853 N.E. 2d 799, 803 (1st Dist. 2006).

An employee's injury is compensable under the Act only if it arises out of and in the course of the claimant's employment. 820 ILCS 305/2 (West 2012). Both elements must be present at the time of the claimant's injury in order to justify compensation. *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 483 (1989). Arising out of the employment refers to the origin or cause of the claimant's injury. *Cox v. Illinois Workers' Compensation Comm'n*, 406

Ill. App.3d 541, 544 (2010). 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. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 58 (1989). An injury arises out of one's employment if, at the time of the occurrence, the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties. *Id.*

Under the law of the case doctrine, a court's unreversed decision on an issue that has been litigated and decided, settles the question for all subsequent stages of the action. *Miller v. Lockport Realty Group, Inc.*, 377 Ill.App.3d 369, 374, 315 Ill.Dec. 945 (2007). The Arbitrator finds that Petitioner sustained an injury that both arose out of and was in the course of her employment with the Respondent, as was previously decided and is the law of the case (Ax2). The primary dispute between the parties is with regards to causation of Petitioner's current low back condition, post the June 2020 trial and post IME. See below.

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

To obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. It is not necessary to prove that the employment was the sole causative factor or even that it was the principal causative factor, but only that it was a causative factor. *Tolbert v. Ill. Workers' Comp. Comm'n*, 2014 IL App (4th) 130523WC, ¶ 1, 11 N.E.3d 453. A work-related injury need not be the sole or principal causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. Even if the claimant had a preexisting degenerative condition which made him more vulnerable to injury, recovery for an accidental injury will not be denied as long as he can show that his employment was also a causative factor. Thus, a claimant may establish a causal connection in such cases if he can show that a work-related injury played a role in aggravating his preexisting condition. *Sisbro, Inc. v. Industrial Comm'n,* 207 Ill. 2d 193, 205, 797 N.E.2d 665, 278 Ill. Dec. 70 (2003). "A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." *International Harvester v. Industrial Com.*, 93 Ill. 2d 59, 63 442 N.E.2d 908 (1982).

Under the law of the case doctrine, a court's unreversed decision on an issue that has been litigated and decided, settles the question for all subsequent stages of the action. *Miller v. Lockport Realty Group, Inc.*, 377 Ill.App.3d 369, 374, 315 Ill.Dec. 945 (2007). Where an award of benefits, based on a finding of causal connection between the claimant's work accident and the claimed injuries, is not challenged as set forth in the Act and becomes a final judgment, it becomes law of the case and is not subject to further review. *Irizarry v. Industrial Comm'n*, 337 Ill.App.3d 598, 271 Ill.Dec. 960 (2003).

The Arbitrator notes that initial causation was established following the last hearing with respect to the lower back injury per Arbitrator Mason's written trial decision. (Arb. Ex. 2).

Further, as the law of the case, none of the prior treatment recommendations before the June 2020 hearing and decision should be challenged by Respondent prior to the Section 12 examination date as causation and necessity of that treatment is established as the law of the case. Arbitrator Mason's decision, which was not appealed, awarded "prospective care in the form of additional physical therapy, as prescribed by Dr. Lipov, and such other treatment as Dr. Lipov recommends for Petitioner's lower back condition. (Ax2). As such, the law of the case doctrine would preclude Respondent from disputing any treatment related to Petitioner's lower back that was recommended by Dr. Lipov until it is validly disputed in the future by a physician. However, Respondent argues it may still dispute the current condition and causation of the same subsequent to the initial June 2020 trial.

The Arbitrator finds that Petitioner's current condition of ill-being is causally related to her work injury of February 25, 2020. Petitioner continues to treat for her same low back condition, underwent a series a various types of injections with five in total, as well as physical therapy and is has not fully recovered. Her treating doctor continues to keep her off of work for the low back pain, lumbar facet syndrome and right L5-S1 lumbar radiculopathy diagnoses, as well as recommended a surgical consult in addition to a FCE. This is reasonable under the circumstances and the fact that there is no new injuries or intervening injuries. The current low back condition is the same for which Petitioner has been treating since the initial February 25, 2020 work injury. Accordingly, based on the testimony of the petitioner as well as the medical records and opinions of Dr. Lipov, the positive EMG test, and the records from ATI physical therapy, the Arbitrator finds that the petitioner has affirmatively demonstrated a causal relationship between her work-related injury on February 25, 2020 and her current condition of ill-being. Immediately prior to her injury, Petitioner did not have any issues with her lower back and was working her regular job full duty for at least two weeks before the accident occurred. Following the injury, she became totally and temporarily disabled and remains the same.

In addition, the Arbitrator is not aware of any aggravating or intervening injuries to the lower back. Since the last trial, the Petitioner has undergone the recommended treatment by way of multiple injections in her lower back with at best limited and temporary relief. All her complaints of pain were consistent throughout the medical records. All of the subjective history portions of the medical records were consistent with Petitioner's testimony with respect to the way the incident happened and mechanism of injury. Further, Dr. Lipov's medical notes show objective positive findings of a positive Kemp Test and positive straight leg raise test on the right side. This objective finding clinically correlates with her complaints of low back pain with associated numbness and tingling traveling down her right lower extremity, which was testified to at trial. Finally, the Arbitrator notes the importance of the objective EMG test that the Petitioner underwent. The EMG test shows a right-sided L5 radiculopathy. Further, Ms. Evans' subjective complaints correlate not only with her clinical exam findings throughout her treatment with Dr. Lipov, but also directly correlate with the EMG findings.

The Arbitrator notes that Respondent sent the Petitioner for a Section 12 examination with Daniel Troy, M.D. The Respondent submitted the Section 12 report into evidence. The Arbitrator notes that Respondent did not send Petitioner for a Section 12 examination prior to the first trial. Further, causation was established at that trial and became the law of the case until

August 30, 2021 when Petitioner was sent for a Section 12 exam. The Arbitrator does not place much weight on Dr. Troy's causal connection opinion for a few reasons. First, Dr. Troy mentions the objective EMG results in his summary of his record review, yet appears to ignore this evidence when providing his causal connection opinions. Dr. Troy opines that Petitioner's subjective complaints of low back pain with numbness into her right lower extremity is not supported by objective findings. He provides no further basis for his opinion. Further, the Arbitrator notes that his statement ignores the EMG. The EMG test shows evidence of a right L5 lumbar radiculopathy. Further, her subjective complaints of numbness and tingling all the way down her right leg correspond directly with the objective evidence of radiculopathy. As such, since there is objective evidence that supports the Petitioner's subjective complaints, the Arbitrator continues to rely on the treating physicians and their opinions regarding causation of the current condition to the work injury.

Upon close examination of the medical records, this Arbitrator finds no inconsistent history, nor any evidence of any intervening cause for the petitioner's current condition. Further, the Section 12 examiner's opinions lacked credibility and persuasiveness for the reasons previously stated. Therefore, the Arbitrator concludes that the petitioner's current condition of ill-being to her low back is causally related to the petitioner's work-related injury from February 25, 2020.

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

Section 8(a) of the Act states a Respondent is responsible "…for all the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter incurred, limited, however, to that which is reasonably required to cure or relieve from the effects of the accidental injury…" A claimant has the burden of proving that the medical services were necessary, and the expenses were reasonable. See *Gallentine v. Industrial Comm'n*, 201 Ill.App.3d 880, 888 (2nd Dist. 1990).

The Arbitrator adopts her findings of fact and conclusions of law contained above and incorporates them by reference as though fully set forth herein. Petitioner's medical bills that have been incurred are in dispute.

Overall, the Arbitrator finds Petitioner's treatment to be reasonable and necessary and finds that Respondent has not paid for all of the said treatment. The Arbitrator acknowledges that some bills have be paid and for those bills and those providers, a credit will be given. Specifically, the Arbitrator notes some payments were made to Illinois Orthopedic Network, ATI and Midwest Specialty Pharmacy. As such, the Arbitrator orders Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule and as provided in Sections 8(a) and 8.2 of the Act, for the following providers:

Illinois Orthopedic Network $18,282.26
Midwest Specialty Pharmacy $7,560.71

ATI Physical Therapy	$13,492.14
Premier Healthcare Services	$13,054.64
Metro Anesthesia Consultants	$2,715.44

Respondent must only pay those medical providers' bills which have not already been paid and only pay those dates of service post the initial June 2020 19(B) hearing.

The Arbitrator notes as the law of the case, none of the treatment recommendations should be challenged by Respondent for those bills awarded following the June 2020 trial. Looking at Arbitrator Mason's decision, which was not appealed, she awarded "prospective care in the form of additional physical therapy, as prescribed by Dr. Lipov, and such other treatment as Dr. Lipov recommends for Petitioner's lower back condition." (Ax2). Irrespective of that fact, since the Arbitrator has found that Petitioner's current condition of ill-being is causally related to the February 25, 2020, work injury, the all of the treatment to date is found to be reasonable and necessary and therefore Respondent is responsible for the charges.

On June 24, 2020, the Petitioner resumed treatment with Dr. Eugene Lipov of the Illinois Orthopedic Network (hereinafter "ION"), following the first 19(b)/8(a) trial. At the time of the hearing on April 20, 2022, the petitioner presented medical bills from ION (Px3). The Arbitrator finds that the treatment rendered by the medical staff and doctor was reasonable and necessary to treat Ms. Evans for the work-related injury she sustained on February 25, 2020. The Arbitrator also finds that since the Petitioner's condition of ill-being was causally related to her injury on February 25, 2020, the respondent is responsible for the aforementioned medical charges and that such charges were generated as a result of treatment that was reasonable and necessary as well as usual and customary. The Arbitrator finds that the related bills on Petitioner's Exhibit 3, totaling $18,282.26, with a current balance of $6,000, are to be paid by Respondent according to the medical fee schedule.

On June 24, 2020, the Petitioner received medication from Midwest Specialty Pharmacy as prescribed by Dr. Lipov. At the time of the hearing on April 20, 2022, the petitioner presented medical bills from Midwest Specialty Pharmacy (Px5). The Arbitrator finds that medication prescribed by the Dr. Lipov was reasonable and necessary to treat Ms. Evans for the work-related injury she sustained on February 25, 2020. The Arbitrator also finds that since the Petitioner's condition of ill-being was causally related to her injury on February 25, 2020, the respondent is responsible for the aforementioned medical charges and that such charges were generated as a result of treatment that was reasonable and necessary as well as usual and customary. The Arbitrator finds that of the related bills in Petitioner's Exhibit 5, totaling $10,395.69, that $7,560.71 are to be paid by Respondent according to the medical fee schedule, because only bills after the first hearing on June 16, 2020 can be awarded.

On July 29, 2020, the Petitioner began receiving medication from Premier Healthcare Services as prescribed by Dr. Lipov. At the time of the hearing on April 20, 2022, the petitioner presented medical bills from Premier Healthcare Services (Px6). The Arbitrator finds that medication prescribed by the Dr. Lipov was reasonable and necessary to treat Ms. Evans for the work-related injury she sustained on February 25, 2020. The Arbitrator also finds that since the

Petitioner's condition of ill-being was causally related to her injury on February 25, 2020, the respondent is responsible for the aforementioned medical charges and that such charges were generated as a result of treatment that was reasonable and necessary as well as usual and customary. The Arbitrator finds that the related bills in Petitioner's Exhibit 6, totaling $13,054.64 are to be paid by Respondent according to the medical fee schedule.

Following the June 16, 2020 hearing, the Petitioner continued physical therapy at ATI PT. At the time of the hearing on April 20, 2020, the petitioner presented medical bills from ATI PT (Px4). The Arbitrator finds that the treatment rendered by the medical staff and was reasonable and necessary to treat Ms. Evans for the work-related injury she sustained on February 25, 2020. The Arbitrator also finds that since the Petitioner's condition of ill-being was causally related to her injury on February 25, 2020, the respondent is responsible for the aforementioned medical charges and that such charges were generated as a result of treatment that was reasonable and necessary as well as usual and customary. The Arbitrator finds that the related bills on Petitioner's Exhibit 4, totaling $13,492.14 are to be paid by Respondent according to the medical fee schedule.

On September 21, 2020, the Petitioner underwent an injection, performed by Dr. Lipov, wherein anesthesia was required. At the time of the hearing on April 20, 2022, the petitioner presented medical bills from Metro Anesthesia Consultants (Px7). The Arbitrator finds that injection prescribed by the Dr. Lipov was reasonable and necessary to treat Ms. Evans for the work-related injury she sustained on February 25, 2020 and that it was also already compensable as the law of the case following the June 16, 2020 hearing. The Arbitrator also finds that since the Petitioner's condition of ill-being was causally related to her injury on February 25, 2020, the respondent is responsible for the aforementioned medical charges and that such charges were generated as a result of treatment that was reasonable and necessary as well as usual and customary. The Arbitrator finds that the bills in Petitioner's Exhibit 7, totaling $2,715.44 are to be paid by Respondent according to the medical fee schedule.

Issue K, whether Petitioner is entitled to any prospective medical care, the Arbitrator finds as follows:

The Arbitrator adopts the above findings of fact and conclusions of law and incorporates them by reference as though fully set forth herein. The Arbitrator finds that Petitioner has not reached maximum medical improvement. Petitioner continues to require medical care to cure and relieve her from her low back related condition of ill-being.

Petitioner seeks prospective care consultation with a spine surgeon and the Functional Capacity Evaluation as recommended by Dr. Lipov. Respondent maintains that Petitioner failed to establish causation as to the need for these measures. The Arbitrator has previously found in Petitioner's favor on the issue of causation. With respect to the low back condition, the Arbitrator awards prospective care in the form of a consultation with a spine surgeon and the Functional Capacity Evaluation as recommended by Dr. Lipov, in addition to follow up appointments with Dr. Lipov. The records from Dr. Lipov as well as the Petitioner's credible testimony support that Petitioner's current low back condition is causally related, and that

additional treatment is still needed. (Px8). The Arbitrator finds that the respondent must authorize the remaining treatment, including follow-up appointments with Dr. Lipov.

Issue L, whether Petitioner is entitled to Temporary Total Disability benefits, the Arbitrator finds as follows:

A claimant is temporarily totally disabled from the time an injury incapacitates him from work until such time as he is as far recovered or restored as the permanent character of his injury will permit. *Westin Hotel v. Indus. Comm'n*, 372 Ill.App.3d 527, 542 (1st Dist. 2007). In determining whether a claimant remains entitled to receiving TTD benefits, the primary consideration is whether the claimant's condition has stabilized and whether she is capable of a return to the workforce. *Interstate Scaffolding, Inc. v. Illinois Workers' Comp. Comm'n*, 236 Ill.2d 132, 148 (2010). Once an injured employee's physical condition stabilizes, she is no longer eligible for TTD benefits. *Archer Daniels Midland Co. v. Indus. Comm'n*, 138 Ill.2d 107, 118 (1990).

The Arbitrator has already found that Petitioner sustained an accident that arose out of an in the course of Petitioner's employment, and that Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator awards temporary total disability benefits to Ms. Evans. The medical records show that Ms. Evans was kept off work by her treating physicians, including Dr. Lipov, from February 26, 2020 to the present (hearing on April 20, 2022). The Arbitrator finds that Ms. Evans is owed temporary total disability benefits from February 26, 2020 through April 20, 2022 for 111 6/7 weeks at a rate of $492.23 per week. As previously noted, Respondent is given a credit of $47,113.30 for TTD already paid.

It is so ordered:

Jacqueline C. Hickey

Jacqueline C. Hickey
Arbitrator

August 31, 2022
Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC023869
Case Name	Kimberly Reiniger v. City of Edwardsville
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0359
Number of Pages of Decision	12
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Thomas C Rich
Respondent Attorney	Andrew Keefe

DATE FILED: 8/16/2023

/s/Christopher Harris, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF JEFFERSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KIMBERLY REINIGER,

Petitioner,

vs. NO: 21 WC 23869

CITY OF EDWARDSVILLE,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed under Section 19(b) of the Act by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, prospective medical care and temporary total disability (TTD) benefits, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator which is attached hereto and made a part hereof. The Commission also remands this case to the Arbitrator for further proceedings and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Indus. Comm'n*, 78 Ill. 2d 327 (1980).

The Commission modifies the Arbitrator's award regarding prospective medical care. The Commission finds that Dr. Gornet performed the prescribed cervical spine surgery on June 29, 2022 and that no additional, specific prospective medical treatment has been prescribed for Petitioner since that surgery was performed. Accordingly, no award of prospective medical treatment is warranted. The Commission modifies the Arbitrator's award to include only the post-operative care and treatment attendant to the surgery of June 29, 2022.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 7, 2022 is hereby modified as stated and otherwise 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.

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

Under Section 19(f)(2) of the Act, no "county, city, town, township, incorporated village, school district, body politic, or municipal corporation" shall be required to file a bond. As such, Respondent is exempt from the bonding requirement. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in the Circuit Court.

August 16, 2023

CAH/pm
O: 8/10/23
052

/s/ *Christopher A. Harris*
Christopher A. Harris

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC023869
Case Name	Kimberly Reiniger v. City of Edwardsville
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	9
Decision Issued By	William Gallagher, Arbitrator

Petitioner Attorney	Thomas Rich
Respondent Attorney	Andrew Keefe

DATE FILED: 9/7/2022

/s/William Gallagher, Arbitrator

Signature

INTEREST RATE WEEK OF SEPTEMBER 7, 2022 3.32%

STATE OF ILLINOIS)
)SS.
COUNTY OF JEFFERSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Kimberly Reiniger
Employee/Petitioner

Case # 21 WC 23869

v.

Consolidated cases: n/a

City of Edwardsville
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Mt. Vernon, on July 27, 2022. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, August 12, 2021, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $86,081.57; the average weekly wage was $1,655.41.

On the date of accident, Petitioner was 36 years of age, married with 1 dependent child(ren).

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

Respondent shall be given a credit of $26,832.48 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $26,832.48.

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

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent be given a credit for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $1,103.61 per week for 26 3/7 weeks, commencing August 13, 2021, through January 17, 2022, and June 29, 2022, through July 27, 2022, as provided in Section 8(b) of the Act.

Respondent shall authorize and pay for prospective medical treatment including, but not limited to, post-operative treatment as recommended by Dr. Matthew Gornet.

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

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

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

William R. Gallagher, Arbitrator

September 7, 2022

ICArbDec19(b)

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged she sustained an accidental injury arising out of and in the course of her employment by Respondent on August 12, 2021. According to the Application, Petitioner sustained an injury to her "Neck/right elbow/right ring finger/body as a whole" as a result of a "Motor vehicle collision" (Arbitrator's Exhibit 2). This case was tried in a 19(b) proceeding and Petitioner sought an order for payment of medical bills and temporary total disability benefits as well as prospective medical treatment. Respondent stipulated Petitioner sustained a work-related accident, but disputed liability on the basis of causal relationship. Respondent also disputed the reasonableness and necessity of medical treatment provided by Dr. Matthew Gornet, specifically, disc replacement surgery (Arbitrator's Exhibit 4).

In regard to temporary total disability benefits, Petitioner claimed she was entitled to temporary total disability benefits of 26 3/7 weeks, commencing August 13, 2021, through January 17, 2022, and June 29, 2022, through July 27, 2022 (date of trial). Respondent stipulated Petitioner was entitled to temporary total disability benefits from August 13, 2021, through January 17, 2022, but disputed liability for temporary total disability benefits from June 29, 2022, through July 27, 2022 (date of trial). Respondent also claimed it had overpaid temporary total disability benefits in the amount of $2,079.62 and was entitled to a credit (Arbitrator's Exhibit 1).

Petitioner has worked for Respondent as a police officer for approximately nine years. On August 12, 2021, Petitioner was driving on patrol and her vehicle was struck in the rear end by another vehicle. As a result of the collision, Petitioner was knocked unconscious and she did not recall the details of her vehicle being struck. However, Petitioner testified she was operating her vehicle at approximately 20 miles per hour. She also testified that the black box recovered from the other vehicle recorded that it was traveling at approximately 62 miles per hour at the time of the collision.

EMS responded to the accident and, when they arrived, Petitioner was restrained in the driver’s seat with the side airbag deployed. Petitioner was taken to SLU Hospital (Petitioner's Exhibit 3).

Petitioner was seen in the ED of SLU Hospital on August 12, 2021. Petitioner could not remember the accident, but complained of neck and right elbow pain. Multiple CT scans were obtained of Petitioner's head, abdomen and spine. They were all negative for fractures and Petitioner was prescribed medication and directed to follow-up with her primary care physician (Petitioner's Exhibit 4).

On August 17, 2021, Petitioner was evaluated by Dr. Sophia Rostovtsava, her family physician. At that time, Petitioner complained of right sided neck pain, right elbow and right fourth finger bruises. Petitioner was wearing a hard cervical brace. Dr. Rostovtsava diagnosed Petitioner with a whiplash injury of the cervical spine and right elbow contusion. She prescribed medication and recommended physical therapy (Petitioner's Exhibit 5).

On August 19, 2021, Petitioner was seen at SLU Trauma Surgery Center. Petitioner continued to complain of neck pain especially with flexion of the neck. Petitioner was diagnosed with persistent cervicalgia, cervical pain with flexion and post-concussion headaches. Petitioner was

recommended to continue with medication and to undergo a cervical MRI scan (Petitioner's Exhibit 6).

On August 23, 2021, Petitioner began treatment at Multicare Specialists and was initially evaluated by Dr. Ashley Eavenson, a chiropractor. Dr. Eavenson opined Petitioner had a cervical disc protrusion. She noted Petitioner's MRI was scheduled for September 2, 2021, but wanted it moved up. She authorized Petitioner to remain off work (Petitioner's Exhibit 7).

Petitioner continued to be treated and Multicare Specialists and received physical therapy. The MRI was performed on August 24, 2021; however, as of August 31, 2021, the radiologist's report had not been received. Dr. Eavenson referred Petitioner to Dr. Matthew Gornet, an orthopedic surgeon (Petitioner's Exhibit 7).

The report of the MRI was prepared on September 1, 2021. According to the radiologist, it revealed bilateral foraminal protrusions at C5-C6, a left foraminal protrusion at C6-C7 and foraminal stenosis at both levels (Petitioner's Exhibit 8).

Dr. Gornet evaluated Petitioner on September 10, 2021. At that time, Petitioner informed Dr. Gornet of the accident of August 12, 2021. Petitioner complained primarily of neck pain, more on the left than right. On examination, Dr. Gornet noted there was a decreased range of motion of the neck with flexion/extension increasing her symptoms. Dr. Gornet reviewed the MRI and opined it revealed protrusions at C3-C4, C4-C5, C5-C6 and C6-C7, with a protrusion being predominate on the left at C5-C6 and C6-C7. Dr. Gornet diagnosed Petitioner with a disc injury at C5-C6 and C6-C7 and, to a lesser extent, at C4-C5. He recommended Petitioner continue physical therapy and undergo a single injection at C5-C6 (Petitioner's Exhibit 9).

Petitioner continued to receive physical therapy at Multicare Specialists, but she continued to have symptoms. When Petitioner was seen by Dr. Gornet on October 25, 2021, he recommended she undergo a single steroid injection at C5-C6. If her symptoms did not improve, then consideration should be given to Petitioner undergoing disc replacement surgery at C5-C6 and C6-C7 (Petitioner's Exhibit 9).

Petitioner was seen by Dr. Helen Blake on November 30, 2021. At that time, Dr. Blake administered an epidural steroid injection on the right at C5-C6 (Petitioner's Exhibit 10).

At the direction of Respondent, Petitioner was examined by Dr. Michael Chabot, a spine surgeon, on December 3, 2021. In connection with his examination of Petitioner, Dr. Chabot reviewed medical records and diagnostic studies provided to him by Respondent. At that time, Petitioner complained of right sided neck pain. Dr. Chabot reviewed the MRI and opined it revealed mild disc bulges at C5-C6 and C6-C7. He recommended Petitioner begin a work conditioning program to regain strength/endurance and opined Petitioner could return to work with a 35 pound lifting restriction (Respondent's Exhibit 1; Deposition Exhibit 2).

Dr. Gornet again saw Petitioner on January 31, 2022. At that time, Dr. Gornet reviewed Dr. Chabot's report of December 3, 2021. He agreed with Dr. Chabot's recommendation that Petitioner

undergo work conditioning and referred Petitioner to Multicare Specialists for same (Petitioner's Exhibit 9).

Petitioner started work conditioning at Multicare Specialists on February 9, 2022, which she continued through March 17, 2022. At the time of her last visit, Petitioner complained of neck and right trapezius/scapular pain (Petitioner's Exhibit 7).

When Petitioner was evaluated by Dr. Gornet on April 18, 2022, Petitioner continued to complain of neck and bilateral trapezius pain, right more than left. Dr. Gornet opined that, because Petitioner had tried and failed with conservative measures, she should proceed with disc replacement surgery at C5-C6 and C6-C7 (Petitioner's Exhibit 9).

At the direction of Respondent, Petitioner was examined for the second time by Dr. Chabot on May 19, 2022. In connection with his examination of Petitioner, Dr. Chabot reviewed up-to-date medical records and diagnostic studies provided to him by Respondent. Petitioner complained of neck pain which did not radiate into the upper extremities, but worsened with lifting and more vigorous activities. Dr. Chabot affirmed his prior diagnosis of neck strain; however, he opined Petitioner might need additional treatment and recommended Petitioner undergo facet injections at C5-C6 and C6-C7 to see if they would relieve her symptoms. If the facet injections provided relief to Petitioner, he stated Petitioner might be a candidate for radiofrequency ablations. He opined Petitioner was not a surgical candidate and stated he would return her to work without restrictions (Respondent's Exhibit 1; Deposition Exhibit 3).

Petitioner was again seen by Dr. Gornet on June 6, 2022. Petitioner continued to complain of left sided neck and left trapezius pain. Dr. Gornet reaffirmed his prior recommendation Petitioner undergo disc replacement surgery at C5-C6 and C6-C7 (Petitioner's Exhibit 9).

On June 29, 2022, Dr. Gornet performed surgery on Petitioner's cervical spine. The procedure consisted of disc replacements at C5-C6 and C6-C7. At the time of surgery, an intraoperative video was obtained which revealed a left sided tear at C5-C6 and a large central tear at C6-C7 (Petitioner's Exhibit 13).

Allyson Joggerst, a Physician Assistant associated with Dr. Gornet, saw Petitioner following surgery on July 11, 2022. Petitioner advised her symptoms had improved, but Petitioner was careful when lifting anything heavy. Dr. Gornet was to see Petitioner in several weeks time (Petitioner's Exhibit 9).

Dr. Chabot was deposed on June 24, 2022, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Chabot's testimony was consistent with his medical reports and he reaffirmed the opinions contained therein. Specifically, Dr. Chabot testified Petitioner sustained a neck strain as a result of the accident and Petitioner had no radicular findings on examination. In regard to the MRI scan, Dr. Chabot testified he did not agree with the interpretation by the radiologist and it revealed no neural compressions (Respondent's Exhibit 1; pp 13-14).
Dr. Chabot testified there was essentially no change in the examination findings when he compared the two examinations of Petitioner. As of his most recent examination of Petitioner, he opined she could return to work without restrictions, but that facet injections at C5-C6 and C6-C7 could be

performed to see if that gave Petitioner any relief from her symptoms. If they did provide relief, Dr. Chabot testified Petitioner could benefit by undergoing radiofrequency ablations. He also testified that no surgery, including the disc replacement surgery recommended by Dr. Gornet, was medically reasonable (Respondent's Exhibit 1; pp 22-24).

On cross-examination, Dr. Chabot reaffirmed his opinion that he disagreed with the radiologist's interpretation of the MRI, as well as that of Dr. Gornet. He acknowledged Petitioner remained symptomatic when he last saw her on May 19, 2022. While he opined Petitioner could return to work without restrictions, he also recommended Petitioner have further treatment including facet injections and possible radiofrequency ablations (Respondent's Exhibit 1; pp 32-34).

Dr. Gornet was deposed on July 26, 2022, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Gornet's testimony was consistent with his medical records and he reaffirmed the opinions contained therein. Specifically, Dr. Gornet testified the MRI revealed disc injuries at C5-C6 and C6-C7 and, to a lesser extent, at C4-C5. Dr. Gornet attempted to treat Petitioner with conservative care, but when it failed, he recommended Petitioner undergo disc replacement surgery at C5-C6 and C6-C7 (Petitioner's Exhibit 14; pp 6-9).

Dr. Gornet testified he performed the disc replacement surgery on June 29, 2022. Dr. Gornet obtained and intraoperative video which confirmed the disc injuries at C5-C6 and C6-C7, in particular a left sided tear at C5-C6 and a large central tear at C6-C7. He testified the preceding was consistent with Petitioner's MRI scan (Petitioner's Exhibit 14; pp 9-10).

Dr. Gornet testified Petitioner had done well following surgery and would likely begin physical therapy at three months and, at four and one-half months, return to work without restrictions. He testified the condition for which he treated Petitioner was related to the accident of August 12, 2021 (Petitioner's Exhibit 14; pp 10-11).

When questioned about Dr. Chabot's opinions, he testified Petitioner had sustained more than just mild disc bulges. He said there was structural injury to the discs which he visualized and recorded (Petitioner's Exhibit 14; pp 12-13).

On cross-examination, Dr. Gornet agreed Petitioner did not have radicular symptoms on examination. However, Dr. Gornet testified that the absence of radicular symptoms is not a contraindication for surgery. Dr. Gornet noted Petitioner had symptoms in both sides of her neck and trapezius. Pathologically, Dr. Gornet stated the disc injuries were more severe on the left than right, but Petitioner consistently complained of some symptoms to both the left and right (Petitioner's Exhibit 14; pp 18-19, 37-38).

At trial, Petitioner testified the conservative treatment she received has helped her regain strength, but she still continues to experience pain in her neck with movement. Petitioner continues to wear a neck brace and only removes it when she takes a shower. Petitioner said that she has been doing well since surgery, but is still being treated by Dr. Gornet. She has not been released to return to work.

Conclusions of Law

In regard to disputed issue (F) the Arbitrator notes the following conclusion of law:

The Arbitrator concludes Petitioner's current condition of ill-being is causally related to the accident of August 12, 2021.

In support of this conclusion the Arbitrator notes following:

There was no dispute Petitioner sustained a work-related injury to her neck/cervical spine on August 12, 2021, as a result of a motor vehicle accident.

Petitioner received a significant amount of conservative treatment including medication, physical therapy and injections, but continued to have neck/cervical spine symptoms.

An MRI was performed on Petitioner's cervical spine on September 1, 2021. According to both the radiologist who performed the MRI and Dr. Gornet, Petitioner's primary treating physician, the MRI revealed disc pathology primarily at C5-C6 and C6C7.

Respondent's Section 12 examiner, Dr. Chabot, also reviewed the MRI and opined it revealed mild disc bulges at C5-C6 and C6-C7.

Dr. Gornet performed disc replacement surgery at C5-C6 and C6-C7 on June 29, 2022. When he did so, he obtained an intraoperative video of the procedure which revealed a left sided tear at C5-C6 and a large central tear at C6-C7.

According to Dr. Gornet, Petitioner consistently had both right and left sided symptoms.

At the time of trial, Petitioner was recovering from the surgery, but testified her symptoms had improved.

Based on the preceding, the Arbitrator finds the opinions of the radiologist who reviewed the MRI and Dr. Gornet to be more persuasive than that of Dr. Chabot in regard the pathology at the two disc levels.

Dr. Gornet opined there was disc pathology at C5-C6 and C6-C7 which he attributed to the accident of August 12, 2021.

Based on the preceding, the Arbitrator finds the opinion of Dr. Gornet to be more persuasive than that of Dr. Chabot in regard to causality.

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

Based upon the Arbitrator's conclusion of law in disputed issue (F), the Arbitrator concludes that all of the medical treatment provided to Petitioner was reasonable and necessary and Respondent is liable for payment of the medical bills incurred therewith.

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall receive a credit for amounts paid for medical benefits that have been paid and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

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

Based upon the Arbitrator's conclusion of law in disputed issue (F), the Arbitrator concludes Petitioner is entitled to prospective medical treatment including, but not limited to, post-operative treatment as recommended by Dr. Gornet.

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

Based upon the Arbitrator's conclusion of law in disputed issue (F) the Arbitrator concludes Petitioner is entitled to temporary total disability benefits of 26 3/7 weeks, commencing August 13, 2021, through January 17, 2022, and June 29, 2022, through July 27, 2022.

William R. Gallagher, Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC017697
Case Name	Rita Conrad v. Community Care Services
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0360
Number of Pages of Decision	16
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Gary Stokes
Respondent Attorney	Kenneth Bima

DATE FILED: 8/16/2023

/s/Christopher Harris, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF CHAMPAIGN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RITA CONRAD,

Petitioner,

vs. NO: 20 WC 17697

COMMUNITY CARE SYSTEMS,

Respondent.

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, benefit rates, causal connection, medical expenses, temporary total disability (TTD) benefits and permanent partial disability (PPD) benefits, 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 September 6, 2022 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 the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in the Circuit Court.

August 16, 2023

CAH/pm
O: 8/10/23
052

/s/ *Christopher A. Harris*
Christopher A. Harris

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC017697
Case Name	Rita Conrad v. Community Care Services
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	13
Decision Issued By	Edward Lee, Arbitrator

Petitioner Attorney	Gary Stokes
Respondent Attorney	Kenneth Bima

DATE FILED: 9/6/2022

THE INTEREST RATE FOR THE WEEK OF AUGUST 30, 2022 3.23%

/s/Edward Lee, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF **CHAMPAIGN**)

☐ 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

RITA CONRAD
Employee/Petitioner
v.
COMMUNITY CARE SYSTEMS
Employer/Respondent

Case # **20** WC **017697**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **EDWARD LEE**, Arbitrator of the Commission, in the city of **Champaign**, on **July 19, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **09/27/2019**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**27,318.72**; the average weekly wage was $**525.36**.

On the date of accident, Petitioner was **59** years of age, ***single*** with **0** dependent children.

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

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

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

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

ORDER

Medical benefits

Respondent shall pay reasonable and necessary medical charges, pursuant to the medical fee schedule, for those services of OSF Physicians (PX13), OSF Health (PX14), American Anesthesiology (PX15), East Central Radiology (PX16) and Christie Clinic Pathology (PX17) as provided in sections 8(a) and 8.2 of the Act.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $350.24/week for 21 weeks, commencing 08/10/2020 through 01/03/2021, as provided in Section 8(b) of the Act.

Permanent Partial Disability: Person as a whole

Respondent shall pay Petitioner permanent partial disability benefits of $315.22/week for 90 weeks, because the injuries sustained caused a 18% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

SEPTEMBER 6, 2022

Edward Lee
Signature of Arbitrator

Conrad v. Community Care Systems
20 WC 017697
Arbitrator Lee

STATEMENT OF FACTS

Petitioner began her employment with Respondent in July 2017 as a home healthcare worker and has been employed in the field for approximately 35 years. In her position as a home health worker, Petitioner was assigned by Respondent to various elderly and disabled clients to assist them in their homes with various things such as house cleaning, including sweeping, mopping, dusting, vacuuming, dishes, etc. Petitioner would also drive the individuals to pharmacies, doctor visits, grocery shopping, etc.

Each client had specific days and times that Petitioner would be present to assist in the various activities. In September 2017, one of Petitioner's clients was Wanda Clark. Petitioner attended to Ms. Clark's needs on Monday, Wednesday, and Friday mornings. Petitioner also assisted Mr. William Brackney on Tuesdays, Wednesdays, and Thursdays.

On Friday morning, September 27, 2019, Petitioner was accompanying Ms. Clark to the grocery store and had driven her to the Danville Walmart. Petitioner pulled up to the handicap area, secured an electric scooter for Ms. Clark and then proceeded to the parking lot while Ms. Clark entered the store.

After parking the car, Petitioner entered the Walmart. Petitioner noticed that her shoe had come untied, and she stopped and propped her foot up onto a concrete ledge just inside the store entrance (PX10). While bent over tying her shoe, Petitioner was struck on the right side of her body by a line of shopping carts that a Walmart employee was pushing into the area. Petitioner was knocked onto the concrete floor, landing on her entire left side with her left arm outstretched and above her head.

Walmart employees quickly came to Petitioner's aid and helped her up from the floor. Petitioner was asked if she was okay. Petitioner recalls being embarrassed and flushed and just wanted to get out of the area. Petitioner and Ms. Clark remained in the store for approximately two hours. Petitioner called her employer to report the accident after leaving the store.

That afternoon, Petitioner was helping another client and she began noticing the left arm and shoulder tightening and beginning to burn. Petitioner completed her day and returned home. By that evening, Petitioner's left arm and shoulder began hurting badly and she used ice and heat

to treat the pain.

The pain failed to improve over the weekend and on Monday morning Petitioner advised her client, Ms. Clark, that her left arm and shoulder were hurting badly, and she would not be able to complete all of the normal cleaning duties. On the following day, Tuesday, Petitioner went to Mr. Brackney's residence. Mr. Brackney immediately noticed Petitioner was in significant pain (PX19, p.7). Petitioner related the events of the previous Friday and Mr. Brackney insisted she refrain from all of her cleaning duties and simply drive him around for his errands (PX19, p. 8).

Petitioner testified that she refrained from going to the doctor because she was single and could not afford to miss any work. Petitioner hoped that the left arm and shoulder would improve on its own if she babied it. However, after the left arm and shoulder pain failed to improve, Petitioner relented and presented herself to Urgent Care on December 5, 2019. The history of injury given that day is perfectly consistent with and corroborates Petitioner's testimony surrounding the events of September 27, 2019.

Petitioner was referred to her primary care physician, Dr. Allanah, who she saw on December 12, 2019. The identical history is once again recorded, and Dr. Allanah ordered a left shoulder MRI (PX3). The Pandemic delayed that procedure for approximately six months. The left shoulder MRI was finally conducted on June 9, 2020, and reported a full thickness tear in Petitioner's left rotator cuff (PX4). Petitioner was immediately referred to an orthopedic surgeon, Dr. Eubanks. Dr. Eubanks performed shoulder surgery on August 13, 2020 (PX7).

Petitioner was restricted from work from August 10, 2020, through her return to work on January 4, 2021. Petitioner was released from care by Dr. Eubanks on October 22, 2021. Petitioner has seen no physician for complaints relative to the left arm and shoulder since that time.

FINDINGS

In support of the Arbitrator's decision relating to: **(F) Is the petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds the following facts:**

The Arbitrator finds the Petitioner to be very credible and her testimony wholly corroborated by the Walmart security video (PX11), the medical records and the witness

testimony of her client, Mr. Brackney (PX19). It is undisputed that Petitioner was struck and did fall onto her left side on September 27, 2019. Though her initial complaint to the employer approximately three hours after the accident reported complaints of finger pain only, Petitioner testified that later that day she began experiencing stiffness and pain in the left arm and shoulder that worsened that evening and over the weekend.

Though Ms. Clark's whereabouts are unknown due to deteriorating health and a move from the area, Mr. Brackney corroborated Petitioner's painful condition just four days post-injury. Petitioner's histories of injury conveyed to the Urgent Care physicians as well as her primary care physician a few days later have all been perfectly consistent with her trial testimony. There is no history of injury other than that of September 27, 2019, and there is a total absence of any history of left arm and shoulder complaints prior to September 27, 2019. Indeed, Petitioner testified that she has never experienced any issues of any kind with her left arm and shoulder prior to September 27, 2019.

The testimony of Petitioner's treating surgeon, Dr. Eubanks, further supports the causal connection between the injury sustained on September 27, 2019, and the full thickness tears in the supraspinatus and infraspinatus of Petitioner's left rotator cuff (PX18, p. 20). Though Dr. Eubanks' initial office note suggests a history of left shoulder pain of only two and one-half months duration, Dr. Eubanks confessed that his office note was either erroneous or should have stated a worsening over the last two and one-half months (PX18, p. 8). Either way, according to Dr. Eubanks, the medical records clearly report a history of injury in September 2019, and there is no record of resolution of problems subsequent thereto (PX18, p. 8). Dr. Eubanks testified that the fall was "the inciting" event which directly led to her development of the tears and her subsequent need for treatment (PX18, p. 20).

Respondent introduced a short-term disability application signed by Dr. Eubanks that

checked a box indicating the injury was not work-related (RX3). Dr. Eubanks testified that he signs 100 forms a day and this would have been a blank document that was completed later by someone on his staff. Dr. Eubanks does not check the forms for accuracy (PX18, p. 29). Petitioner testified that with the exception of her name and address, she did not complete the form, had not seen the completed form until the day of trial and did not know who filled it out. Without evidence of precisely who completed the forms and where the information came from, the Arbitrator finds the short-term disability forms to be of no probative value.

Respondent's IME, Dr. Paletta, initially opined that Petitioner did not suffer an acute tear of the rotator cuff on September 27, 2019, because she did not "immediately" experience pain in the arm and shoulder (RX1, pp. 17-18). However, on cross-examination, Respondent's physician admitted that Petitioner may have had a pre-existing rotator cuff tear that was aggravated in the accidental fall on September 27, 2019. Individuals with pre-existing tears do not experience as much pain initially (RX1, p. 32), and if there was corroborating evidence that Petitioner was suffering from left shoulder pain and an inability to lift her arm just four days after the incident, that could change his original opinion of no causal connection (RX1, p 37).

The Arbitrator finds the opinions of Dr. Eubanks more persuasive than those of Dr. Paletta on the issue of causal connection. The corroborating evidence further supports Dr. Eubanks' testimony. It is more probably true than not true that on September 27, 2019, Petitioner either tore the rotator cuff in her left shoulder or aggravated a previously asymptomatic degenerative tear that led directly to the painful symptoms Petitioner complained of thereafter. The tear was clearly evident in the MRI of June 2020 and further verified in the operative findings of Dr. Eubanks' August 2020 surgery.

In support of the Arbitrator's decision relating to: **(G) What were Petitioner's earnings, the Arbitrator finds the following facts:**

The parties are disputing average weekly wage. Petitioner testified that in the 52-week period preceding her date of accident, she earned at least $13.25 per hour and worked an average of 40 hours per week for each week worked, which would equal $530.00 per week. Petitioner testified, however, that in the prior 52 weeks, she would have had less than forty hours per week in five or six of those weeks due to scheduling conflicts, clients in the hospital, etc. However, in those weeks, Petitioner testified that she would still have worked at least 37 hours per week.

Subtracting 18 hours (six weeks times three hours per week) from 2080 hours (52 weeks at 40 hours per week), yields 2062 hours. 2062 hours divided by 52 weeks equals 39.65 hours per week. Multiplying 39.65 hours per week times $13.25 per hour yields an average weekly wage of $525.36 per week.

Respondent submitted a document entitled "payroll check history" (RX5). Respondent presented no foundation witness or evidence of any kind explaining the numbers contained therein. Dividing the alleged gross earnings every two weeks by the hours worked yields a completely different payrate every two weeks, a highly unlikely scenario for an hourly employee. Petitioner testified that when she commenced working for Respondent in 2017, her hourly pay was $12.25 per hour. Respondent's Exhibit 5 seems to report hourly rates as low as $11.33 per hour in some pay periods.

Columns entitled "training hours" and "miscellaneous" are not defined. Nor is there any data reflecting normal payroll deductions or exactly what "net pay" was or how it was calculated. Petitioner noted her disagreement with the wage records at the time they were offered but refrained from making a foundation objection to their admission for what they are worth.

Respondent also presented testimony that Petitioner resigned her employment with Respondent for a very brief period of time in calendar year 2019. The Arbitrator finds this evidence to be irrelevant to the calculation of average weekly wage. Section 10 of the Act requires that "actual earnings" of the employee in the prior 52-week period is to be divided by "the number of weeks and parts thereof remaining after the time so lost has been deducted" (820 ILCS 305/10). The Act makes no distinction on how or why the "lost" time occurred, be it vacation, illness, discipline or resignation.

The Arbitrator finds Petitioner's testimony to be more credible than the unexplained documents presented by Respondent. The Arbitrator finds Petitioner's average weekly wage to be $525.36.

In support of the Arbitrator's decision relating to: **(J) Were the medical services that were provided to petitioner reasonable and necessary, the Arbitrator finds the following facts:**

Respondent disputes the itemized medical bills contained in Petitioner's exhibits 13-17 on the basis of liability only. Respondent's expert, Dr. Paletta, agreed that all of the medical treatment received by Petitioner was indeed reasonable and necessary for the conditions she suffered in the left arm and shoulder (RX1, p. 25). The medical bills are awarded subject to the applicable fee schedule.

In support of the Arbitrator's decision relating to: **(K) What amount of compensation is due for temporary total disability, the Arbitrator finds the following facts:**

The Petitioner testified that she was restricted from all work effective August 10, 2020, prior to her surgery of August 13, 2020, and that she remained restricted from work through January 3, 2021. Dr. Eubanks confirmed (PX18, p. 12). Respondent offered no evidence to the contrary. Petitioner was temporarily totally disabled for a period of 21 weeks.

In support of the Arbitrator's decision relating to: **(L) What is the nature and extent of the injury, the Arbitrator finds the following facts:**

Section 8.1b(b)(i)

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

Section 8.1b(b)(ii)

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator finds that Petitioner has been employed in the home healthcare field for 35 years and was so employed on September 27, 2019. Petitioner has testified that she was able to return to her job effective January 2021 and was able to satisfactorily perform her duties, albeit with difficulty, since that time. Though Petitioner was unemployed at the time of hearing, she credibly testified that she has obtained new employment in a nursing home back in her home state of Alabama. Petitioner testified that she will be starting that employment upon her return home.

It is evident, based upon Petitioner's testimony, that her duties in the healthcare field are quite physical and require the use of both arms. Petitioner testified that if her condition should worsen and she would be unable to continue in healthcare, she would be physically unable to perform any of the previous jobs that she performed prior to entering the healthcare field. Considering the very physical nature of Petitioner's occupation, the Arbitrator gives moderate weight to this factor.

Section 8.1b(b)(iii)

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 59 years of age at the time of injury. In light of Petitioner's advanced age, the Arbitrator gives little

weight to this factor.

Section 8.1b(b)(iv)

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator finds that, again, Petitioner credibly testified that her future earnings as a healthcare worker in Alabama, though somewhat less than her earnings for Respondent, are certainly comparable. It thus appears, that in the absence of a worsening of her left shoulder condition that would prevent her from performing the physical requirements of a healthcare worker, Petitioner will sustain little to no lost future earnings. The Arbitrator, consequently, gives little weight to this factor.

Section 8.1b(b)(v)

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator finds that Petitioner now suffers from considerable disability with her left arm and shoulder that is corroborated by the medical record and history of surgery and post-operative complications. It is evident that, according to both Petitioner's treating surgeon and Respondent's examining physician, Petitioner has a significant permanent disability as a consequence of the injuries suffered in this claim.

Dr. Eubanks has testified that there is post-operative MRI evidence of a persisting full thickness tear of the supraspinatus and infraspinatus measuring approximately 8 millimeters in size in Petitioner's left shoulder (PX18, p. 15). According to Dr. Eubanks, the condition in Petitioner's left shoulder will likely decline over time and will require further care at a future date, including a possible total shoulder replacement (PX18, p. 17).

Respondent's examining physician diagnosed Petitioner with adhesive capsulitis or frozen shoulder which was a direct result of her surgery and rotator cuff repair (RX1, p. 23). Dr.

Paletta also felt that additional medical intervention, including possible surgery, would be appropriate and Petitioner was not capable of returning to work full duty (RX1, p. 24).

Petitioner's testimony is consistent with the testimony of both physicians. Petitioner testified that she is limited in her ability to reach up or behind with the left arm and shoulder. Even simple daily activities like washing her hair or placing a hairclip is compromised by the pain and limited range of motion she now has in the left arm and shoulder. Activities performed below chest level, like dusting, sweeping and even folding clothes can be performed for short periods of time due to increased pain.

Because the extent of disability evident in the medical record, and illustrated by Petitioner's testimony is significant, the Arbitrator gives great weight to this factor.

Based on all of the above factors and the record taken as a whole, the Arbitrator finds that Petitioner has sustained permanent partial disability to the extent of 18% loss of use of the person as a whole pursuant to §8(d)2 of the Act.

In support of the Arbitrator's decision relating to: **(N) Is the Respondent due any credit, the Arbitrator finds the following facts:**

Though the parties appear to have inadvertently failed to include credit as an issue on the stipulation sheets, it is well established that the Arbitrator is not bound by the parties' stipulations or failure to stipulate. *Lusietto v. Industrial Commission*, 174 Ill. App 3d, 121 (1988). The unrebutted evidence presented at trial is that Petitioner, and Petitioner alone, paid the premiums for the short-term disability insurance that she received during her period of temporary total disability. According to Petitioner, the premiums for the short-term disability insurance were withheld from her paycheck every two weeks prior to injury. Respondent neither objected to the testimony nor offered any evidence in rebuttal.

The Collateral Source Rule has long been recognized by the Commission with regard to short-term disability payments. Respondent is entitled to no credit.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC033477
Case Name	David W. Buhrmester v. Lake Forest Country Day School
Consolidated Cases	19WC033481;
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0361
Number of Pages of Decision	13
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Craig Linn
Respondent Attorney	Micaela Cassidy

DATE FILED: 8/16/2023

/s/ Deborah Simpson, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

David W. Buhrmester,
Petitioner,

vs. NO: 19 WC 33477

Lake Forest Country Day School,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 1, 2022, 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 the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

August 16, 2023

o8/9/23
DLS/rm
046

/s/*Deborah L. Simpson*
Deborah L. Simpson

/s/*Stephen J. Mathis*
Stephen J. Mathis

/s/*Deborah J. Baker*
Deborah J. Baker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC033477
Case Name	David W. Buhrmester v. Lake Forest Country Day School
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	11
Decision Issued By	Michael Glaub, Arbitrator

Petitioner Attorney	Craig Linn
Respondent Attorney	Micaela Cassidy

DATE FILED: 12/1/2022

THE INTEREST RATE FOR THE WEEK OF NOVEMBER 29, 2022 4.55%

/s/Michael Glaub, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF **Lake**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

David W. Buhrmester
Employee/Petitioner

v.

Lake Forest Country Day School
Employer/Respondent

Case # **19** WC **33477**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Michael Glaub**, Arbitrator of the Commission, in the city of **Waukegan**, on **9/19/22**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **1/18/19**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**97,640.92**; the average weekly wage was $**1,877.71**.

On the date of accident, Petitioner was **57** years of age, ***married*** with **0** dependent children.

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

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

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

Respondent is entitled to a credit of $**38,806.02** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner the sum of **$813.87** per week for a further period of **105.10** weeks, as provided in Section 8(e) of the Act, as the injuries sustained caused the 45% loss of use of the Petitioner's left leg (96.75 Weeks) and the 5% loss of use of the left foot (8.35 Weeks). See Arbitration Decision rendered in case #19WC33481 for permanence award regarding right leg, right shoulder, and right ankle.

Respondent is liable for the reasonable and necessary medical expenses as detailed in Petitioner's Exhibits 2 through 5, including for the total amount paid by the Respondent's group insurance carrier of $38,806.02 and the total unpaid balances of $6,467.00 as provided in Section 8(a) of the Act, subject to the fee schedule of Section 8.2 of the Act. Respondent is entitled to a credit of $38,806.02 under section 8(j) of the Act. Respondent shall pay to the Petitioner the reasonable and necessary out of pocket medical expenses of $1,336.20 as provided in Section 8(a) 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.

DECEMBER 1, 2022

Michael Glaub
Signature of Arbitrator

ARBITRATION DECISION

DAVID W. BUHRMESTER V. LAKE FOREST COUNTRY DAY SCHOOL

19 WC 33477 & 19 WC 33481

FINDINGS OF FACT:

The 57 year old Petitioner was employed by the Respondent as the director of facilities at Lake Forest Country Day School. He began his employment with the Respondent in March of 2018. His job duties involved overseeing the day to day operations of facility related matters at the school, including performing repairs and maintenance involving plumbing and electrical systems; the job was necessarily physical in nature. The Petitioner is right hand dominant.

The Petitioner sustained undisputed injury to his right shoulder, right knee and right ankle on October 25, 2018. He was standing on a countertop working on water leak when water sprayed out from a pipe and knocked him to the floor, landing on his right side. He felt immediate pain in his right shoulder, right knee and right ankle and notified his supervisor, Chris Harper.

The Petitioner testified that he had undergone a meniscal repair in his right knee in 2010 and an injection in his right knee in 2015; he had been working full duty for the Respondent with no right knee issues prior to the date of accident on October 25, 2018 (Tr. Trans P. 11-12).

Following the accident, the Petitioner sought treatment the same day at Northwestern Lake Forest Hospital. The medical record from that visit notes that the Petitioner fell 5 feet from a countertop and sustained injury to his right knee, right ankle, and right shoulder. X-Rays performed at the hospital revealed a right lateral malleolar fracture of the ankle with mild displacement. He was also diagnosed with right knee internal derangement and a possible right shoulder rotator cuff injury. The Petitioner was referred to Dr. Pavlatos for orthopedic followup (PX 6).

The Petitioner saw Dr. Pavlatos the next day, October 26, 2018. Dr. Pavlatos' record reflected that the Petitioner sustained injury to his right shoulder, right knee, and right ankle following a fall at work. Dr. Pavlatos prescribed MRIs for the Petitioner's right shoulder and right knee and referred the Petitioner to Dr. Vora for his right ankle fracture (PX 8).

The Petitioner saw Dr. Vora on October 29, 2018. Dr. Vora prescribed a CAM walker boot for the right ankle fracture and recommended conservative care (PX 8).

The Petitioner underwent MRIs of the right knee and right shoulder on October 30, 2018. The MRI of the right knee revealed tears of the medial and lateral menisci along with a full thickness ACL tear, fractures of the medial and lateral tibial plateaus, and MCL and LCL

sprains. The MRI of the right shoulder revealed tears of the supraspinatus and infraspinatus of the rotator cuff and tears of the labrum. Dr. Pavlatos recommended surgical repair of the Petitioner's right knee and conservative treatment for the right shoulder including a cortisone shot and physical therapy (PX 8).

The Petitioner followed up with Dr. Vora for his right ankle on December 10, 2018. Dr. Vora advised the Petitioner to transition out of the CAM walker boot and to undergo a course of physical therapy (PX 8).

Dr. Pavlatos performed corrective surgery on the Petitioner's right knee on December 28, 2018. The operative report detailed the following (PX 8).

> Post-Operative Diagnosis: ACL deficient right knee with medial and lateral meniscus tears and chondromalacia.
>
> Procedure: Right knee arthroscopy, partial medial meniscectomy, partial lateral meniscectomy, debridement of the ACL stump and chondroplasty of the medial and lateral compartments.

The Petitioner followed up with Dr. Pavlatos for post-surgical consult on January 4, 2019. Dr. Pavlatos advised the Petitioner to continue strengthening; he allowed the Petitioner to work light duty with the Respondent (PX 8).

While back on light duty, the Petitioner sustained a second undisputed work accident on January 18, 2019. He was walking from the school building to his work truck in the employee only parking lot to obtain tools when he slipped and fell on black ice in the parking lot. The Petitioner testified that he felt a crack in his left knee upon falling to the ground. He immediately notified his supervisor, Chris Harper, and sought treatment the same day at Northwestern Lake Forest Hospital (Tr. Trans. P. 15).

The medical record from the hospital states that the Petitioner slipped and fell on black ice at work, causing his knees to be in a contorted position and pain in both his left knee and right knee. The Petitioner was given a knee immobilizer for his right knee and advised to follow up with Dr. Pavlatos for further treatment (PX 7).

The Petitioner returned to Dr. Pavlatos on January 21, 2019. Dr. Pavlatos office note reflects that the Petitioner slipped and fell on black ice at work and injured both of his knees. Dr. Pavlatos prescribed MRIs of both knee (PX 8).

Following the MRIs, the Petitioner saw Dr. Pavlatos on January 29, 2019. Dr. Pavlatos stated that the Petitioner's right knee MRI revealed a tibial avulsion fracture of the PCL which could be treated conservatively, and that the Petitioner's left knee MRI revealed a significant tear of the medial meniscus from the work-related injury. Dr. Pavlatos prescribed surgery on the Petitioner's left knee. (PX 8).

Dr. Pavlatos performed corrective surgery on the Petitioner's left knee on February 6, 2019. The operative report detailed the following (PX 8):

> Post-Operative Diagnosis: Medial meniscal tear of the left knee with some chondromalacia.
>
> Procedure: Left knee arthroscopy with partial medial meniscectomy and chondroplasty.

The Petitioner followed up with Dr. Pavlatos on March 1, 2019. Dr. Pavlatos noted that the Petitioner was experiencing persistent synovitis in the left knee and administered a cortisone injection. Dr. Pavlatos advised the Petitioner to continue his strengthening program for both knees; he allowed the Petitioner to continue working light duty (PX 8).

The Petitioner returned to see Dr. Vora for his right ankle on March 18, 2019. Dr. Vora reviewed x-rays performed that day which revealed appropriate healing of the fracture and released the Petitioner to full duty with respect to the right ankle (PX 8).

The Petitioner's next follow up appointment with Dr. Pavlatos took place on May 7, 2019. Dr. Pavlatos noted that the Petitioner was continuing to experience symptoms in his right knee including instability with daily activities. Dr. Pavlatos prescribed a second corrective surgery on the Petitioner's right knee, which he performed on June 18, 2019. The operative report detailed the following (PX 8):

> Post-Operative Diagnosis: ACL tear of the right knee with chondromalacia
>
> Procedure: Right knee arthroscopy, ACL reconstruction with posterior tibial tendon allograft.

The Petitioner followed up with Dr. Pavlatos on July 23, 2019. Dr. Pavlatos noted the Petitioner had some erythema around the right knee surgical incision and prescribed a course of Duricef to resolve the issue. He advised the Petitioner to continue physical therapy; the Petitioner continued to work light duty (PX 8).

The Petitioner next saw Dr. Pavlatos on September 6, 2019. Dr. Pavlatos felt that the Petitioner's right knee was doing well following the second surgery but stated that the Petitioner was experiencing ongoing pain in the left knee. He gave the Petitioner a cortisone injection in the left knee (PX 8).

The Petitioner followed up with Dr. Pavlatos on October 4, 2019. Dr. Pavlatos noted that the Petitioner only felt brief relief in the left knee following the cortisone injection. Dr. Pavlatos stated that the Petitioner did have arthritis in the left knee and that his work related accident resulted in a meniscal tear which "accelerated the arthritic process" Dr. Pavlatos advised the Petitioner that as a result he may require a left knee replacement. Dr. Pavlatos prescribed a Monovisc injection to the left knee which was administered on October 23, 2019 (PX 8).

The Petitioner returned to Dr. Pavlatos on January 8, 2020. Dr. Pavlatos stated that the Petitioner's rehabilitation for the right knee had gone well and the Petitioner was doing well with the right knee. For the left knee, Dr. Pavlatos noted that the Petitioner was continuing to experience pain and swelling; Dr. Pavlatos prescribed a left knee replacement (PX 8).

The Petitioner was sent by the Respondent for a Section 12 evaluation with Dr. David Fetter on April 6, 2020. Dr. Fetter stated that the Petitioner may require a knee replacement, but that it would not be related to the work injury (RX 8).

The Petitioner testified that during this time period he continued to work while waiting for approval of the left knee replacement. He testified that his left knee was very unstable and would buckle throughout the day. The Petitioner testified that as of November 22, 2020 the knee replacement had not been approved. On that day, his left knee buckled while walking down the stairs at his home, he fell down the stairs, and felt pain in his left foot (Tr. Trans. P. 19).

The Petitioner sought treatment for his left foot at Northwestern Lake Forest Hospital on November 29, 2020. The medical record from that date states that the Petitioner's left knee gave out a week prior, he fell down the stairs, and was continuing to experience pain in his left foot. He was diagnosed with a left foot sprain (PX 7).

The Petitioner returned to Dr. Vora on December 2, 2020 for consultation regarding his left foot. Dr. Vora reviewed x-rays preformed that day and diagnosed the petitioner with a left hallux second phalanx fracture. Dr. Vora advised the Petitioner to use a post-op shoe for ambulation (PX 8).

Following the fall at home due to ongoing left knee instability, the Petitioner testified that he felt he could not wait any longer for approval of the left knee replacement and he contacted Dr. Pavlatos to proceed with the surgery through his group insurance carrier (Tr. Trans. P. 20.)

Dr. Pavlatos performed the left knee replacement on December 16, 2020. The operative report detailed the procedure performed including a left total knee arthroplasty using the Attune system, a #7 posterior cruciate sparing implant, a #7 tibial baseplate, and a #7 rotating platform poly with a 38mm patella (PX 8).

The Petitioner returned to light duty work with the Respondent post-operatively. He followed up with Dr. Vora for his left foot injury on January 5, 2021. Dr. Vora stated that he could transition to a regular shoe. The Petitioner had one final visit with Dr. Vora for the left foot on February 2, 2021. Dr. Vora stated that his left foot was doing well, and he could follow up as needed. Dr. Vora did note that there was a small fragment on his second proximal phalanx fracture which may not heal completely (PX 8).

The Petitioner followed up with Dr. Pavlatos on March 5, 2021. Dr. Pavlatos advised him to continue his rehab program following the knee replacement. (PX 8)

The Petitioner next saw Dr. Pavlatos on June 11, 2021. Dr. Pavlatos noted that the Petitioner's right knee was continuing to cause him pain with activity. Dr. Pavlatos gave the Petitioner a cortisone injection in the right knee (PX 8).

The Petitioner's final office visit with Dr. Pavlatos took place on November 10, 2021. The Petitioner continued to work full duty with the Respondent. Dr. Pavlatos noted that the Petitioner's left knee was doing well following the replacement. Dr. Pavlatos stated that the Petitioner was still experiencing ongoing pain in his right knee and advised the Petitioner he may require a right knee replacement in the future (PX 8).

The Petitioner was sent by the Respondent for a Section 12 evaluation with Dr. Troy Karlsson on July 7, 2022. Dr. Karlsson stated that the right knee surgeries performed on December 28, 2018 and June 18, 2019 were both causally related to the Petitioner's October 25, 2018 work injury. Dr. Karlsson stated that the left knee surgery performed on February 6, 2019 was causally related to the Petitioner's January 18, 2019 work injury (RX 7).

Dr. Karlsson stated that the Petitioner's fall at home and subsequent left foot fracture in November of 2020 was not related to the work injury, Further, Dr. Karlsson opined that the Petitioner's left knee replacement was not related to the work-injury (RX 7).

The Petitioner testified to the current complaints he his referable to his work injures. He testified that he continues to experience weakness and stiffness in both knees, difficulty when climbing ladders and difficulty when attempting to kneel. The Petitioner further testified that he doesn't walk when holding his grandchildren because he is concerned about the instability in his knees. The Petitioner testified that he has pain and weakness in his right shoulder, and avoids overhead lifting with his right arm. The Petitioner testified that he experiences ongoing stiffness in both his right ankle and left foot. (Tr. Trans. P. 22-24). The Petitioner testified that prior to October 25, 2018 he was working full duty with none of these problems (Tr. Trans. P. 24).

CONCLUSIONS OF LAW:

(F.) Causal Connection

The Petitioner sustained undisputed work injuries on October 25, 2018 and January 18, 2019. He reported both injuries on the day they occurred and sought treatment the same day in both instances. The medical records contained in Petitioner's exhibits 6 through 8 are all consistent as to the timing and mechanism of the Petitioner's work injuries.

No disputes exist as to the causal relation between the Petitioner's October 25, 2018 work injury and the Petitioner's right shoulder rotator cuff tear and right ankle fracture.

Respondent raised the issue of the Petitioner's prior right knee treatment, which the Petitioner testified consisted of a meniscal surgery in 2010 and a cortisone injection in 2015. The Petitioner was working full duty with the Respondent with no issues at the time of the initial work injury. Furthermore, the Petitioner had no left knee treatment prior to the work injury.

Dr. Karlsson, Respondent's Section 12 examiner, opined that the two right knee surgeries the Petitioner underwent were causally related to the October 25, 2018 work injury. He further opined that the Petitioner's February 6, 2019 left knee surgery was causally related to the January 18, 2019 work injury.

As to the causal relationship between the Petitioner's left knee replacement and the January 18, 2019 work injury, Dr. Pavlatos clearly states in his October 4, 2019 office note that the Petitioner's need for the left knee replacement was caused by the initial work-related meniscal tear and surgery, which "accelerated the arthritic process." Furthermore, the Petitioner had no left knee complaints or treatment prior to the January 18, 2019 work injury.

Dr. Karlsson in his evaluation stated that the Petitioner's left knee replacement was not causally related to the work injury. However, in the same report Dr. Karlsson states that prior meniscectomies are risk factors for future arthritis (RX 7). At his deposition, Dr. Karlsson again stated that prior knee surgeries can be a risk factor for future instability and weakness in a knee (RX 7, Deposition Transcript P. 26). Dr. Karlsson also stated that in many cases a physician who performs a surgery and is able to directly examine the knee is in the best position to understand the pathology of the knee (RX 7, Deposition Transcript P. 26). In the present matter, the doctor who performed the initial surgery, Dr. Pavlatos, felt that the left knee replacement was due to the acceleration of the arthritic process caused by that initial surgery (PX 8).

The Petitioner was working full duty, with no left knee complaints. He had no prior treatment for his left knee. He sustained undisputed injury to his left knee, and underwent the first knee surgery which Respondent's own Section 12 examiner felt was causally related to the work injury. He then required a left knee replacement, caused by the acceleration of the arthritic process. Dr. Pavlatos opinion is clear that but for the January 18, 2019 work injury the Petitioner would not have needed the left knee replacement. Based on the foregoing, the Arbitrator finds Dr. Pavlatos to be more credible than Dr. Karlsson.

Dr. Karlsson also opined that the condition of the Petitioner's left foot was not related to the work injury. The Petitioner sustained two fractures in his left foot when he fell at home due to instability in his left knee which was caused by the work injury according to Dr. Pavlatos (PX 8). Dr. Karlsson admitted at his deposition that he did not even review the November 29, 2020 emergency room note from Northwestern Lake Forest Hospital referable to this fall in coming to his conclusion that it was not related to the work injury (RX 7, Deposition Transcript P. 27).

Based on all of the above including the petitioner's testimony and the corroborating medical records of Doctors Pavlatos (PX 8) and Vora (PX 8), the Arbitrator finds that petitioner's left knee, left foot, right knee, right ankle and right shoulder conditions as well as petitioner's left knee replacement are all causally related to his accidental injuries of October 25, 2018, and January 18, 2019.

(L.) Nature and Extent

In determining the level of permanent partial disability for injuries incurred on or after September 1, 2011, the Commission shall base its determination on the following factors: (i) the reported level of impairment pursuant to the most current edition of the AMA's "Guides to the Evaluation of Permanent Impairment"; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; (v) evidence of disability corroborated by the treating medical records. (820 ILCS 305/8.1b)

No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order. (820 ILCS 305/8.1b)

With regards to subsection (i) of Section 8.1(b), the Arbitrator notes that the only impairment rating submitted was that of Respondent's original Section 12 examiner, Dr. Fetter. Dr. Fetter opined that the Petitioner had a 0% impairment (RX 8). The Arbitrator notes that this rating was submitted before the Petitioner had completed treatment. Furthermore, Dr. Fetter also opined that none of the Petitioner's injuries were related to the work accident, in direct contradiction to Dr. Pavlatos, Dr. Vora, and Dr. Karlsson. The Arbitrator therefore finds that this factor weighs neither in favor of increased nor decreased permanence.

With regard to subsection (ii) of Section 8.1(b), the Petitioner remains the Director of Facilities with the Respondent following the work injury. The Arbitrator notes that this is a physical job and that the Petitioner testified he has issues with the use of both knees, his right shoulder, right ankle, and left foot during the work day. The Arbitrator finds that this factor weighs in favor of increased permanence.

With regard to subsection (iii) of Section 8.1(b), the Arbitrator notes that the Petitioner was 57 years old at the time of the injury. the Arbitrator noted that the petitioner is closer to the end of his natural work life. The Arbitrator finds that this factor weighs in favor of decreased permanence.

With regard to subsection (iv) of Section 8.1(b), No evidence was introduced that would indicate petitioner will sustain any loss of earnings as a result of this accident. The Arbitrator finds that this factor weighs in favor of decreased permanence.

With regard to subsection (v) of Section 8.1(b), evidence of disability corroborated by the treating medical records, the Arbitrator incorporates the foregoing and notes the following: the Petitioner sustained tears of the medial and lateral menisci along with a full thickness ACL tear, fractures of the medial and lateral tibial plateaus, and MCL and LCL sprains in the right knee requiring two right knee surgeries. The Petitioner sustained a significant tear of the medial meniscus of the left knee requiring two surgeries including a knee replacement. The Petitioner sustained tears of the supraspinatus and infraspinatus of the rotator cuff and tears of the labrum in the right shoulder, right lateral malleolar fracture of the right ankle with mild displacement, and a left hallux second phalanx fracture in his left foot.

The Arbitrator further notes the Petitioner's testimony regarding his ongoing complaints referable to his work injuries. The Petitioner testified that he continues to experience weakness and stiffness in both knees, difficulty when climbing ladders and difficulty when attempting to kneel. The Petitioner further testified that he doesn't walk when holding his grandchildren because he is concerned about the instability in his knees. The Petitioner testified that he has pain and weakness in his right shoulder, and avoids overhead lifting with his right arm. The Petitioner testified that he experiences ongoing stiffness in both his right ankle and left foot. The Arbitrator does find the petitioner's testimony was credible.

The Arbitrator finds that this factor weighs in favor of greater permanence.

Based on all of the above, the Arbitrator finds in case 19 WC 33477 that the Petitioner is entitled to have and receive from Respondent the sum of $813.87 per week for a further period of 105.10 weeks, as provided in Sections 8(e) of the Act, as the injuries sustained caused the 45% loss of use of the Petitioner's left leg (96.75 Weeks) and the 5% loss of use of the left foot (8.35 Weeks).

The Arbitrator further finds in case 19WC 33481 that the Petitioner is entitled to have and receive from Respondent the sum of $813.87 per week for a further period of 177.75 weeks, as provided in Sections 8(d)2 and 8(e) of the Act, as the injuries sustained caused the 40% loss of use of the Petitioner's right leg (86 Weeks), the 10% loss of the man as a whole (right shoulder) (50 Weeks) and the 25% loss of use of the Petitioner's right foot (41.75 Weeks).

(J.) Medical Expenses/ 8(J) Credit

The Arbitrator's findings regarding causal connection as noted above are incorporated herein.

Petitioner submitted medical bills for reasonable and related treatment referable to the January 18, 2019 injury in Petitioner's Exhibits 2 through 5.

Based on the above, the Arbitrator finds in case 19 WC 33477 that Respondent is liable for the reasonable and necessary medical expenses as detailed in Petitioner's Exhibits 2 through 5, including for the total amount paid by the Respondent's group insurance carrier of $38,806.02 and the total unpaid balances of $6,467.00 as provided in Section 8(a) of the Act, subject to the fee schedule of Section 8.2 of the Act. Respondent is entitled to a credit of $38,806.02 under section 8(j) of the Act. Respondent shall pay to the Petitioner the reasonable and necessary out of pocket medical expenses of $1,336.20 as provided in Section 8(a) of the Act.

The Arbitrator further finds in case 19 WC 33481 that Respondent is liable for the reasonable and necessary medical expenses as detailed in Petitioner's Exhibits 1 and 5, including for the total amount paid by the Respondent's group insurance carrier of $1,758.14 as provided in Section 8(a) of the Act, subject to the fee schedule of Section 8.2 of the Act. Respondent is entitled to a credit of $1,758.14 under section 8(j) of the Act

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC033481
Case Name	David W. Buhrmester v. Lake Forest Country Day School
Consolidated Cases	19WC033477;
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0362
Number of Pages of Decision	13
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Craig Linn
Respondent Attorney	Micaela Cassidy

DATE FILED: 8/16/2023

/s/ Deborah Simpson, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

David W. Buhrmester,
Petitioner,

vs. NO: 19 WC 33481

Lake Forest Country Day School,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 1, 2022, 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 the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

August 16, 2023

o8/9/23
DLS/rm
046

/s/*Deborah L. Simpson*
Deborah L. Simpson

/s/*Stephen J. Mathis*
Stephen J. Mathis

/s/*Deborah J. Baker*
Deborah J. Baker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC033481
Case Name	David W. Buhrmester v. Lake Forest Country Day School
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	11
Decision Issued By	Michael Glaub, Arbitrator

Petitioner Attorney	Craig Linn
Respondent Attorney	Micaela Cassidy

DATE FILED: 12/1/2022

THE INTEREST RATE FOR THE WEEK OF NOVEMBER 29, 2022 4.55%

/s/Michael Glaub, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF **Lake**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

David W. Buhrmester
Employee/Petitioner

v.

Lake Forest Country Day School
Employer/Respondent

Case # **19** WC **33481**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Michael Glaub**, Arbitrator of the Commission, in the city of **Waukegan**, on **9/19/22**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **10/25/18**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**97,640.92**; the average weekly wage was $**1,877.71**.

On the date of accident, Petitioner was **57** years of age, ***married*** with **0** dependent children.

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

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

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

Respondent is entitled to a credit of $**1,758.14** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner the sum of **$813.87** per week for a further period of **177.75** weeks, as provided in Sections 8(d)2 and 8(e) of the Act, as the injuries sustained caused the 40% loss of use of the Petitioner's right leg (86 Weeks), the 10% loss of the man as a whole (right shoulder) (50 Weeks), the 25% loss of use of the Petitioner's right foot (41.75 Weeks). See Arbitration Decision rendered in case #19WC33477 for permanence award regarding left leg and left foot.

Respondent is liable for the reasonable and necessary medical expenses as detailed in Petitioner's Exhibits 1 and 2, including for the total amount paid by the Respondent's group insurance carrier of $1,758.14 as provided in Section 8(a) of the Act, subject to the fee schedule of Section 8.2 of the Act. Respondent is entitled to a credit of $1,758.14 under section 8(j) 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.

Michael Glaub **DECEMBER 1, 2022**

Signature of Arbitrator

ARBITRATION DECISION

DAVID W. BUHRMESTER V. LAKE FOREST COUNTRY DAY SCHOOL

19 WC 33477 & 19 WC 33481

FINDINGS OF FACT:

The 57 year old Petitioner was employed by the Respondent as the director of facilities at Lake Forest Country Day School. He began his employment with the Respondent in March of 2018. His job duties involved overseeing the day to day operations of facility related matters at the school, including performing repairs and maintenance involving plumbing and electrical systems; the job was necessarily physical in nature. The Petitioner is right hand dominant.

The Petitioner sustained undisputed injury to his right shoulder, right knee and right ankle on October 25, 2018. He was standing on a countertop working on water leak when water sprayed out from a pipe and knocked him to the floor, landing on his right side. He felt immediate pain in his right shoulder, right knee and right ankle and notified his supervisor, Chris Harper.

The Petitioner testified that he had undergone a meniscal repair in his right knee in 2010 and an injection in his right knee in 2015; he had been working full duty for the Respondent with no right knee issues prior to the date of accident on October 25, 2018 (Tr. Trans P. 11-12).

Following the accident, the Petitioner sought treatment the same day at Northwestern Lake Forest Hospital. The medical record from that visit notes that the Petitioner fell 5 feet from a countertop and sustained injury to his right knee, right ankle, and right shoulder. X-Rays performed at the hospital revealed a right lateral malleolar fracture of the ankle with mild displacement. He was also diagnosed with right knee internal derangement and a possible right shoulder rotator cuff injury. The Petitioner was referred to Dr. Pavlatos for orthopedic followup (PX 6).

The Petitioner saw Dr. Pavlatos the next day, October 26, 2018. Dr. Pavlatos' record reflected that the Petitioner sustained injury to his right shoulder, right knee, and right ankle following a fall at work. Dr. Pavlatos prescribed MRIs for the Petitioner's right shoulder and right knee and referred the Petitioner to Dr. Vora for his right ankle fracture (PX 8).

The Petitioner saw Dr. Vora on October 29, 2018. Dr. Vora prescribed a CAM walker boot for the right ankle fracture and recommended conservative care (PX 8).

The Petitioner underwent MRIs of the right knee and right shoulder on October 30, 2018. The MRI of the right knee revealed tears of the medial and lateral menisci along with a full thickness ACL tear, fractures of the medial and lateral tibial plateaus, and MCL and LCL

sprains. The MRI of the right shoulder revealed tears of the supraspinatus and infraspinatus of the rotator cuff and tears of the labrum. Dr. Pavlatos recommended surgical repair of the Petitioner's right knee and conservative treatment for the right shoulder including a cortisone shot and physical therapy (PX 8).

The Petitioner followed up with Dr. Vora for his right ankle on December 10, 2018. Dr. Vora advised the Petitioner to transition out of the CAM walker boot and to undergo a course of physical therapy (PX 8).

Dr. Pavlatos performed corrective surgery on the Petitioner's right knee on December 28, 2018. The operative report detailed the following (PX 8).

> Post-Operative Diagnosis: ACL deficient right knee with medial and lateral meniscus tears and chondromalacia.
>
> Procedure: Right knee arthroscopy, partial medial meniscectomy, partial lateral meniscectomy, debridement of the ACL stump and chondroplasty of the medial and lateral compartments.

The Petitioner followed up with Dr. Pavlatos for post-surgical consult on January 4, 2019. Dr. Pavlatos advised the Petitioner to continue strengthening; he allowed the Petitioner to work light duty with the Respondent (PX 8).

While back on light duty, the Petitioner sustained a second undisputed work accident on January 18, 2019. He was walking from the school building to his work truck in the employee only parking lot to obtain tools when he slipped and fell on black ice in the parking lot. The Petitioner testified that he felt a crack in his left knee upon falling to the ground. He immediately notified his supervisor, Chris Harper, and sought treatment the same day at Northwestern Lake Forest Hospital (Tr. Trans. P. 15).

The medical record from the hospital states that the Petitioner slipped and fell on black ice at work, causing his knees to be in a contorted position and pain in both his left knee and right knee. The Petitioner was given a knee immobilizer for his right knee and advised to follow up with Dr. Pavlatos for further treatment (PX 7).

The Petitioner returned to Dr. Pavlatos on January 21, 2019. Dr. Pavlatos office note reflects that the Petitioner slipped and fell on black ice at work and injured both of his knees. Dr. Pavlatos prescribed MRIs of both knee (PX 8).

Following the MRIs, the Petitioner saw Dr. Pavlatos on January 29, 2019. Dr. Pavlatos stated that the Petitioner's right knee MRI revealed a tibial avulsion fracture of the PCL which could be treated conservatively, and that the Petitioner's left knee MRI revealed a significant tear of the medial meniscus from the work-related injury. Dr. Pavlatos prescribed surgery on the Petitioner's left knee. (PX 8).

Dr. Pavlatos performed corrective surgery on the Petitioner's left knee on February 6, 2019. The operative report detailed the following (PX 8):

> Post-Operative Diagnosis: Medial meniscal tear of the left knee with some chondromalacia.
>
> Procedure: Left knee arthroscopy with partial medial meniscectomy and chondroplasty.

The Petitioner followed up with Dr. Pavlatos on March 1, 2019. Dr. Pavlatos noted that the Petitioner was experiencing persistent synovitis in the left knee and administered a cortisone injection. Dr. Pavlatos advised the Petitioner to continue his strengthening program for both knees; he allowed the Petitioner to continue working light duty (PX 8).

The Petitioner returned to see Dr. Vora for his right ankle on March 18, 2019. Dr. Vora reviewed x-rays performed that day which revealed appropriate healing of the fracture and released the Petitioner to full duty with respect to the right ankle (PX 8).

The Petitioner's next follow up appointment with Dr. Pavlatos took place on May 7, 2019. Dr. Pavlatos noted that the Petitioner was continuing to experience symptoms in his right knee including instability with daily activities. Dr. Pavlatos prescribed a second corrective surgery on the Petitioner's right knee, which he performed on June 18, 2019. The operative report detailed the following (PX 8):

> Post-Operative Diagnosis: ACL tear of the right knee with chondromalacia
>
> Procedure: Right knee arthroscopy, ACL reconstruction with posterior tibial tendon allograft.

The Petitioner followed up with Dr. Pavlatos on July 23, 2019. Dr. Pavlatos noted the Petitioner had some erythema around the right knee surgical incision and prescribed a course of Duricef to resolve the issue. He advised the Petitioner to continue physical therapy; the Petitioner continued to work light duty (PX 8).

The Petitioner next saw Dr. Pavlatos on September 6, 2019. Dr. Pavlatos felt that the Petitioner's right knee was doing well following the second surgery but stated that the Petitioner was experiencing ongoing pain in the left knee. He gave the Petitioner a cortisone injection in the left knee (PX 8).

The Petitioner followed up with Dr. Pavlatos on October 4, 2019. Dr. Pavlatos noted that the Petitioner only felt brief relief in the left knee following the cortisone injection. Dr. Pavlatos stated that the Petitioner did have arthritis in the left knee and that his work related accident resulted in a meniscal tear which "accelerated the arthritic process" Dr. Pavlatos advised the Petitioner that as a result he may require a left knee replacement. Dr. Pavlatos prescribed a Monovisc injection to the left knee which was administered on October 23, 2019 (PX 8).

The Petitioner returned to Dr. Pavlatos on January 8, 2020. Dr. Pavlatos stated that the Petitioner's rehabilitation for the right knee had gone well and the Petitioner was doing well with the right knee. For the left knee, Dr. Pavlatos noted that the Petitioner was continuing to experience pain and swelling; Dr. Pavlatos prescribed a left knee replacement (PX 8).

The Petitioner was sent by the Respondent for a Section 12 evaluation with Dr. David Fetter on April 6, 2020. Dr. Fetter stated that the Petitioner may require a knee replacement, but that it would not be related to the work injury (RX 8).

The Petitioner testified that during this time period he continued to work while waiting for approval of the left knee replacement. He testified that his left knee was very unstable and would buckle throughout the day. The Petitioner testified that as of November 22, 2020 the knee replacement had not been approved. On that day, his left knee buckled while walking down the stairs at his home, he fell down the stairs, and felt pain in his left foot (Tr. Trans. P. 19).

The Petitioner sought treatment for his left foot at Northwestern Lake Forest Hospital on November 29, 2020. The medical record from that date states that the Petitioner's left knee gave out a week prior, he fell down the stairs, and was continuing to experience pain in his left foot. He was diagnosed with a left foot sprain (PX 7).

The Petitioner returned to Dr. Vora on December 2, 2020 for consultation regarding his left foot. Dr. Vora reviewed x-rays preformed that day and diagnosed the petitioner with a left hallux second phalanx fracture. Dr. Vora advised the Petitioner to use a post-op shoe for ambulation (PX 8).

Following the fall at home due to ongoing left knee instability, the Petitioner testified that he felt he could not wait any longer for approval of the left knee replacement and he contacted Dr. Pavlatos to proceed with the surgery through his group insurance carrier (Tr. Trans. P. 20.)

Dr. Pavlatos performed the left knee replacement on December 16, 2020. The operative report detailed the procedure performed including a left total knee arthroplasty using the Attune system, a #7 posterior cruciate sparing implant, a #7 tibial baseplate, and a #7 rotating platform poly with a 38mm patella (PX 8).

The Petitioner returned to light duty work with the Respondent post-operatively. He followed up with Dr. Vora for his left foot injury on January 5, 2021. Dr. Vora stated that he could transition to a regular shoe. The Petitioner had one final visit with Dr. Vora for the left foot on February 2, 2021. Dr. Vora stated that his left foot was doing well, and he could follow up as needed. Dr. Vora did note that there was a small fragment on his second proximal phalanx fracture which may not heal completely (PX 8).

The Petitioner followed up with Dr. Pavlatos on March 5, 2021. Dr. Pavlatos advised him to continue his rehab program following the knee replacement. (PX 8)

The Petitioner next saw Dr. Pavlatos on June 11, 2021. Dr. Pavlatos noted that the Petitioner's right knee was continuing to cause him pain with activity. Dr. Pavlatos gave the Petitioner a cortisone injection in the right knee (PX 8).

The Petitioner's final office visit with Dr. Pavlatos took place on November 10, 2021. The Petitioner continued to work full duty with the Respondent. Dr. Pavlatos noted that the Petitioner's left knee was doing well following the replacement. Dr. Pavlatos stated that the Petitioner was still experiencing ongoing pain in his right knee and advised the Petitioner he may require a right knee replacement in the future (PX 8).

The Petitioner was sent by the Respondent for a Section 12 evaluation with Dr. Troy Karlsson on July 7, 2022. Dr. Karlsson stated that the right knee surgeries performed on December 28, 2018 and June 18, 2019 were both causally related to the Petitioner's October 25, 2018 work injury. Dr. Karlsson stated that the left knee surgery performed on February 6, 2019 was causally related to the Petitioner's January 18, 2019 work injury (RX 7).

Dr. Karlsson stated that the Petitioner's fall at home and subsequent left foot fracture in November of 2020 was not related to the work injury, Further, Dr. Karlsson opined that the Petitioner's left knee replacement was not related to the work-injury (RX 7).

The Petitioner testified to the current complaints he his referable to his work injures. He testified that he continues to experience weakness and stiffness in both knees, difficulty when climbing ladders and difficulty when attempting to kneel. The Petitioner further testified that he doesn't walk when holding his grandchildren because he is concerned about the instability in his knees. The Petitioner testified that he has pain and weakness in his right shoulder, and avoids overhead lifting with his right arm. The Petitioner testified that he experiences ongoing stiffness in both his right ankle and left foot. (Tr. Trans. P. 22-24). The Petitioner testified that prior to October 25, 2018 he was working full duty with none of these problems (Tr. Trans. P. 24).

CONCLUSIONS OF LAW:

(F.) Causal Connection

The Petitioner sustained undisputed work injuries on October 25, 2018 and January 18, 2019. He reported both injuries on the day they occurred and sought treatment the same day in both instances. The medical records contained in Petitioner's exhibits 6 through 8 are all consistent as to the timing and mechanism of the Petitioner's work injuries.

No disputes exist as to the causal relation between the Petitioner's October 25, 2018 work injury and the Petitioner's right shoulder rotator cuff tear and right ankle fracture.

Respondent raised the issue of the Petitioner's prior right knee treatment, which the Petitioner testified consisted of a meniscal surgery in 2010 and a cortisone injection in 2015. The Petitioner was working full duty with the Respondent with no issues at the time of the initial work injury. Furthermore, the Petitioner had no left knee treatment prior to the work injury.

Dr. Karlsson, Respondent's Section 12 examiner, opined that the two right knee surgeries the Petitioner underwent were causally related to the October 25, 2018 work injury. He further opined that the Petitioner's February 6, 2019 left knee surgery was causally related to the January 18, 2019 work injury.

As to the causal relationship between the Petitioner's left knee replacement and the January 18, 2019 work injury, Dr. Pavlatos clearly states in his October 4, 2019 office note that the Petitioner's need for the left knee replacement was caused by the initial work-related meniscal tear and surgery, which "accelerated the arthritic process." Furthermore, the Petitioner had no left knee complaints or treatment prior to the January 18, 2019 work injury.

Dr. Karlsson in his evaluation stated that the Petitioner's left knee replacement was not causally related to the work injury. However, in the same report Dr. Karlsson states that prior meniscectomies are risk factors for future arthritis (RX 7). At his deposition, Dr. Karlsson again stated that prior knee surgeries can be a risk factor for future instability and weakness in a knee (RX 7, Deposition Transcript P. 26). Dr. Karlsson also stated that in many cases a physician who performs a surgery and is able to directly examine the knee is in the best position to understand the pathology of the knee (RX 7, Deposition Transcript P. 26). In the present matter, the doctor who performed the initial surgery, Dr. Pavlatos, felt that the left knee replacement was due to the acceleration of the arthritic process caused by that initial surgery (PX 8).

The Petitioner was working full duty, with no left knee complaints. He had no prior treatment for his left knee. He sustained undisputed injury to his left knee, and underwent the first knee surgery which Respondent's own Section 12 examiner felt was causally related to the work injury. He then required a left knee replacement, caused by the acceleration of the arthritic process. Dr. Pavlatos opinion is clear that but for the January 18, 2019 work injury the Petitioner would not have needed the left knee replacement. Based on the foregoing, the Arbitrator finds Dr. Pavlatos to be more credible than Dr. Karlsson.

Dr. Karlsson also opined that the condition of the Petitioner's left foot was not related to the work injury. The Petitioner sustained two fractures in his left foot when he fell at home due to instability in his left knee which was caused by the work injury according to Dr. Pavlatos (PX 8). Dr. Karlsson admitted at his deposition that he did not even review the November 29, 2020 emergency room note from Northwestern Lake Forest Hospital referable to this fall in coming to his conclusion that it was not related to the work injury (RX 7, Deposition Transcript P. 27).

Based on all of the above including the petitioner's testimony and the corroborating medical records of Doctors Pavlatos (PX 8) and Vora (PX 8), the Arbitrator finds that petitioner's left knee, left foot, right knee, right ankle and right shoulder conditions as well as petitioner's left knee replacement are all causally related to his accidental injuries of October 25, 2018, and January 18, 2019.

(L.) Nature and Extent

In determining the level of permanent partial disability for injuries incurred on or after September 1, 2011, the Commission shall base its determination on the following factors: (i) the reported level of impairment pursuant to the most current edition of the AMA's "Guides to the Evaluation of Permanent Impairment"; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; (v) evidence of disability corroborated by the treating medical records. (820 ILCS 305/8.1b)

No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order. (820 ILCS 305/8.1b)

With regards to subsection (i) of Section 8.1(b), the Arbitrator notes that the only impairment rating submitted was that of Respondent's original Section 12 examiner, Dr. Fetter. Dr. Fetter opined that the Petitioner had a 0% impairment (RX 8). The Arbitrator notes that this rating was submitted before the Petitioner had completed treatment. Furthermore, Dr. Fetter also opined that none of the Petitioner's injuries were related to the work accident, in direct contradiction to Dr. Pavlatos, Dr. Vora, and Dr. Karlsson. The Arbitrator therefore finds that this factor weighs neither in favor of increased nor decreased permanence.

With regard to subsection (ii) of Section 8.1(b), the Petitioner remains the Director of Facilities with the Respondent following the work injury. The Arbitrator notes that this is a physical job and that the Petitioner testified he has issues with the use of both knees, his right shoulder, right ankle, and left foot during the work day. The Arbitrator finds that this factor weighs in favor of increased permanence.

With regard to subsection (iii) of Section 8.1(b), the Arbitrator notes that the Petitioner was 57 years old at the time of the injury. the Arbitrator noted that the petitioner is closer to the end of his natural work life. The Arbitrator finds that this factor weighs in favor of decreased permanence.

With regard to subsection (iv) of Section 8.1(b), No evidence was introduced that would indicate petitioner will sustain any loss of earnings as a result of this accident. The Arbitrator finds that this factor weighs in favor of decreased permanence.

With regard to subsection (v) of Section 8.1(b), evidence of disability corroborated by the treating medical records, the Arbitrator incorporates the foregoing and notes the following: the Petitioner sustained tears of the medial and lateral menisci along with a full thickness ACL tear, fractures of the medial and lateral tibial plateaus, and MCL and LCL sprains in the right knee requiring two right knee surgeries. The Petitioner sustained a significant tear of the medial meniscus of the left knee requiring two surgeries including a knee replacement. The Petitioner sustained tears of the supraspinatus and infraspinatus of the rotator cuff and tears of the labrum in the right shoulder, right lateral malleolar fracture of the right ankle with mild displacement, and a left hallux second phalanx fracture in his left foot.

The Arbitrator further notes the Petitioner's testimony regarding his ongoing complaints referable to his work injuries. The Petitioner testified that he continues to experience weakness and stiffness in both knees, difficulty when climbing ladders and difficulty when attempting to kneel. The Petitioner further testified that he doesn't walk when holding his grandchildren because he is concerned about the instability in his knees. The Petitioner testified that he has pain and weakness in his right shoulder, and avoids overhead lifting with his right arm. The Petitioner testified that he experiences ongoing stiffness in both his right ankle and left foot. The Arbitrator does find the petitioner's testimony was credible.

The Arbitrator finds that this factor weighs in favor of greater permanence.

Based on all of the above, the Arbitrator finds in case 19 WC 33477 that the Petitioner is entitled to have and receive from Respondent the sum of $813.87 per week for a further period of 105.10 weeks, as provided in Sections 8(e) of the Act, as the injuries sustained caused the 45% loss of use of the Petitioner's left leg (96.75 Weeks) and the 5% loss of use of the left foot (8.35 Weeks).

The Arbitrator further finds in case 19WC 33481 that the Petitioner is entitled to have and receive from Respondent the sum of $813.87 per week for a further period of 177.75 weeks, as provided in Sections 8(d)2 and 8(e) of the Act, as the injuries sustained caused the 40% loss of use of the Petitioner's right leg (86 Weeks), the 10% loss of the man as a whole (right shoulder) (50 Weeks) and the 25% loss of use of the Petitioner's right foot (41.75 Weeks).

(J.) Medical Expenses/ 8(J) Credit

The Arbitrator's findings regarding causal connection as noted above are incorporated herein.

Petitioner submitted medical bills for reasonable and related treatment referable to the January 18, 2019 injury in Petitioner's Exhibits 2 through 5.

Based on the above, the Arbitrator finds in case 19 WC 33477 that Respondent is liable for the reasonable and necessary medical expenses as detailed in Petitioner's Exhibits 2 through 5, including for the total amount paid by the Respondent's group insurance carrier of $38,806.02 and the total unpaid balances of $6,467.00 as provided in Section 8(a) of the Act, subject to the fee schedule of Section 8.2 of the Act. Respondent is entitled to a credit of $38,806.02 under section 8(j) of the Act. Respondent shall pay to the Petitioner the reasonable and necessary out of pocket medical expenses of $1,336.20 as provided in Section 8(a) of the Act.

The Arbitrator further finds in case 19 WC 33481 that Respondent is liable for the reasonable and necessary medical expenses as detailed in Petitioner's Exhibits 1 and 5, including for the total amount paid by the Respondent's group insurance carrier of $1,758.14 as provided in Section 8(a) of the Act, subject to the fee schedule of Section 8.2 of the Act. Respondent is entitled to a credit of $1,758.14 under section 8(j) of the Act

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC023178
Case Name	Tracy Jones v. Memorial Hospital
Consolidated Cases	
Proceeding Type	Petition for Review Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0363
Number of Pages of Decision	12
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Brad Badgley
Respondent Attorney	Deanna Litzenburg

DATE FILED: 8/16/2023

/s/Carolyn Doherty, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF JEFFERSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TRACY JONES,
Petitioner,

vs. NO: 21 WC 23178

MEMORIAL HOSPITAL,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, prospective medical treatment, and temporary total disability benefits and being advised of the facts and law, affirms, and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission also remands this case to the Arbitrator for further proceedings and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Indus. Comm'n*, 78 Ill. 2d 327 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 15, 2022 is hereby affirmed and adopted.

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

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 $5,900.00. The party commencing the proceedings for review in the Circuit Court shall

file with the Commission a Notice of Intent to File for Review in Circuit Court.

August 16, 2023

o: 08/10/23
CMD/jjm
045

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

/s/ *Marc Parker*
Marc Parker

/s/ *Christopher A. Harris*
Christopher A. Harris

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC023178
Case Name	Tracy Jones v. Memorial Hospital
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	9
Decision Issued By	William Gallagher, Arbitrator

Petitioner Attorney	Brad Badgley
Respondent Attorney	Deanna Litzenburg

DATE FILED: 12/15/2022

THE INTEREST RATE FOR THE WEEK OF DECEMBER 13, 2022 4.63%

/s/William Gallagher, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF JEFFERSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Tracy Jones
Employee/Petitioner

Case # 21 WC 23178

v.

Consolidated cases: n/a

Memorial Hospital
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Mt. Vernon, on October 26, 2022. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, July 26, 2021, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $28,416.96; the average weekly wage was $546.48.

On the date of accident, Petitioner was 59 years of age, married with 0 dependent child(ren).

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

Respondent shall be given a credit of $2,863.56 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $2,863.56.

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

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibits 2, 4 and 5, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

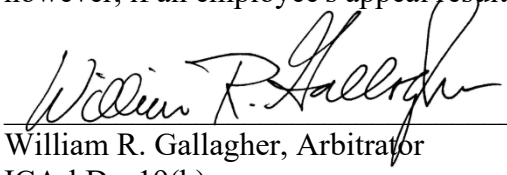
Respondent shall authorize and pay for prospective medical treatment, including but not limited to, right shoulder surgery, as recommended by Dr. Ryan Pitts.

Respondent shall pay Petitioner temporary total disability benefits of $364.32 per week for seven and six-sevenths (7 6/7) weeks, commencing July 26, 2021, through September 14, 2021, as provided in Section 8(b) of the Act.

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

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

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



DECEMBER 15, 2022

William R. Gallagher, Arbitrator
ICArbDec19(b)

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged she sustained an accidental injury arising out of and in the course of her employment by Respondent on July 26, 2021. According to the Application, "Petitioner while in the course of her employment as a housekeeper, sustained injury while pulling curtains overhead" and sustained an injury to her "right arm" (Arbitrator's Exhibit 2). This case was tried in a 19(b) proceeding and Petitioner sought an order for payment of medical bills and temporary total disability benefits as well as prospective medical treatment. Respondent disputed liability on the basis of accident and causal relationship (Arbitrator's Exhibit 1).

In regard to medical bills, Respondent stipulated it was liable for payment of same; however, some of the medical bills tendered into evidence showed balances still owed. It was not clear if this was because of balance billing or application of the fee schedule. In regard to temporary total disability benefits, Petitioner claimed she was entitled to temporary total disability benefits of seven and six-sevenths (7 6/7) weeks, commencing July 26, 2021, through September 14, 2021. The Petitioner and Respondent stipulated temporary total disability benefits had been paid in full by Respondent. In regard to prospective medical treatment, Petitioner sought an order for Respondent to authorize and pay for right shoulder surgery as recommended by Dr. Ryan Pitts, an orthopedic surgeon (Arbitrator's Exhibit 1).

Petitioner became employed by Respondent in 2014, and worked as a housekeeper. Petitioner is still employed by Respondent in that capacity. Petitioner's job duties consist primarily of cleaning rooms as well as doing some laundry.

On July 26, 2021, Petitioner was in the process of cleaning a room which had been occupied by a Covid patient. Because of this, the room required a more thorough cleaning than normal which mandated the removal of curtains so they could be cleaned. Petitioner was required to work with both of her arms overhead when she was in the process of removing the curtains. The curtains were secured in place with snaps which Petitioner described as being "real tight." When Petitioner pulled on a curtain in an effort to loosen it, she experienced pain/burning in her right shoulder.

Petitioner testified she had sustained prior injuries to her right shoulder. In 2005, Petitioner sustained a fall in which she injured her right shoulder. This injury did require arthroscopic surgery and approximately three weeks of physical therapy, but Petitioner recovered.

On April 20, 2015, Petitioner sustained another injury to her right shoulder when she was struck by an elevator door. This was a work-related injury and Petitioner was examined by Dr. George Paletta, an orthopedic surgeon. Petitioner testified she received a course of conservative treatment and was subsequently released to return to work without restrictions. Petitioner received no medical treatment for her right shoulder from October 5, 2015, to July 26, 2021, but said she did experience a occasional right shoulder aches/pains for which she took Tylenol.

There were no medical records tendered into evidence regarding Petitioner's 2005 shoulder injury and surgery. However, Respondent tendered into evidence medical reports of Dr. Paletta regarding his examination of Petitioner following her accident of April 20, 2015.

Dr. Paletta examined Petitioner at the request of Respondent on August 31, 2015, and reviewed medical records and diagnostic studies provided to him. Dr. Paletta opined Petitioner had sustained blunt trauma with a contusion to the right shoulder which caused post traumatic adhesive capsulitis. He also diagnosed Petitioner with a chronic labral tear with paralabral cyst, but opined this was not related to the accident. He recommended Petitioner receive an injection and undergo a period of physical therapy. He anticipated Petitioner would fully recover in eight to 12 weeks after the initiation of treatment (Respondent's Exhibits 5 and 6).

Following the accident of July 26, 2021, Petitioner was seen in the ER of Memorial Hospital. At that time, Petitioner advised she was changing curtains at work, lifted her right arm and felt a burning pain in her right shoulder. An x-ray of Petitioner's right shoulder revealed osteoarthritis of the glenohumeral joint with joint space narrowing and osteophyte formation. Petitioner was diagnosed with a right shoulder strain, given medication and discharged (Petitioner's Exhibit 3).

Petitioner was subsequently evaluated by Dr. Ryan Pitts, an orthopedic surgeon, on September 14, 2021. When seen by Dr. Pitts, Petitioner informed him of the accident of July 26, 2021, as well as her prior 2005 surgery and 2015 accident. Petitioner advised Dr. Pitts that following the 2015 accident, she received two injections, had physical therapy and was able to resume normal activities until she sustained the accident on July 26, 2021 (Petitioner's Exhibit 1; Deposition Exhibit 1B).

Petitioner advised Dr. Pitts that she sustained the accident at work as a result of "repetitive motion." Petitioner told Dr. Pitts there while she was unsnapping buttons from curtains, she started to feel a burning pain in her right shoulder. When evaluated by Dr. Pitts, Petitioner stated she had a throbbing pain in her right shoulder which she rated as 7/10, and the symptoms were aggravated by activity (Petitioner's Exhibit 1; Deposition Exhibit 1B).

Dr. Pitts reviewed the x-ray of Petitioner's right shoulder of July 26, 2021, and the radiology reports of the right shoulder x-ray of July 1, 2015, and right shoulder MRI of June 8, 2015. He opined the x-ray of July 26, 2021, and x-ray report of July 1, 2015, revealed degenerative osteoarthritis in the glenohumeral joint space. He noted the report of the MRI of June 8, 2015, did not reveal a rotator cuff tear, but revealed calcific tendinitis and a paralabral cyst. Dr. Pitts opined the work injury described by Petitioner was the primary and prevailing factor of her current symptoms to the extent Petitioner sustained an exacerbation of the pre-existing shoulder pathology. He ordered medication and physical therapy (Petitioner's Exhibit 1; Deposition Exhibit 1B).

Petitioner received physical therapy from September 25, 2021, through October 25, 2021. According to the physical therapy records, Petitioner only made minimal progress (Petitioner's Exhibit 6).

Dr. Pitts again saw Petitioner on October 26, 2021. At that time, Petitioner advised she experienced no improvement in her symptoms and that her symptoms/function were worse. Dr. Pitts reaffirmed his opinion regarding causality and opined that non-operative treatment had failed and Petitioner's only option was surgery. The surgical procedure he recommended was a reverse total shoulder replacement (Petitioner's Exhibit 1; Deposition Exhibit 1C).

At the direction of Respondent, Petitioner was examined by Dr. William Frisella, an orthopedic surgeon, on February 2, 2022. In connection with his examination of Petitioner, Dr. Frisella reviewed medical records and diagnostic studies, including the MRI of June 8, 2015, provided to him by Respondent. When seen by Dr. Frisella, Petitioner complained of pain in the right shoulder which radiated down the arm as well as occasional tingling/numbness in her right arm. Dr. Frisella opined Petitioner had severe arthritis in the right shoulder with a complete loss of cartilage which predated the accident of July 26, 2021. He also noted the 2015 MRI revealed multiple small tears of the rotator cuff. He opined the work exposure of July 26, 2021, caused increased pain relative to the underlying arthritis. Because the right shoulder cartilage was completely gone, he opined Petitioner would have required shoulder replacement at some point in the future, regardless of whether or not the work exposure of July 26, 2021, had occurred. However, he did not recommend Petitioner undergo shoulder replacement surgery at this time, but undergo another injection followed by additional physical therapy (Respondent's Exhibit 1; Deposition Exhibit 2).

Dr. Frisella deferred making a definitive statement regarding causality. He recommended Petitioner undergo an MRI scan so that he could compare it to the prior MRI scan and determine if there was a new structural injury (Respondent's Exhibit 1; Deposition Exhibit 2).

The MRI of Petitioner's right shoulder was performed on June 13, 2022. According to the radiologist, the MRI revealed severe right glenohumeral chondrosis with posterior subluxation of the humeral head, right supraspinatus cuff tendinopathy, but no cuff tear, and degenerative tears of the posterior glenoid labrum and mild right acromioclavicular joint osteoarthritis with mild subacromial subdeltoid bursitis (Respondent's Exhibit 1; Deposition Exhibit 4).

Dr. Pitts was deposed on August 17, 2022, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Pitts' testimony was consistent with his medical reports and he reaffirmed the opinions contained therein. Specifically, Dr. Pitts testified Petitioner informed him that she experienced an onset of pain while doing overhead work, had a history of prior right shoulder issues, including surgery, but had been working without restrictions up until she sustained the accident in July. Dr. Pitts testified Petitioner had extensive arthritic changes in her right shoulder which were exacerbated by her work activities. Dr. Pitts stated the injury did not cause the arthritis, but Petitioner had no evidence of any symptoms which required treatment for evaluation in the period of three to five years prior to the work event which he stated aggravated the arthritic condition. He recommended Petitioner undergo reverse shoulder replacement surgery (Petitioner's Exhibit 1; pp 8-15).

On cross-examination, Dr. Pitts agreed the injury did not cause the arthritis but he reaffirmed his opinion it aggravated the condition. When Dr. Pitts was asked whether Petitioner's shoulder condition was so degenerated that any normal activity could have caused the injury, he agreed it was "possible" (Petitioner's Exhibit 1; pp 20-22).

Dr. Frisella reviewed the report of the MRI of June 13, 2022, and prepared a supplemental report dated June 20, 2022. Dr. Frisella opined the MRI of June 13, 2022, did not reveal a rotator cuff tear or other acute injury to the right shoulder. He opined Petitioner has severe osteoarthritis in the right shoulder which is not related to the work injury of July 26, 2021, which he noted was not an

acute injury/trauma, but rather, Petitioner's performance of normal daily work tasks (Respondent's Exhibit 1; Deposition Exhibit 3).

Dr. Frisella was deposed on September 29, 2022, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Frisella's testimony was consistent with his medical reports and he reaffirmed the opinions contained therein. Specifically, he testified Petitioner had severe glenohumeral osteoarthritis of the right shoulder which he initially opined may have been worsened by the work activity. To determine if there was any structural change in Petitioner's right shoulder, he recommended Petitioner undergo another MRI scan. While he opined there was no structural change in Petitioner's right shoulder, namely, a rotator cuff tear, he also testified that 2015 MRI revealed moderate osteoarthritis and 2022 MRI revealed severe osteoarthritis. Because of the severity of the osteoarthritis, Dr. Frisella testified Petitioner would have developed the right shoulder pain whether or not the incident of July 26, 2021 had occurred. He testified any normal daily activity could have caused Petitioner's symptoms (Respondent's Exhibit 1; pp 13-18).

On cross-examination, Dr. Frisella agreed Petitioner received no treatment for her right shoulder condition from 2015 until she sustained the accident on July 26, 2021. He also agreed that Petitioner's work activities of July 26, 2021 caused increased pain related to the underlying arthritis (Respondent's Exhibit 1; pp 24-28).

Petitioner testified she has continued to work for Respondent as a housekeeper, but on light duty. Petitioner continues to experience right shoulder pain symptoms and wants to proceed with the surgery as recommended by Dr. Pitts.

Conclusions of Law

In regard to disputed issues (C) and (F) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner sustained an accidental injury arising out of and in the course of her employment by Respondent on July 26, 2021, and her current condition of ill-being in regard to her right shoulder is causally related to same.

In support of this conclusion the Arbitrator notes the following:

There was no dispute Petitioner was performing work which required the overhead use of her arms and she experienced an onset of pain in her right shoulder.

Petitioner's job as a housekeeper required her to clean patient rooms; however, because of Covid, the room she cleaned on July 26, 2021, required a more thorough cleaning than normal.

Petitioner sustained prior injuries to her right shoulder in 2005 and 2015. The 2005 injury required arthroscopic surgery and the 2015 injury required a period of conservative treatment after which Petitioner was able to return to work without restrictions.

Petitioner received no medical treatment from October 5, 2015, to July 26, 2021, for right shoulder symptoms, but agreed she experienced occasional aches/pains for which she took Tylenol.

It is not clear to the Arbitrator if Petitioner's right shoulder condition was a result of repetitive trauma of her using her right arm in an overhead manner while working with the curtain in the patient room, or a specific incident in which she pulled on a curtain and experienced pain/burning in her right shoulder. However, this makes no difference because it is clear to the Arbitrator that the onset of Petitioner's right shoulder symptoms was related to her work activities.

Petitioner's treating physician, Dr. Pitts, opined Petitioner had pre-existing osteoarthritis in her right shoulder which was exacerbated by her work activities. This opinion was based, in part, on the fact there was no evidence Petitioner had any right shoulder symptoms which required treatment or evaluation in the 3 to 5 years preceding the accident.

Respondent's Section 12 examiner, Dr. Frisella, opined Petitioner's right shoulder arthritic condition was so advanced that any normal activity could have caused Petitioner's right shoulder symptoms. When Dr. Pitts was deposed, he admitted on cross-examination that it was "possible" normal daily activity could have caused the injury.

Petitioner did not sustain the onset of right shoulder symptoms as a result of normal daily activity. She sustained the right shoulder symptoms as a result of her using her right arm in an overhead manner while working with curtain snaps. Further, Petitioner used her right arm in normal daily activities from October, 2015, until she sustained the injury in July, 2021, without experiencing right shoulder symptoms which required medical treatment.

Given the preceding, the Arbitrator finds opinion of Dr. Pitts to be more persuasive than that of Dr. Frisella in regard to causality.

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

Based upon the Arbitrator's conclusion of law in disputed issues (C) and (F), the Arbitrator concludes that all of the medical treatment provided to Petitioner was reasonable and necessary and Respondent is liable for payment of the medical bills incurred therewith.

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibits 2, 4 and 5, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

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

The Arbitrator concludes Petitioner is entitled to prospective medical treatment including, but not limited to, the right shoulder surgery recommended by Dr. Pitts.

In support of this conclusion the Arbitrator notes the following:

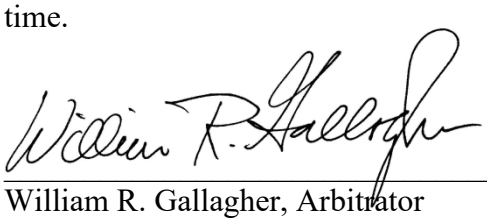
Dr. Pitts opined non-operative treatment had failed and Petitioner's only option was surgery, specifically, a reverse total shoulder replacement.

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

The Arbitrator concludes Petitioner is entitled to temporary total disability benefits of seven and six-sevenths (7 6/7) weeks, commencing July 26, 2021, through September 14, 2021.

In support of this conclusion the Arbitrator notes the following:

There was no dispute Petitioner was temporarily totally disabled during the aforestated period of time.



William R. Gallagher, Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC006200
Case Name	Trinidad Cuevas v. Florida Fruit Juices, Inc., Personnel Staffing Group, LLC. and Metropolitan Associates, LLC
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0364
Number of Pages of Decision	10
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Kenneth Peters
Respondent Attorney	Tedd Warden, Lisa Barbieri, Steven Leech, Norman Finkel

DATE FILED: 8/17/2023

/s/ Deborah Baker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TRINIDAD CUEVAS,

Petitioner,

vs. NO: 16 WC 06200

FLORIDA FRUIT JUICES, INC.,
PERSONNEL STAFFING GROUP, LLC,
and METROPOLITAN ASSOCIATES, LLC,

Respondents.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent Personnel Staffing Group and notice given to all parties, the Commission, after considering the denial of Respondent Personnel Staffing Group's Emergency Motion to Reopen Proofs, and being advised of the facts and law, amends the Decision of the Arbitrator as set forth below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Respondent Personnel Staffing Group attached three exhibits to its Statement of Exceptions and Supporting Brief. The Commission observes none of those documents were submitted into evidence at arbitration and pursuant to Section 19(e), our review is limited to the evidence adduced at trial: "In all cases in which the hearing before the arbitrator is held after December 18, 1989, no additional evidence shall be introduced by the parties before the Commission on review of the decision of the Arbitrator." *820 ILCS 305/19(e)*. As such, we have not considered the additional evidence submitted by Respondent Personnel Staffing Group, and the exhibits are hereby stricken.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 2, 2023 as amended above is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent Personnel Staffing Group pay to Petitioner the sum of $387.78 per week for a period of 54 5/7 weeks, representing February 19, 2016 through March 8, 2017, that being the period of temporary total incapacity for work under §8(b) of the Act. Respondent Personnel Staffing Group shall have credit of $120,599.00 for TTD benefits previously paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent Personnel Staffing Group pay to Petitioner permanent total disability benefits of $524.34 per week for life, commencing on March 9, 2017, as provided in §8(f) of the Act. Commencing on the second July 15 after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the Rate Adjustment Fund, as provided in §8(g) of the Act.

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

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

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

August 17, 2023

DJB/mck

O: 8/9/23

43

/s/ *Deborah J. Baker*

/s/ *Stephen J. Mathis*

/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC006200
Case Name	Trinidad Cuevas v. Florida Fruit Juices, Inc., Personnel Staffing Group, LLC. and Metropolitan Associates, LLC
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	7
Decision Issued By	Raychel Wesley, Arbitrator

Petitioner Attorney	Kenneth Peters
Respondent Attorney	Steven Leech, Tedd Warden, Daniel Swanson, Norman Finkel

DATE FILED: 2/2/2023

THE INTEREST RATE FOR THE WEEK OF JANUARY 31, 2023 4.68%

/s/ Raychel Wesley, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF **COOK**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

TRINIDAD CUEVAS,
Employee/Petitioner

v.

FLORIDA FRUIT JUICES, INC.,
PERSONNEL STAFFING GROUP, LLC,
AND METROPOLITAN ASSOCIATES, LLC
Employer/Respondent

Case # **16** WC **6200**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **RAYCHEL A. WESLEY**, Arbitrator of the Commission, in the city of **CHICAGO**, on **12/1/2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

1) SHOULD THE MOTION OF PERSONNEL STAFFING GROUP LLC TO REOPEN PROOFS TO VACATE THEIR STIPULATION AT TRIAL THAT AN EMPLOYER-EMPLOYEE RELATIONSHIP EXISTED BETWEEN TRINIDAD CUEVAS AND PERSONNEL STAFFING GROUP, LLC BE GRANTED.

2) WHEN DID PETITIONER'S CONDITION REACH MAXIMUM MEDICAL IMPROVEMENT AND HIS ENTITLEMENT TO PERMANENT TOTAL BENEFITS BEGIN.

FINDINGS

On **FEBRUARY 18, 2016**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondents, Personnel Staffing Group, LLC and Florida Fruit Juices, Inc..

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

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

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

In the year preceding the injury, Petitioner earned $**30,246.84**; the average weekly wage was $**581.67**.

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

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

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services and has agreed to pay medical bills from City of Chicago EMS and Rush Medical that total $44,527.74 pursuant to the medical fee schedule.

Respondent shall be given a credit of $**120,599.00** for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $**120,599.00**.

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

ORDER

THE ARBITRATOR DENIES THE MOTION OF PERSONNEL STAFFING GROUP TO REOPEN PROOFS.

RESPONDENT SHALL PAY PETITIONER TEMPORARY TOTAL DISABIILTY BENEFITS OF $387.78 A WEEK FOR 54 5/7 WEEKS FROM FEBRUARY 19, 2016 THROUGH MARCH 8, 2017.

THE ARBITRATOR FINDS THE PETITIONER IS PERMANENTLY AND TOTALLY DISABLED AS A RESULT OF THE INJURIES SUSTAINED ON FEBRUARY 18, 2016 AND RESPONDENT SHALL PAY PETITIONER PERMANENT AND TOTAL DISABILITY BENEFITS OF $524.34 A WEEK FOR LIFE COMMENCING MARCH 9, 2017, AS PROVIDED IN SECTION 8(f) OF THE ACT.

COMMENCING ON THE SECOND JULY 15TH AFTER THE ENTRY OF THE THIS AWARD, PETITIONER WILL BECOME ELIBILBLE FOR COST OF LIVING ADJUSTMENTS, PAID BY THE RATE ADJUSTMENT FUND, AS PROVIDED IN SECTION 8(g) 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.

RAYCHEL WESLEY
Signature of Arbitrator

FEBRUARY 2, 2023

TRINIDAD CUEVAS V FLORIDA FRUIT JUICES, INC.
16 WC 006200

STATEMENT OF FACTS

This case proceeded to hearing on February 25, 2022. At that hearing, Petitioner, Trinidad Cuevas ("Petitioner") was represented by Kenneth D. Peters and Personnel Staffing Group, LLC ("Personnel Staffing") and Zurich Insurance were represented by Daniel Swanson.

The Attorneys stipulated that an employee-employer relationship existed between Petitioner and Florida Fruit Juices, Inc. ("Florida Fruit") and Personnel Staffing. Florida Fruit was the borrowing employer and Personnel Staffing was the lending employer. (Arb. Ex. No. 1, Arb. P. 4) Personnel Staffing's workers' compensation carrier, Zurich Insurance, had paid and were still paying workers' compensation benefits to Petitioner. The hearing proceeded in the form of a prove up with a stipulation between the parties that the Petitioner was permanently and totally disabled as a result of the injuries he sustained on February 18, 2016.

Petitioner's testimony was very limited. He had no memory of the accident that he was involved in on February 18, 2016 or the medical treatment he has received following the accident. He testified that he lives with his wife and came to the hearing with his wife and daughter. (A. 14-16).

Maricella Cuevas testified that she is the daughter of Petitioner and at the time of the accident lived very close to her father and mother. She testified that on February 18, 2016 she received a phone call from her father's phone. She answered the phone and it was Mr. Franco, her father's supervisor at Florida Fruit. He told her that her father was in an accident at work and that she needed to come to Christ Hospital Emergency Room. Ms. Cuevas testified that she went to her parent's home where she picked up her mother and then drove immediately to Christ Hospital.

Upon arriving at the hospital, she found her father in the emergency room and he was unresponsive. She was advised by Mr. Franco that her father was on the back of a truck unloading or cleaning and that he slipped and fell. They found him on the ground. (A. 20).

The medical records of Christ Hospital document that upon admission Mr. Cuevas was unresponsive and was placed on a ventilator. He was admitted to the ICU. A CT Scan of the head showed a severe traumatic brain injury. He remained hospitalized at Christ Hospital until March 16, 2016. (Pet. Ex. No. 1)

Maricela Cuevas then made arrangements to transfer her father to Rehabilitation Institute of Chicago ("RIC"). During his intake examination at RIC his condition worsened, and he was sent to Northwestern Memorial where he was admitted for five days.

On March 23, 2016, he was admitted to RIC now known as Shirley Ryan Ability Lab. He received inpatient treatment until May 9, 2016. He then attended therapy at Neuro Restorative to assist in learning to walk, talk and swallow. He also received several sessions of

outpatient physical at RIC. Dr. Ripley at RIC monitored his progress. Outpatient physical therapy at RIC ended March 8, 2017. (Pet. Ex. No. 2)

Ms. Cuevas testified that her father's condition has not improved since March 8, 2017. She and her family together make all decisions for their father. At present, her father only sees the doctors at RIC for an annual checkup.

Ms. Cuevas testified her father had a recent episode on May 5, 2021 when he was admitted to Rush Hospital after getting sick at home. He was seen by Dr. Blatt, a neurologist, who changed his medications. (A. 34-35)

Ms. Cuevas testified she has not seen any improvement in her father's condition since March of 2017.

On cross examination, Ms. Cuevas testified that her father's condition has not improved since March 8, 2017. (A. 39).

Documentary evidence corroborating Maricella Cuevas' testimony was introduced, and proofs were closed.

On March 9, 2022, Personnel Staffing filed an emergency Motion to Reopen Proofs to Amend the Stipulation that Trinidad Cuevas was employed by Personnel Staffing.

On March 22, 2022 an Amended Application for Adjustment of Claim was filed adding Metropolitan Associates, LLC ("Metropolitan") as a Respondent.

Webex discussions concerning proceeding with the Motion resulted in the matter being continued to allow Florida Fruit and Metropolitan to obtain counsel. An in person hearing on Respondent Personnel Staffing's Motion to Reopen proofs was set for September 27, 2022.

On September 27, 2022, all parties appeared through their respective attorneys including Florida Fruit and Metropolitan. Following a discussion, a continuance was granted in order to allow Metropolitan to comply with the subpoenas issued by Personnel Staffing. Briefs were requested from Florida Fruit and Metropolitan to support their opposition to Personnel Staffing's Motion to Reopen Proofs. The motion was continued by agreement to December 1, 2022 for an in person hearing.

Prior to December 1, 2022 Personnel Staffing filed a Motion for Penalties pursuant to 820ILCS 305-25.5 and a brief in support of their Motion to Reopen Proofs to Vacate their Stipulation. Metropolitan and Florida Fruit filed briefs in opposition to Personnel Staffing's Motion.

On December 1, 2022, Oral Arguments from all parties were heard in support of their positions as set forth in their briefs.

ISSUE: 1) SHOULD THE MOTION OF PERSONNEL STAFFING GROUP, LLC TO REOPEN PROOFS TO VACATE THEIR STIPULATION AT TRIAL THAT AN EMPLOYER-EMPLOYEE RELATIONSHIP EXISTED BETWEEN TRINIDAD CUEVAS AND PERSONNEL STAFFING, LLC GROUP BE GRANTED.

The decision whether to grant a motion to reopen proofs lies within the Arbitrator's discretion and will not be disturbed on appeal absent an abuse of discretion. Freeman United Coal Management v. Ill. Workers' Compensation, 2008, 386 Ill. App. 3d 779.

Florida Fruit cites, Montgomery Ward & Company v. Industrial Commission, 304 Ill. 576, 578 (1922), that states "one of the purposes of the Compensation Act is to secure a speedy and economical settlement of claims for industrial accidents, and stipulations tending to expedite the hearing should be encouraged rather than discouraged by the courts and should be enforced unless good cause is shown to the contrary. Montgomery Ward & Company v. Industrial Commission, 304 Ill. 576, 578, 136 N.E. 2d 796, 797 (1922) Parties will not be relieved from a stipulation in the absence of a clear showing that the matter stipulated is untrue and then only when the application is seasonably made. Brink v. Industrial Commission, 368 Ill, 607, 609 15 N.E. 2d 491, 492 (1938) citing Montgomery Ward & Co., supra.

Florida Fruit argues that Personnel Staffing Group has failed to show any good cause to withdraw their stipulation and that they failed to make a clear showing that the stipulated facts are untrue. Florida Fruit also asserts that Personnel Staffing application for relief was not timely since the acknowledgement of the employment relationship took place in 2016 when this claim was accepted by Zurich Insurance their workers' compensation carrier.

Metropolitan cites In Re: Estate of Bennoon, 2014 Ill. App. 1st. 12224 that states in ruling on a motion to reopen proofs, the trier of fact must consider three factors:

1) whether the moving party has provided a reasonable excuse for failing to submit evidence during trial;

2) whether granting the motion would cause surprise or unfair prejudice to the other party and;

3) whether the evidence is of the utmost importance to the movement's case.

Metropolitan argues that none of those three elements have been shown by Personnel Staffing Group. Therefore, Personnel Staffing's Motion should be denied. Personnel Staffing Group agrees that they only discovered that an employer-employee relationship did not exist until after the hearing on February 25, 2022 and that upon the discovery filed their motion on March 9, 2022 to reopen proofs. Personnel Staffing asserts in their brief that interests of justice require the granting of their motion to reopen proofs to introduce additional evidence to determine which of the Respondent's were employers of Petitioner.

The Arbitrator finds the Arguments of Metropolitan and Florida Fruit Juices more persuasive.

Personnel Staffing accepted that Petitioner was their employee at the time of accident and stipulated to that fact at a hearing six years later. Personnel Staffing has been unable to provide an explanation as to why this alleged mistake, if there was one, was not discovered until after a hearing was held and proofs were closed. The Arbitrator finds that Florida Fruit and Metropolitan have been prejudiced by Personnel Staffing Group and Zurich Insurance's failure to discover that there was an issue concerning employment with Personnel Staffing until after proofs were closed on February 25, 2022.

The Arbitrator therefore denies Personnel Staffing's Motion to Reopen Proofs in this matter.

ISSUE: 2) WHEN DID PETITIONER'S CONDITION REACH MAXIMUM MEDICAL IMPROVEMENT AND HIS ENTITLEMENT TO PERMANENT TOTAL BENEFITS BEGIN.

The only disputed issue presented in the hearing on February 25, 2022 was when did the Petitioner's entitlement to temporary total disability end and his entitlement to Permanent Total Disability benefits begin.

Temporary total disability exists from the time the injury incapacitates the employee until such time as he is as far recovered as the character of the injury will permit. Kuhl v. Industrial Commission, 126 Ill. App. 3d, 946 (1989)

The medical evidence documents that Petitioner was under active medical treatment from the day of the accident until his outpatient physical therapy at RIC on March 8, 2017. The testimony of Maricela Cuevas, the Petitioner's daughter, was that by that date her father was living at home. His active treatment at RIC was completed and his medical treatment consisted of annual visits with Dr. Ripley to monitor his condition.

The Arbitrator therefore finds Petitioner was temporarily totally disabled from February 19, 2016 to March 8, 2017 totaling 54 5/7 weeks. The Arbitrator finds that Petitioner reached a stage of permanency on that date. The Arbitrator finds that, as stipulated by the parties, the injuries Petitioner sustained on February 18, 2016 have rendered him permanently and totally disabled.

The Arbitrator therefore finds the Petitioner is entitled to $524.34 per week beginning March 9, 2017 for life pursuant to Section 8(f) of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC004977
Case Name	Chrystalyn K Sobczak v. State of Illinois Chester Mental Health Center
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0365
Number of Pages of Decision	10
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	James Ruppert
Respondent Attorney	Kenton Owens

DATE FILED: 8/17/2023

/s/Marc Parker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Chrystalyn Sobczak,

Petitioner,

vs. No. 20 WC 004977

State of Illinois, Chester Mental Health Center,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of benefit rates/average weekly wage, temporary total disability, and nature and extent, and being advised of the facts and law, modifies the Corrected Decision of the Arbitrator as stated below and otherwise affirms and adopts the Corrected Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Arbitrator found Petitioner's average weekly wage to be $1,092.41, and awarded Petitioner permanent partial disability benefits of $655.45 per week for 20 weeks because the injury sustained caused the four percent (4%) loss of use of the person as a whole, as provided in §8(d)2 of the Act. The Commission affirms those findings.

At arbitration, the parties stipulated that Petitioner was entitled to 14 weeks of TTD, from December 24, 2019 through March 30, 2020. The parties also stipulated that Respondent paid $10.461.31 in TTD benefits. In his decision, the Arbitrator gave Respondent a credit of $10,461.31 for TTD paid, per the parties' stipulation. However, the Arbitrator did not award Petitioner the 14 weeks of TTD to which the parties stipulated. The Commission does so at this time.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Corrected Decision of the Arbitrator filed April 6, 2022, is hereby modified as stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that, based upon an average wage of $1,092.41, Respondent shall pay Petitioner temporary total disability benefits of $728.27 per week for 14 weeks, for the period of December 24, 2019 through March 30, 2020, that being the period of temporary total incapacity from work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner permanent partial disability benefits of $655.45 per week for 20 weeks because the injury sustained caused the four percent (4%) loss of use of the person as a whole, as provided in §8(d)2.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall 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.

Pursuant to §19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review. Therefore, no appeal bond is set in this case.

August 17, 2023

MP/mcp
o-08/10/23
068

/s/ *Marc Parker*
Marc Parker

/s/ *Christopher A. Harris*
Christopher A. Harris

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC004977
Case Name	SOBCZAK, CHRYSTALYN K. v. STATE OF ILLINOIS CHESTER MENTAL HEALTH CENTER
Consolidated Cases	
Proceeding Type	
Decision Type	Corrected Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	7
Decision Issued By	William Gallagher, Arbitrator

Petitioner Attorney	James Ruppert
Respondent Attorney	Kenton Owens

DATE FILED: 4/6/2022

THE INTEREST RATE FOR THE WEEK OF APRIL 5, 2022 1.11%

/s/ William Gallagher, Arbitrator

Signature

CERTIFIED as a true and correct
copypursuant to820 ILCS 305/14

April 6, 2022

/s/ Michele Kowalski

Michele Kowalski, Secretary

Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF Madison)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION

Chrystalyn K. Sobczak
Employee/Petitioner

v.

State of Illinois Chester Mental Health Center
Employer/Respondent

Case # 20 WC 04977

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Collinsville, Herrin Docket, on February 24, 2022. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On December 23, 2019, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $54,464.63; the average weekly wage was $1,092.41.

On the date of accident, Petitioner was 22 years of age, married with 0 dependent child(ren).

Petitioner has received all reasonable and necessary medical services.

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

Respondent shall be given a credit of $10,461.31 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $10,461.31. The parties stipulated TTD benefits were paid in full.

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

ORDER

Based upon the Arbitrator's Conclusions of Law attached hereto, Petitioner's average weekly wage is $1,092.41.

Respondent shall pay Petitioner permanent partial disability benefits of $655.45 per week for 20 weeks because the injury sustained caused the four percent (4%) loss of use of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

William R. Gallagher

APRIL 6, 2022

William R. Gallagher, Arbitrator
ICArbDec p. 2

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged she sustained an accidental injury arising out of and in the course of her employment by Respondent on December 23, 2019. According to the Application, Petitioner was "Injured in the course of work" and sustained an injury to her "Head, face, left ear, neck, back, shoulders and other body parts" (Arbitrator's Exhibit 2). There was no dispute Petitioner sustained a work-related accident. Further, Petitioner and Respondent stipulated that medical and temporary total disability benefits had been paid and the only disputed issues were the computation of Petitioner's average weekly wage and the nature and extent of disability (Arbitrator's Exhibit 1).

The dispute regarding the computation of Petitioner's average weekly wage was based on whether or not Petitioner working overtime hours was mandatory or voluntary. Petitioner and Respondent stipulated that if Petitioner was required to work overtime hours, her average weekly wage was $1092.41; and if Petitioner was not required to work overtime hours, her average weekly wage was $804.75 (Arbitrator's Exhibit 1).

Petitioner worked for Respondent as a security therapy aide. On December 23, 2019, Petitioner was struck in the face by a combative patient.

Following the accident, Petitioner sought treatment at Sparta Convenient Care, on December 23, 2019, and was seen by Danielle Preuss, a Physician Assistant. PA Preuss diagnosed Petitioner with a head injury and ataxia and directed Petitioner to go to an ER (Petitioner's Exhibit 1).

Petitioner was seen in the ER of Sparta Community Hospital on December 23, 2019. At that time, she advised she had been punched in the head by a patient. Petitioner was diagnosed as having sustained a minor closed head injury and headache. A CT scan of Petitioner's head was performed which was normal. Petitioner was prescribed medication and discharged (Petitioner's Exhibit 3).

Petitioner subsequently sought treatment from Dr. Kelly Wood, her family physician, who saw her on December 27, 2019. At that time, Petitioner advised Dr. Wood of the accident and complained primarily of pain/stiffness in the neck/shoulders as well as dizziness and headaches. Dr. Wood opined Petitioner had sustained a facial/cranial contusion and a mild concussion. She prescribed medication (Petitioner's Exhibit 4).

Dr. Wood again saw Petitioner in December, 2019, January, 2020, and February, 2020. Petitioner's complaints included neck/back stiffness, vertigo, anxiety, dizziness and headaches. Dr. Wood opined Petitioner had concussion syndrome as well as anxiety/depression. She recommended Petitioner have an MRI scan of her brain and be evaluated by a neurologist (Petitioner's Exhibit 4).

On February 25, 2020, Petitioner was evaluated by Dr. Bilal Butt, a neurologist. At that time, Petitioner's primary complaints were dizziness and headaches. Dr. Butt's neurological examination was normal, but he diagnosed Petitioner with postconcussion syndrome (Respondent's Exhibit 2).

On February 26, 2020, an MRI scan was performed on Petitioner's brain. According to the radiologist, there were no abnormalities or any findings which would explain Petitioner's symptoms (Petitioner's Exhibit 4).

Dr. Wood saw Petitioner on March 16, 2020, and March 30, 2020. Dr. Wood reviewed the report of the MRI of March 16, 2020, and noted it was normal. However, she reaffirmed her diagnosis of postconcussion syndrome. When Petitioner was seen by Dr. Wood on March 30, 2020, Petitioner continued to complain of anxiety, dizziness and headaches.

Dr. Wood last saw Petitioner on July 6, 2020. At that time, Petitioner advised her headaches were controlled and her depression symptoms had improved (Petitioner's Exhibit 4). Since the time Petitioner was last seen by Dr. Wood, she has not sought further medical treatment elsewhere.

At trial, Petitioner testified she was able to return to work to her job with Respondent and was still working for Respondent. Petitioner complained of dizziness and stated she experiences headaches two to three times per week. When Petitioner experiences dizziness, she will many times have her husband drive her to work. Petitioner said she has periodically missed a few days from work because of her headaches. Petitioner also testified she continues to experience what she calls PTSD symptoms, including nightmares and anxiety especially when she observes situations at work similar to her accident.

On cross-examination, Petitioner agreed she was able to return to work without restrictions following her examination with Dr. Wood on March 30, 2020. Further, Petitioner conceded she has not been seen by Dr. Wood or any other medical providers since she was last seen by Dr. Wood on July 6, 2020.

In regard to the computation of Petitioner's average weekly wage, Petitioner testified she was paid twice a month with the first pay period being from the first day of the month through the 15th day of the month. The second pay period was from the 16th day of the month through the last day of the month.

Respondent tendered into evidence a wage statement of Petitioner's earnings from the pay period ending December 31, 2018, through the pay period ending December 15, 2019. The wage statement included a breakdown of regular and overtime earnings for each pay period (Respondent's Exhibit 1).

Petitioner testified that all of the overtime hours she worked during the pay periods on the wage statement were mandatory. Petitioner stated she would sign up for overtime so she would be able to designate the shift and location where she would work the overtime hours. If Petitioner did not sign up for overtime, then she would be mandated to work overtime at whatever shift and location was designated by Respondent. Petitioner testified she knew that if she did not sign up for overtime, she would be mandated to work overtime because there was a "mandate list" which indicated the order employees would be mandated to work overtime. Petitioner testified this had been the procedure for determining who worked overtime hours since the time she was hired in 2018.

There were two pay periods on the wage statement in which Petitioner did not work any overtime hours. Petitioner explained that one of the pay periods she was in "training status" and Respondent could not mandate overtime hours for trainees. During the other pay period, Petitioner said she was on vacation.

On cross-examination, Petitioner testified she took voluntary overtime so she could pick her shift. However, Petitioner stated she did not consider it to be "voluntary" although her understanding was that it was considered voluntary by Respondent.

Tamara Linders testified on behalf of Respondent. Linders was Respondent's Workers' Compensation Coordinator. Linders authenticated Petitioner's wage statement. Linders testified mandatory overtime was when the employee was ordered to stay at work and voluntary overtime was when the employee could choose if they wanted to stay at work or not. Linders testified she had reviewed the records and Petitioner worked 648 overtime hours for the year, of which 568 overtime hours worked voluntary. She stated approximately 88% of the overtime hours worked by Petitioner were voluntary.

On cross-examination, Linders agreed that if an employee volunteered for overtime, the employee could then choose a better time/hours to work. She also agreed that if Petitioner did not volunteer, she could be given other hours to work if her name was on the rotation. Of the 568 hours she determined to be voluntary, she did not have specific knowledge if Petitioner had volunteered to work or if she would have been mandated to do so. However, she was aware that employees would volunteer for overtime hours so as to avoid being mandated to take shifts they did not want to work.

Conclusions of Law

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

The Arbitrator concludes Petitioner's average weekly wage was $1,092.41.

In support of this conclusion the Arbitrator notes the following:

Petitioner and Respondent stipulated that if Petitioner was required to work overtime hours, her average weekly wage was $1,092.41.

Petitioner testified that all of the hours she worked overtime were mandatory. She explained she signed up for overtime hours because, by doing so, she was able to designate the shift and area she worked. If Petitioner did not sign up for overtime hours, she would have been mandated by Respondent to work overtime, but Respondent would then designate the shift and the location where she would work.

On cross-examination, Petitioner agreed she "volunteered" to work overtime hours, but the reason she did so was to designate her shift. Petitioner testified she did not consider the overtime hours to be "voluntary" even though they were considered voluntary by Respondent.

Tamara Linders, Respondent's Workers' Compensation Coordinator, testified that Petitioner worked 648 overtime hours during the year of which 568 overtime hours were voluntary. However, Linders acknowledged that if Petitioner did not volunteer to work overtime, she could be mandated to do so. Linders had no knowledge of the number of hours Petitioner volunteered to work overtime and if Petitioner declined to volunteer if she would have been mandated to do so.

The Arbitrator finds Petitioner's testimony regarding her being mandated to work overtime hours was unrebutted. Linders' testimony was consistent with the testimony of Petitioner. While Respondent designated the majority of overtime hours worked by Petitioner as being "voluntary," they were, in fact, mandated by Respondent.

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

The Arbitrator concludes Petitioner has sustained permanent partial disability to the extent of four percent (4%) disability to the person as a whole.

In support of this conclusion the Arbitrator notes the following:

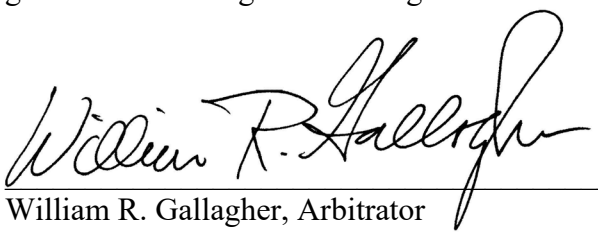
Neither Petitioner nor Respondent tendered an AMA impairment rating. The Arbitrator gives this factor no weight.

At the time of the accident, Petitioner worked for Respondent as a security therapy aide. Petitioner was able to return to work to that job and was working in that capacity at the time of trial. The Arbitrator gives this factor moderate weight.

Petitioner was 22 years old at the time of the accident. She will have to live with the effects of the injury for the remainder of her working and natural life. The Arbitrator gives this factor significant weight.

There was no evidence the injury had any effect on Petitioner's future earning capacity. The Arbitrator gives this factor moderate weight.

Petitioner was diagnosed with a postconcussion syndrome and she experienced dizziness, headaches and anxiety/depression afterward. However, the MRI scan of Petitioner's brain was normal as was a neurological examination. Further, Petitioner has not sought any medical treatment since she was last seen by Dr. Wood on July 6, 2020. Accordingly, the Arbitrator finds Petitioner's disability to be partially corroborated by the medical treatment records. The Arbitrator gives this factor significant weight.



William R. Gallagher, Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC007176
Case Name	Erik Esker v. State of Illinois – Illinois Department of Natural Resources
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0366
Number of Pages of Decision	12
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	John Bays
Respondent Attorney	Christina Smith

DATE FILED: 8/17/2023

/s/Carolyn Doherty, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF CHAMPAIGN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ERIK ESKER,
Petitioner,

vs. NO: 20 WC 7176

IL DEPT. OF NATURAL RESOURCES.,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of nature and extent and "other – evidentiary ruling" 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, with a clerical correction stated as follows.

The Commission writes additionally to correct a clerical error on the last page of the Arbitrator's Decision which states, "Respondent shall pay Petitioner permanent partial disability benefits of $644.87 for a period of 9.72 weeks because Petitioner suffered 5% damage to the left eye pursuant to Section 8(e)(13) of the Act." However, as correctly stated in the Arbitrator's Order, under Section 8(e)(13) of the Act, 9.72 weeks is equivalent to 6% loss of use of the left eye. As such, the Commission corrects the error on the last page of the Arbitrator's Decision to reflect an award of 6% loss of use of the left eye or 9.72 weeks benefits pursuant to Section 8(e)(13) of the Act.

In all other respects, the Commission affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 16, 2022 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.

Pursuant to §19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review. Therefore, no appeal bond is set in this case.

August 17, 2023

d: 08/10/23
CMD/jjm
045

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

/s/ *Marc Parker*
Marc Parker

/s/ *Christopher A. Harris*
Christopher A. Harris

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC007176
Case Name	ESKER, ERIK v. ILLINOIS DEPARTMENT OF NATURAL RESOURCES
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	9
Decision Issued By	Edward Lee, Arbitrator

Petitioner Attorney	Fred Johnson
Respondent Attorney	Christina Smith

DATE FILED: 11/16/2022

THE INTEREST RATE FOR THE WEEK OF NOVEMBER 15, 2022 4.44%

/s/ Edward Lee, Arbitrator
Signature

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

November 16, 2022

/s/ Michele Kowalski

Michele Kowalski, Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF **Champaign**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

Erik Esker
Employee/Petitioner

v.

Illinois Department of Natural Resources
Employer/Respondent

Case # **20** WC **007176**

Consolidated cases: **n/a**

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Urbana**, on **10/18/22**. By stipulation, the parties agree:

On the date of accident, **12/11/19**, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $**55,889.00**, and the average weekly wage was $**1,074.79**.

At the time of injury, Petitioner was **40** years of age, ***single*** with **1** dependent children.

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

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

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

ORDER

Respondent shall pay Petitioner the sum of $**644.87**/week for a further period of **9.72** weeks, as provided in Section **8(e)(13)** of the Act, because the injuries sustained caused 6% loss of use of the left eye. Respondent shall pay Petitioner the further sum of **$644.87**/week for a further period of **12** weeks, as provided in Section 8(b) 2.1 and 8(c) because of the disfigurement on Petitioner's left temple.

Respondent shall pay Petitioner temporary total disability benefits of **$716.52** for 2 5/7 weeks from **December 12, 2019 through December 31, 2019** as provided in Section 8(b) of the Act.

Respondent shall pay all reasonable and related medical bills per the Fee Schedule in the Act.

Respondent shall pay Petitioner compensation that has accrued from **12/11/19** through **10/18/22**.

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

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

NOVEMBER 16, 2022

Edward Lee_____
Signature of Arbitrator

I. STATEMENT OF FACTS

A. Petitioner's Testimony

Petitioner Erik Esker was employed as a site technician for the Department of Natural Resources when he suffered an injury on December 11, 2019. (TX 7). Petitioner's job duties as a site technician include working at various state parks performing any necessary maintenance tasks at the parks including plumbing, electrical work, carpentry work, forestry work, tree cutting, cleaning, lifting downed trees and logs, working on heavy machinery, and using mechanical equipment such as chainsaws. (TX 7-8). Petitioner also testified that he works several times a year with the Illinois Interagency Fire Crew going to western states fighting fires. This includes hiking, chainsaw work, dragging brush, digging lines, carrying heavy packs and dealing with dangerous conditions including smoke. (TX 9). Petitioner also performs carpentry work in the form of roofing repairs, building sign kiosks, viewing platforms, docks, repairs to restaurant and shower house facilities. (TX 9-10).

On December 11, 2019, Petitioner was stationed at Walnut Point State Park and was cutting hazardous trees that posed a risk to the public. Petitioner was cutting an ash tree that was approximately 14 inches in diameter with a chainsaw. (TX 10) Several other trees had been cut nearby. Petitioner checked his

overhead, made a cut to fell the tree and it got hung up another tree slightly so he made one more cut and got the tree on the ground. As he was stepping away, another branch came loose and hit Petitioner on the upper right side of his face toward his temple. (TX 11). The branch was a 3-4 inch diameter limb approximately 12 to 16 feet long. The branch hit him with force causing his helmet to brake and causing Petitioner to be knocked down. (TX 11-12).

The Petitioner has a three inch long scar on his face from the force of the branch that hit him. Petitioner testified that he was dazed but not knocked unconscious. (TX 13-14). Petitioner was then taken by ambulance to Carle Hospital in Champaign emergency department. Petitioner testified that they cleaned the wound and made sure all the debris was out and then called in a facial specialist who identified and removed a pinky sized splinter that they pulled out and then stitched his wound up. (TX 14-15). Petitioner testified that he was off work from December 11, 2019 to January 2, 2020. (TX 15). Petitioner subsequently treated with Dr. Craig Norbutt, an oral maxillofacial surgeon at Carle and was referred to an opthamologist, Dr. Ruidi Wang also at Carle. Petitioner's last day of treatment was July 27, 2020. (TX 16).

Petitioner was released to regular work but still notices a general discomfort through the area of the scar and his eye is itchy and twitches randomly-sometimes once a day or sometimes a half dozen times a day. (TX 17). This symptoms are usually worse in the winter when it is dry out and there is itchiness and dryness at least three times a day. Petitioner does not take any medicine for these symptoms. Petitioner has numbness and tingling in the area of the scar and below his eye. (TX 18-19). In response to this, Petitioner wears sunglasses a lot more because he is more light sensitive and to keep the air out. (TX 19). Petitioner testified that his eye gets tired and it takes effort to keep his eye fully open and also more effort to close it. When he is relaxing or sleeping his eye drifts open. (TX 20). Petitioner testified to shooting pains once in a while toward the bottom part of the scar just under his eye. (TX20). Petitioner also testified that when he is fighting fires that his eye waters a lot more with the smoke and he needs to use eye drops and goggles. (TX 21). When Petitioner is sleeping, his eye gets dry and he wakes up rubbing it. (TX 21). Where the wound was, there is a knot of scar tissue just under his cheekbone about the size of a half marble. (TX22). Petitioner testified that when hunting and he needs to use a scope, he has to pinch it closed because it does not close easily.

Petitioner testified that he does perform all his normal duties but if he has to use optics or spotting scopes at work to count waterfowl, he would experience difficulty with the eye and be unable to close it. (TX23). Riding on a tractor is something that he does every day and it bothers his eye with the watering and dryness. (TX23). Petitioner testified that he can still do his job but he just sometimes has to do it differently. (TX 24).

On cross-examination, Petitioner testified that he did not have to wear glasses or contacts to correct his visions before the accident and does not have to wear them after the accident. (PX 26). Petitioner also testified that if he has pain, it subsides in a few minutes and that he only uses over the counter medication and eye drops for his pain. (TX 26). Petitioner also testified that he does not experience headaches related to the accident and did not notice any changes in his vision. (TX 27). Petitioner testified that he has been able to perform his work full duty and could perform all the material duties of the job. He has not requested accommodations other than googles that are more windproof. Petitioner testified that he has received all raises that he was entitled to and that his salary had increased since the accident. (TX 29).

B. Medical Treatment

On 12/11/19, Petitioner presented to the Carle Foundations Hospital Trauma center for evaluation noting a head trauma at work. Petitioner had a CT of brain, cervical and facial bones. A consult from Carle Foundation Hospital Oral and Maxillofacial Surgery department was brought in and noted moderate left

mid-facial and periorbital edema soft to palpation with no overlying erythema. Petitioner presented with a 12 cm curvilinear laceration from inferior to the left eye preauricular region. It was noted that the laceration extended to the bone and that there was a 5 cm piece of wood noted in the laceration along with multiple smaller pieces of wood. (PX 3).

Petitioner had significant periorbital edema and it was noted that he was unable to open the left eye independently. Patient denied any blurry or double vision. The imaging showed no acute intracranial hemorrhage and no evidence of acute fracture. The imaging did show a foreign body measuring approximately 5.0 cm in length within the left infratemporal fossa which appears to extend into the left temporalis muscle. It was noted that there was extensive left periorbital, cheek and jaw soft tissue swelling and hemotoma with locules of gas extending into the left masticator space. The Petitioner underwent a suture repair of lacerations under local anesthesia and a 5 cm piece of wood was removed along with debridement of small pieces of wood. (PX 3).

On December 18, 2019, Petitioner returned for follow up at Carle with Dr. Craig Norbutt and it was noted that he still had significant swelling over the left periorbital area and that his left eye was still almost completely swollen shut but the swelling around the right eye had dissipated. He reported feeling stiff and achy but was able to move his neck around in all directions with no pain. Petitioner had the sutures removed there was significant fluid collection. The doctor performed an aspiration of fluid and a Penrose drain was placed to collect the remaining fluid. Petitioner was to continue off work. (PX 3)

On December 23, 2019, Petitioner returned to Carle for drain removal which was removed without issues. Patient was instructed to continue with wound care. (PX3).

On December 30, 2019, Petitioner returned for follow up and was diagnosed with left facial nerve weakness. Petitioner was referred to opthamology for evaluation of left eyelid weakness and dryness of left eye. (PX3).

On July 22, 2020, Petitioner treated with Dr. Ruidi Wang and was diagnosed with lagophthalmos of the left eye which results in an incomplete or abnormal closure of the eyelid. Artificial tears were recommended for this condition. Petitioner was also diagnosed with blepharitis of both the upper and lower eyelids on both eyes which is an inflammation of the eyelids and is treated with artificial tears, warm compresses and eyelid scrub. (PX3).

On July 27, 2020, Petitioner treated with Dr. Norbutt and was released from care. At this time, Dr. Norbutt indicated that if wanted surgery in the future for scar revision or facial muscle weakness or the lagophthalmos, he should return and a surgical consult would be provided. (PX3).

C. Deposition Testimony

Petitioner's treating doctor, Craig Norbutt M.D. was deposed on June 8, 2022. Dr. Norbutt testified regarding Petitioner's conditions:

> Q: "Were his conditions at this time causally related the trauma of the incident involving the tree branch?"
> A: "Most likely, yes."
> Q: "Alright, and in your December 30 note it stated: patient recommended follow-up
> dryness of left eye. Why did you make that recommendation with ophthalmology?"
> A: "One of the things that was noted is that patient had concerns with some dryness to his eye, so the nerve that was likely traumatized as a result of

the injury was responsible for closing the eye, so if the eye cannot close fully, the eyelid cannot do its job protecting the cornea and that can potentially cause injury to the cornea, so we wanted to make sure that that was being followed and managed appropriately so that was the indication for ophthalmology consultation."
Q: "What nerve is it that was injured that was causing this condition with his eye?"
A: "That's the facial nerve."
Q: "Alright, and was that causing twitching to the patient as well?"
A: "An injury to the facial nerve likely would not be responsible for twitching. That's a motor nerve that supplies the muscles, so I can't remember the episode of twitching, but there was likely some numbness to that area as well." (PX 3)

Beginning at page 16, line 16, the following questions were posed to Dr. Norbutt:

Q: "My question to you, doctor, is-- and the patient continues, by the way, to report that. Do you have a reasonable degree of medical certainty whether the intermittent pain, tingling, twitching, with the left face around the scar region is a permanent condition on a scale of what's more probably true than not."
A: "Yes."
Q: "And what is your opinion?"
A: "Being greater than 6 months out having sustained a likely injury to his facial nerve, the chance of further recovery at this point would be unlikely. However, slight continued improvement is certainly a possibility."
Q: "Ok, and that condition is causally related to the trauma of the accident at work still?"
A: "Yes."
Q: "Alright, and it was also charted at that time that he can fully close his eye; however, it does drift open slightly. Is your opinion the same that that is a permanent condition secondary to the trauma of the accident at this point?"
A: "Most likely."

(PX 3).

Beginning at page 18 of his deposition, the following questions were posed to Dr. Norbutt and the following answers given:
Q: "And can you elaborate for the arbitrator what you're referring to there insofar as the potential for scar revision and a referral?"
A: "Sure. So, as a result of his injury, a scar had developed where the tree branch had penetrated the skin. The scar persists and there are different techniques used to help blend the scar into the surrounding tissue or revise it. I tend to recommend those patients to a facial plastic surgeon who is better equipped and more experienced to perform those interventions should that be proceeded by the patient."
Q: "Is that something the patient might or still could require down the road if he desired it?"
A: "Sure."
Q: "Ok, so your answer is yes?"
A: "Yes."

Dr. Norbutt further elaborated on other potential surgical intervention the patient might require. At pages 18 and 19 of his deposition, Dr. Norbutt testified as followed:

Q: "All right. And then under the plan, and I quote: We also discussed that should the patient want to pursue surgical intervention for facial muscle weakness that we would be able to refer him to the appropriate place. Can you elaborate to the arbitrator what you're referring to there?"

A: "So that would be a consultation for an ocular plastic surgeon who would potentially assist if the inability to fully close the eye would continue to be an issue for the patient. The fact that he was able to close his eye fully and to protect the cornea and to use the artificial tears has seemed to work well for him up to that point."

Q: "And doctor, can you tell us with reasonable medical certainty whether such a referral that you referenced might or still could be considered in the future if the patient would elect to do so?"

A: "Yes."

Q: "And that is something that might still occur if the patient elected to do that?"

A: "Sure, yes."

(PX3).

On June 13, 2022, the deposition of Dr. Ruidi Wang, an ophthalmologist was taken.(PX 4). Dr. Wang diagnosed the Petitioner as suffering from lagophthalmos in the left eye. Beginning at page 20 of his deposition, Dr. Wang was asked the following questions and provided the following answers:

Q: "Ok, and what is the significance of the fact that the lagophthalmos was only observed in the left and not right eye with respect to his potential relationship to the trauma of getting hit by the tree branch?"

A: "I mean, you know, since I only observed it in the left eye, I think, at the time that I saw him in July, what I observed is most likely related to the acute injury that he's had in the left eye."

Q: "Alright, and doctor, the potential surgery that the patient might or could require, if you could tell us with reasonable medical certainty, would that be related to the lagophthalmos in the left eye then?"

A: "Yes, that would be directly related to the lagophthalmos in the left eye if it were to need surgical repair."

At page 6 of his deposition, Dr. Wang testified that lagophthalmos is the incomplete closure of the eyelid. When asked, beginning at page 8 of his deposition, how the diagnosed conditions he found in the Petitioner's eye would affect the patient's day to day activities, Dr. Wang testified he thought it would be minimal but that the Petitioner would have tearing and irritation with an intermittent eyelid closure issue (Wang dep. pgs. 8-9).

Dr. Wang further testified as follows on page 13 and 14:

Q: Okay. And in your opinion, doctor, on a scale of what is more probably true than not do you have an opinion, with reasonable medical certainty, whether these related conditions to the trauma of the branch hitting him are more likely than not permanent?

A: That I cannot say. It could be transient or permanent. I haven't seen the patient since. I don't know the exact status of his condition right now, so it could certainly be transient.

Dr. Wang also testified as follows on page 17:

Q: You said that "if there was a nerve injury." Do you have any reason to believe that there was a nerve injury, or have you diagnosed a nerve injury?

A: No. I don't believe from my examination that I noted any significant facial nerve injury. I am reviewing the notes from the oral maxillofacial surgeon, their notes, and they seem to suggest that there may be suspicion of a facial nerve injury for the laceration, but I certainly—I have not made that diagnosis myself, no.

(PX 4).

Dr. Wang also testified that there was no injury to the cornea from this accident on page 17-18:

Q: Okay. On direct examination when you were going through the list of diagnoses, I just wanted to make clear. When you were talking about the corneal scar opacity, that's in relation to the right eye. Correct?

A: Yes, ma'am.

Q: And that has not relation to the injury. Correct?

A: Most likely, no. Yeah. As far as I understand, he sustained no direct injury to the cornea from the accident, so I don't think that's –and given that I noted that it was an old corneal scar and most likely from a different injury, no. Yeah.

(PX4).

II. CONCLUSIONS OF LAW

Pursuant to 820 ILCS 305/8.1b, permanent partial disability shall be established using the following criteria:

(b)(i) The reported level of impairment pursuant to subsection (a): Neither Petitioner or Respondent submitted an AMA impairment rating in this matter. The Arbitrator gives no weight to this factor.

(ii) The occupation of the injured employee: Petitioner is a Site Technician responsible for all areas of maintenance in various state parks. Petitioner's job duties require hard physical labor and outdoor work in all weather and the injury may cause twitching of his eye, dryness and watering that may impact some of his duties. The Arbitrator gives great weight to this factor.

(iii) The age of the employee at the time of the injury: Petitioner was 40 at the age of his injury and therefore has a large portion of his working life ahead of himself. The Arbitrator gives moderate weight to this factor.

(iv) The employee's future earning capacity: Petitioner testified that the injury has not affected his earnings and that he has received all anticipated raises. Petitioner's income has increased since the accident and therefore there is no reason to anticipate that the accident impacted his future earnings. The arbitrator gives moderate weight to this factor.

(v) Evidence of disability corroborated by the treating medical records: Petitioner's medical records and his testimony indicate that there has been no change to his vision and no corneal damage or other damage to the surface of the eye. Petitioner's complaints arise from the eyelid not fully closing which causes dryness and watering and itching. Petitioner will need to use eye drops for the condition. Petitioner also will experience pain, tingling and twitching related to his accident at the area of the facial scar. The Arbitrator gives great weight to this factor.

Based upon the above factors and the record taken as a whole, the Arbitrator finds that Respondent shall pay Petitioner permanent partial disability benefits of $644.87 for a period of 9.72 weeks because Petitioner suffered 5% damage to the left eye pursuant to Section 8(e)(13) of the Act and shall further pay Petitioner an additional sum of $644.87 for 12 weeks for the disfigurement injury of the scar on his face pursuant to Section 8(b)2.1 and 8(c) of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC037322
Case Name	Jennifer Winfrey v. Oak Park Oasis
Consolidated Cases	20WC003100;
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0367
Number of Pages of Decision	21
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Michael Trybalski, Ronald Sklare
Respondent Attorney	Aisha Shotande

DATE FILED: 8/18/2023

/s/ Deborah Baker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JENNIFER WINFREY,

Petitioner,

vs. NO: 18 WC 37322

OAK PARK OASIS,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of whether Petitioner's current left knee condition is causally related to the undisptued December 8, 2018 work injury, entitlement to temporary disability benefits, and entitlement to incurred medical expenses as well as prospective medical care, and being advised of the facts and law, amends the Decision of the Arbitrator as set forth below, but otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill. 2d 327 (1980).

PROLOGUE

The Commission observes Petitioner's personal identity information was unredacted from Petitioner's Exhibit 10. The Commission cautions Counsel to adhere to Supreme Court Rule 138. *Ill. S. Ct. R. 138* (eff. Jan. 1, 2018).

The Commission corrects Page 8 to reflect the employee's burden of proof for obtaining compensation under the Act is set forth in Section 1(d) (*820 ILCS 305/1(d)*).

CONCLUSIONS OF LAW

This case was consolidated for hearing with case number 20 WC 3100. Both cases involve injuries to Petitioner's left knee while Petitioner was in the employ of Oak Park Oasis: 18 WC 37322 involves an undisputed December 8, 2018 accident and 20 WC 3100 involves an accidental injury on October 30, 2019. Oak Park Oasis was covered by different workers' compensation insurance carriers on the two dates of accident. The crux of the issue at trial was whether the October 30, 2019 incident is an intervening accident that broke the chain of causation from the December 8, 2018 accident, thereby shifting liability for the recommended meniscal surgery from the carrier on the first date of accident ("Respondent/Carrier 1") to the carrier on the second date of accident ("Respondent/Carrier 2"). The Arbitrator authored two decisions, each finding Petitioner's current left knee condition causally related exclusively to the accidental injury therein and ordering both carriers to pay duplicative benefits. The Commission observes the two decisions are mutually exclusive and fail to resolve the carriers' intervening accident dispute.

We begin with a review of the applicable standard. Intervening accidents are evaluated under a "but for" standard:

> Every natural consequence that flows from a work-related injury is compensable under the Act unless the chain of causation is broken by an independent intervening accident. (Citations). Under an independent intervening cause analysis, compensability for an ultimate injury or disability is based upon a finding that the employee's condition was caused by an event that would not have occurred "but for" the original injury. (Citation). Thus, when an employee's condition is weakened by a work-related accident, a subsequent accident, whether work related or not, that aggravates the condition does not break the causal chain. (Citations). "For an employer to be relieved of liability by virtue of an intervening cause, the intervening cause must completely break the causal chain between the original work-related injury and the ensuing condition." *Global Products*, 392 Ill. App. 3d at 411. As long as there is a "but for" relationship between the work-related injury and subsequent condition of ill-being, the first employer remains liable. *Global Products*, 392 Ill. App. 3d at 412. *PAR Electric v. Illinois Workers' Compensation Commission*, 2018 IL App (3d) 170656WC, ¶ 63 (Emphasis added).

This is a difficult burden of proof, as in order for an incident to rise to the level of an independent intervening accident, the proponent must prove the subsequent condition of ill-being would have occurred even if the claimant's condition had not already been weakened by the work accident.

Turning to the evidence, the Commission finds it important to clarify Petitioner's clinical picture leading up to the October 30, 2019 accident, as well as the specific pathology for which surgery is recommended. On April 12, 2019, Dr. Gregory Markarian performed arthroscopy. The operative findings included, *inter alia*, a lateral meniscus tear and a "grade 4 chondral defect that was 8 x 8 mm…over the major weightbearing surface of the lateral femoral condyle." Pet.'s Ex. 6. The lateral meniscus tear was addressed with a "partial lateral meniscectomy…on the outer third" of the meniscus; the lesion was addressed with "chondroplasty…then a marrow stimulating

procedure was done using the nanofracture." Pet.'s Ex. 6. Dr. Markarian's records reflect Petitioner did well post-operatively; on June 19, 2019, "per protocol" at the three-month mark, the doctor ordered an MRI to evaluate cartilage. Pet.'s Ex. 6. The updated MRI was done June 21, 2019; when Dr. Markarian reviewed the MRI on July 10, 2019, he observed the "lesion was good on postop MRI" and recommended a final month of work hardening. Pet.'s Ex. 6. At the August 7, 2019 re-evaluation, Dr. Markarian noted Petitioner reported minimal residual symptoms and her examination findings included good quadriceps contracture, no extensor lag, full range of motion, and no swelling; Dr. Markarian further noted Petitioner's "lesion reconstituted postop, s/p [marrow] stimulation procedure," though he warned the lesion repair may not be permanent: "In the future, the lesion may break down. It may become worse and she may need future surgery related to breakdown and possible future arthritis." Pet.'s Ex. 6. Dr. Markarian discharged Petitioner from care; while the office note states, "If [*sic*] she gets maximum medical improvement, she can return to work without restrictions," the August 7, 2019 Work Status Report reflects Petitioner was "MMI D/C" and released with no restrictions. Pet.'s Ex. 6 (Emphasis added).

Petitioner thereafter returned to work, and per her testimony, her left knee did well; leading up to October 30, 2019, she performed her regular duties and experienced only occasional mild aches. T. 22, 38. On October 30, 2019, while pushing a medication cart, she had an acute onset of stabbing pain in her knee. T. 20. That day, Petitioner was evaluated by Dr. Markarian's colleague, Dr. Mona Clor, who ordered an updated MRI. Pet.'s Ex. 6. Dr. Markarian's records reflect he was "waiting" for that MRI for several months, and it was finally done on July 29, 2020; the scan was interpreted by the same radiologist who read the June 21, 2019 scan, Dr. Gregory Goldstein, and his impression was "1. Small effusion and mild tricompartment [*sic*] osteoarthritis; 2. Suspect horizontal tear within the body of the lateral meniscus." Pet.'s Ex. 16 (Emphasis added). On August 3, 2020, Dr. Markarian reviewed the MRI, noted Petitioner "has possibly got recurrent horizontal tear of the lateral meniscus," and recommended "revision arthroscopy with possible inlay resurfacing." Pet.'s Ex. 6. (Emphasis added). It is liability for this surgery that is in dispute.

In arguing the October 30, 2019 incident broke the chain of causal connection, Respondent/Carrier 1 highlights the opinion of its §12 physician, Dr. Andrew Kim, who felt Petitioner was at maximum medical improvement as of August 7, 2019 and suffered no new injury on October 30, 2019. The Commission does not find Dr. Kim's opinions persuasive or credible. We observe Dr. Kim did not review either the report or the images from the July 29, 2020 MRI that demonstrated a recurrent meniscal tear; rather, Dr. Kim was provided only with the report from a January 2, 2020 MRI, which was done through Concentra and never forwarded to Dr. Markarian. In the Commission's view, Petitioner's left knee was compromised by the December 8, 2018 accident and "but for" the initial lateral meniscus tear, the benign maneuver on October 30, 2019 would not have caused a recurrent meniscal tear. Therefore, the October 30, 2019 accident does not constitute an intervening accident, and Petitioner's left knee condition remains causally related to the December 8, 2018 accident. Consistent with this determination, the Commission clarifies benefits are only awarded in the instant case 18 WC 37322.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 27, 2022, as amended above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $650.97 per week for a period of 91 5/7 weeks, representing December 8, 2018 through August 7, 2019; October 30, 2019 through February 20, 2020; and February 1, 2021 through November 12, 2021, those being the periods of temporary total incapacity for work under §8(b), and that as provided in §19(b), this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any. Respondent shall have credit of $17,904.16 for TTD benefits previously paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $34,109.11 for medical expenses as provided in §8(a), subject to §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Responent shall provide and pay for left knee surgery as recommended by Dr. Gregory Markarian, including but not limited to any necessary pre-operative and post-operative rehabilitative treatment, as provided in §8(a) of the Act.

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

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

August 18, 2023

DJB/mck

O: 7/12/23

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/s/ *Deborah J. Baker*

/s/ *Stephen J. Mathis*

/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC037322
Case Name	Jennifer Winfrey v. Oak Park Oasis, LLC
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	16
Decision Issued By	Charles Watts, Arbitrator

Petitioner Attorney	Michael Trybalski
Respondent Attorney	Aisha Shotande

DATE FILED: 7/27/2022

THE INTEREST RATE FOR THE WEEK OF JULY 26, 2022 2.92%

/s/Charles Watts, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF **Cook**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Jennifer Winfrey Case # **18** WC **37322**
Employee/Petitioner

v.

Oak Park Oasis, LLC
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Charles Watts**, Arbitrator of the Commission, in the city of **Chicago**, on **11/12/21**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **12/8/18**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**50,775.40**; the average weekly wage was $**976.45**.

On the date of accident, Petitioner was **42** years of age, ***single*** with **2** dependent children.

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

Petitioner is entitled to, and Respondent liable for, further medical care and benefits under section 8(a) of the Act.

Respondent is liable for TTD benefits during the periods of: 12/8/18 – 8/8/19, 10/30/19-2/20/20, and 2/1/21 – current (11/12/21), for a total of 89 & 5/7 weeks at a weekly rate of $650.97.

Respondent shall be given a credit of $**17,904.16** for TTD, $**0** for TPD, $**0** for maintenance, and $ for other benefits, for a total credit of $**17,904.16**.

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

ORDER

Medical benefits

Pursuant to the medical fee schedule and as provided in Sections 8(a) and 8.2 of the Act, Respondent shall satisfy the **$34,109.11** in outstanding medical charges as itemized below and in Petitioner's Exhibits: 2, 5, 7, 8, 13, 15, 17, & 19 as said charges were for the reasonable and necessary medical treatment of Petitioner's 12/8/18 work-related injuries. Funds shall be issued directly to Petitioner's Counsel, who will then satisfy balances with each of the medical service providers/facilities.

1. Elmhurst Memorial Hospital..... $548.07
2. Advanced Physical Medicine..... $1,743.06
3. Chicago Sports Medicine Institute..... $2,456.28
4. Prescription Partners, LLC..... $5,752.70
5. APM Surgical Group $19,459.00
6. Berwyn Diagnostic Imaging $1,950.00
7. Archer Open MRI $1,950.00
8. American Diagnostic MRI..... $250.00

$34,109.11

Respondent shall authorize further medical treatment related to Petitioner's left leg/knee injury. This shall include, but not be limited to, the surgical revision and left knee arthroscopy with possible resurfacing as recommended by Petitioner's surgeon Dr. Markarian.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of ***$650.97***/week for ***89 & 5/7*** weeks, commencing ***12/8/18*** through ***8/8/19***, ***10/30/19*** through ***2/20/20***, & ***2/1/21*** through ***current (11/12/21*** as provided in Section 8(b) of the Act, for a total award of $58,401.31.

Respondent shall be given a credit of ***$17,904.16*** for temporary total disability benefits that have already been issued. This amounts to an award of $40,497.15 in fresh TTD benefits.

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

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

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

JULY 27, 2022

Signature of Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION
DECISION

Jennifer Winfrey,	)	
	)	
Petitioner,	)	Case No.: 18 WC 37322
	)	Related Matter: 20 WC 3100
v.	)	
	)	Arbitrator: Charles Watts
Oak Park Oasis, LLC,	)	
	)	
Respondent.	)	

Pursuant to Petitioner's motion for hearing under section 19(b) of the Illinois Workers' Compensation Act, and by agreement of the parties, matters 18 WC 37322 and 20 WC 3100 proceeded to a hearing under section 19(b) of the Act before the Honorable Arbitrator Charles Watts of the Illinois Industrial Commission on 11/12/21, in the city of Chicago, IL.

The record relating to matter 18 WC 37322 consists of: One (1) exhibit offered by Arbitrator Charles Watts (Herein after, Arb. Ex.1), three (3) exhibits offered by Respondent (Herein after, Rx.1 – Rx.3), and Nineteen (19) exhibits offered by Petitioner (Px.1 – Px.19).

The record relating to matter 20 WC 3100 consisting of: One (1) exhibit offered by Arbitrator Charles Watts (Herein after, Arb. Ex.2), One (1) exhibit offered by Respondent (Herein after, Rx.4), and Nineteen (19) exhibits offered by Petitioner (Px.1 – Px.19).

The parties agree to the following: (Arb. Ex. #1)

A.) As of December 8, 2018 (12/8/18) Respondent was operating under and subject to the Illinois Workers' Compensation or Occupational Disease Act,

B.) The relationship of Petitioner and Respondent on 12/8/18 was one of employee and employer.

C.) An accident did occur that arose out of and in the course of Petitioner's employment by Respondent.

D.) The date of the alleged accident was 12/8/18.

E.) Timely notice of the alleged accident was provided to the Respondent.

G.) Petitioner's earnings during the 52-week period prior to 12/8/18 was $50,775.40, with a corresponding Average Weekly Wage (*A.W.W.*) of $976.45 pursuant to the Illinois Workers' Compensation Act.

H.) On 12/8/18 Petitioner was 42 years old.

I.) On 12/8/18 Petitioner was unmarried with two (2) minor dependents.

L.) The nature and extent of Petitioner's injuries are not in dispute.

M.) There is no claim for penalties or fees being asserted by either party.

N.) Respondent makes no claim for a disputed credit.

The parties dispute the following: (Arb. Ex. #1)

F.) Whether Petitioner's current condition of ill-being is causally related to the injuries of 12/8/18.

J.) Whether the medical services which were provided to Petitioner were reasonable and necessary. Whether Respondent has paid all appropriate charges for the reasonable and necessary medical services.

K.) Whether Petitioner is entitled to further TTD benefits.

O.) Whether Respondent is liable for further medical benefits under section 8(a) of the Act.

FINDINGS OF FACT

12/8/18 Incident

On December 8, 2018 (12/8/18), Ms. Jennifer Winfrey (herein after "Petitioner") was employed by Oak Park Oasis, LLC. (herein after "Respondent").

Petitioner was employed as a licensed practical nurse. In this role Petitioner was responsible for the care and treatment of between 30 and 36 residents. Typical duties for Petitioner included: assigning patient nurses, updating doctors on patient status, scheduling patient appointments, administering medication, etc. (T. 9-10).

Petitioner testified she used a cart while administering medication to patients. Petitioner estimated the size of the cart as roughly three (3) feet wide by five (5) to six (6) feet long and weighing over one hundred and ten pounds (110 lbs.) (T. 20).

Petitioner testified she has been employed as a nurse since 1994. From1994 until March of 2012 Petitioner worked as a certified nursing assistant (CNA). Since March of 2012 Petitioner

has been employed as a certified practical nurse. Petitioner's employment for Respondent began in February of 2018 (T. 10).

Petitioner's typical shift while working for Respondent was from 11:00 PM until 7:00 AM (T. 10).

Petitioner alleges that on 12/8/18 she sustained work-related injuries to her left leg/knee while in the performance of her work duties. According to Petitioner, she began her usual work shift at 11:00 PM on 12/7/18, and that shortly before the end of her shift at 7:00 AM on 12/8/18, she had used the bathroom. Petitioner explained "as I came out of the bathroom, there was liquid on the floor, which I didn't know at that time, and I fell forward" (T. 11).

Petitioner stated she fell forward, landing on both of her knees. Petitioner noted that she felt pain immediately, and that the pain was localized primarily to her left knee (T. 11-12).

Petitioner testified that she was unable to get off the floor on her own, and that the nightly nurse supervisor was able to help her up off the floor. Petitioner noted that "as soon as myself and the nurse supervisor got up, my knee and my – like from the top of my thigh to my like midsection of the calf, it swole like triple of what the normal size is." (T. 12).

Petitioner testified that she contacted the injury hotline as required by the employer. Petitioner stated that she was given two options at that point, either go to the emergency room or schedule a doctor's appointment. Petitioner noted that she needed medical care immediately and so she went to the emergency room at Elmhurst Memorial Hospital (T. 13).

Medical Treatment (12/8/18 – 10/30/19)

Medical records establish that Petitioner presented to the emergency room at Elmhurst Memorial Hospital around 9:30 AM on 12/8/18 (Px. 1). Petitioner complained of left knee pain which she stated began "after falling in a puddle at work around 7 AM this morning" (Px. 1, pg. 5). Petitioner denied any history of prior knee injuries or surgeries (Px. 1, pg. 5-6).

X-ray imaging of Petitioner's knee was negative for fracture or dislocation (Px. 1, pg. 8). An ACE wrap was applied to Petitioner's left knee and pain medication given before her discharge (Px. 1, pg. 8). At the time of her discharge, Petitioner's diagnosis included: sprain of left knee, unspecified ligament, left knee contusion, and right knee contusion (Px. 1, pg. 8).

Petitioner was instructed to present to an occupational health facility the following Monday (Px. 1, pg. 8).

Petitioner presented to Concentra Occupational Health on 12/10/18 (Px. 3). Medical records note that Petitioner complained of left knee pain (Px. 3, pg. 4). The history section notes "This is the result of slip and fall coming out of the bathroom at work. Landed with both knees on the ground. Right knee symptoms have resolved…Occurred while at work" (Px. 3, pg. 4). Doctors noted that Petitioner's prior medical history was "non-contributory" (Px. 3, pg. 4).

Concentra diagnosed Petitioner with contusion and sprain of the left knee (Px. 3, pg. 6). Petitioner was referred to begin a course of physical therapy, provided with medication, and scheduled to return for a follow up in four days (Px. 3, pg. 6).

Petitioner was advised against returning to her normal job duties at that time, but was cleared to return on a modified basis. Specifically, Petitioner's restrictions included having the ability to sit for 90% of the time, no lifting over 10 lbs other than on an occasional basis, and no pushing or pulling items over 20 lbs at all (Px. 3, pg. 6).

The next day (12/11/18) Petitioner was seen by Concentra for an initial physical therapy evaluation (Px. 3, pg. 8). It was noted that 20% of Petitioner's treatment goals had been met (Px. 3, pg. 8).

In total Petitioner completed six (6) sessions of physical therapy at Concentra between 12/11/18 and 12/27/18. Petitioner was also seen by the medical doctors at Concentra three times during this period (Px. 3).

Given that physical therapy had failed to improve Petitioner's condition, on 12/14/18 Concentra referred her for an MRI of the left knee (Px. 3, pg. 18).

Petitioner presented to Athlete Imaging in Bellwood on 12/20/18 (Px. 4, pg. 29-31).

The MRI imaging of Petitioner's left knee was reviewed with Petitioner on 12/27/18 (Px. 3, pg. 33). The reviewing doctor noted that "the MRI images demonstrate an effusion with lateral compartment chondromalacia" (Px. 3, pg. 33). Treatment options were discussed with Petitioner including, "physical therapy, cortisone injections, surgery." Petitioner noted her preference to proceed with an injection over surgery at that time (Px. 3, pg. 33).

On 1/7/19 Petitioner presented to Advanced Physical Medicine for an initial evaluation. This was Petitioner's first choice of medical provider (Px. 4). Petitioner complained of left knee/leg pain which she stated began on 12/8/18 while working for Oak Park Oasis (Px. 4, pg. 4). The history provided states that Petitioner "was exiting the washroom when she slipped and fell landing on both knees due to wet floor" (Px. 4, pg. 4). Petitioner denied any prior medical history involving the left knee (Px. 4, pg. 4).

Petitioner was diagnosed with a left knee meniscal tear/contusion/injury (Px. 4, pg. 4). Petitioner was provided medication, advised to begin a course of physical therapy, scheduled for a follow up visit and referred to see an orthopedic surgeon (Px. 4, pg. 4). Petitioner was cleared to perform sedentary work beginning 1/7/19 (Px. 4, pg. 5).

Petitioner was seen for an initial therapy evaluation at Advanced Physical Medicine on 1/15/19 (Px. 4, pg. 6). In total, Petitioner was seen for approximately forty-two (42) sessions of PT between 1/7/19 and 8/6/19 (Px. 4).

On 1/31/19 Petitioner presented to Orthopedic Associates of Naperville pursuant to the orthopedic surgeon referral given by Advanced Physical Medicine (Px. 6, pg. 8). Petitioner was

seen by Dr. Gregory Markarian. Petitioner complained of left knee pain which she states began after "she was coming out of the bathroom at work when there was water outside the bathroom and she slipped and fell" (Px. 6, pg. 7).

Dr. Markarian noted that Petitioner should continue to try physical therapy for another month and that if Petitioner's condition didn't improve that surgical intervention would be recommended (Px. 6, pg. 8). Petitioner was scheduled for a return visit on 2/14/19. Petitioner was advised to remain off of work entirely until then (Px. 6, pg. 10). Dr. Markarian ordered further imaging of Petitioner's left knee be completed before Petitioner's follow up visit (Px. 6, pg. 9).

Pursuant to the referral from Dr. Markarian for additional imaging, Petitioner presented to Molecular Imaging on 2/8/19 (Px. 10).

On 2/14/19 Petitioner was seen by Dr. Markarian for a follow up visit (Px. 6, pg 48). Dr. Markarian noted that Petitioner "has a medial meniscus tear and a chondral defect over the high trochanteric area of the lateral femoral condyle" (Px. 6, pg. 48). Dr. Markarian recommended that Petitioner proceed with a left knee arthroscopy, partial medial meniscectomy, chondroplasty and possible marrow stimulating procedure…" (Px. 6, pg. 48). Petitioner was advised to remain off of work entirely until her follow up appointment on 3/6/19 (Px. 6, pg. 49).

These surgical recommendations and off work status were reiterated by Dr. Markarian at the 3/6/19 visit (Px. 6, pg. 53-54).

On 4/12/19 Petitioner was able to proceed with the surgical intervention recommended by Dr. Markarian (Px. 6, pg. 55). Specifically, what was performed included: left knee arthroscopy, partial lateral meniscectomy, tricompartmental synovectomy, chondroplasty over the medial femoral condyle, Radiofrequency chondroplasty over the patella, over the lateral femoral condyle 8 x 8 mm lesion, marrow stimulating procedure, a microfracture using the nanofracture technique (Px. 6, pg. 55).

Petitioner continued to receive post-operative treatment and therapy at Chicago Sports Medicine Institute through 8/7/19 (Px. 6).

On 8/7/19 Petitioner was seen by Dr. Markarian (Px. 6, pg. 83). Dr. Markarian noted "It is estimated that she is stable, status post left knee arthroscopy, nanofracture and nerve stimulation procedure…We are going to discharge her. If she gets maximum medical improvement, she can return to work without restrictions. In the future, this lesion may break down. It may become worse and she may need future surgery related to breakdown and possible future arthritis." (Px. 6, pg 83-84).

Petitioner testified she had "a little pain" in her left knee at that time, which she rated as a 2 out of 10 on a scale of 1 to 10 (T. 17). Petitioner testified she "was informed that in the future there could be – I don't know how to word that, like maybe for future injury or treatment may be needed. (T. 17).

Petitioner testified she returned to work in August of 2019 (T. 18). Petitioner was performing her same pre-injury work duties and was receiving her same pay (T. 18, 27). Petitioner continued to work from the time of her return in August of 2019 until 10/30/19.

10/30/19 Incident

Petitioner alleges a second work-related injury occurred while working for Respondent. That matter, pending as 20 WC 3100, alleges an injury to the same left leg/knee occurred on 10/30/19. Because the employer had changed workers compensation insurance carriers between the two dates of injury alleged, different carriers are handling the two claims on behalf of Respondent.

Petitioner testified that around 5:30 AM on 10/30/19 she was "in the middle of doing my medication administration pushing the medicine cart . . . and as I was pushing the cart and parking it alongside the wall, I felt a sharp pain in my left knee…" (T. 19). Petitioner described what felt like a stabbing pain in the knee (T. 19).

Petitioner stated she informed the night supervisor immediately (T. 19). Petitioner identified the night supervisor she spoke with as Blessing A. She was unsure of Blessing's last name spelling/pronunciation (T. 22-23). Petitioner testified she applied ice to Petitioner's knee and contacted the administrator (T. 23).

Petitioner testified she left work and presented to the emergency room at Loyola Hospital. While waiting in the ER, Petitioner contacted Dr. Markarian's office to schedule an appointment (T. 23-24). Petitioner left the Loyola Hospital ER before being seen (T. 23).

Medical Treatment (Post 10/30/19)

That same day (10/30/19) Petitioner saw Dr. Markarian (Px. 6, pg. 87). Petitioner noted left knee pain which had begun earlier that morning at work. The history notes that Petitioner was pushing her medication cart and suddenly developed a very sharp pain in the medial aspect of the left knee" (Px. 6, pg. 87).

Dr. Markarian recommended updated imaging and MRIs of Petitioner's left knee be obtained. Petitioner was advised to remain off of work entirely, and to return for follow up on 11/20/19 (Px. 6, pg. 88-89).

The notes from Petitioner's 10/30/19 visit document that "At her last visit on 8/7/19, Dr. Markarian had discharged her and she had returned to work without restrictions, but he did note that in the future if her pain may become worse, then she may need further surgery related to the breakdown of the lesion" (Px. 6, pg. 87).

On 12/3/19 Petitioner was seen by Dr. Andrew Kim for purposes of an IME at the request of Respondent in matter 18 WC 37322 (Rx. 1). Regarding the condition of Petitioner's left knee, Dr. Kim noted that "whether this is exacerbation of the work-related injury from December 8, 2018, and treatment versus a new injury that occurred while pushing the medication cart from

October 30, 2019, is not entirely clear at this point" Dr. Kim opined on that updated MRI imaging "may bring more information" (Rx. 1, pg. 5 of 6).

As of 12/4/19 the MRI imaging requested by Dr. Markarian had not yet been approved. Dr. Markarian noted in his records that date that Petitioner "is status post arthroscopy and she re-injured herself at work" (Px. 6, pg 95). Further therapy and off work status was reiterated.

On 1/8/20 Dr. Markarian notes that he reviewed an IME report by Dr. Andrew Kim dated 12/3/19 (Px. 6, pg. 100). Dr. Markarian notes that Dr. Kim "unfortunately does not discuss the left knee. Everything is related to the right knee which for Jennifer Winfrey, she has no symptoms to the right knee." (Px. 6, pg. 100). Dr. Markarian recommended proceeding with repeat injections of the left knee.

On 1/13/20 Dr. Kim authored an addendum in which he notes "This new pain in the left knee is more likely a temporary exacerbation of a prior knee condition. It most likely does not represent any new injury, as reflected by the most recent MRI indicating no new injury." (Rx. 2).

Dr. Markarian continued to reiterated his recommendation that Petitioner proceed with a knee injection and obtain updated MRI imaging. Those recommendations were consistent and numerous, including office visits on: 2/5/20, 3/4/20, and 7/21/20 (Px. 6, pg. 104).

Updated MRI imaging of Petitioner's left knee was eventually obtained on 7/29/20 at Archer Open MRI (Px. 16). The radiology report indicates "suspect horizontal tear within the body of the lateral meniscus" (Px. 16, pg. 5).

On 8/3/20 Dr. Markarian reviewed the updated imaging and noted the possible presence of "recurrent horizontal tear of the lateral meniscus" At that point Dr. Markarian made the recommendation for "a revision arthroscopy with possible inlay resurfacing" (Px. 6, pg. 118).

Dr. Markarian reiterated his recommendation for revision surgery on 10/6/20 (Px. 6, pg. 121).

Petitioner has continued to treat with Dr. Markarian. At the time of trial, the most recent service date was 10/6/21 (Px. 6, pg. 141). At that time Dr. Markarian was still recommending the revision surgery.

To date, Petitioner has completed neither the knee injection nor the revision surgery.

Petitioner testified that she would like to proceed with the left leg/knee revision surgery should it be authorized, noting "My knee hurts every day. I can't really tell you the level of pain, but I can tell you where it ranges from day to day because the level of pain is not the same from day to day. But its never below a 6, and its gotten as high as where I'm in tears" (T. 26).

CONCLUSIONS OF LAW

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

Section 1(b)3(d) of the Act provides that, in order to obtain compensation under the Act, the employee bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment. 820 ILCS 305/1(b)3(d).

To obtain compensation under the act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of her claim (O'Dette v. Industrial Commission, 79 Ill.2d 249, 253 (1980) including that the accidental injury both arose out of and occurred in the course of his employment (Horvath v. Industrial Commission, 96 Ill.2d. 349 (1983)) and that there is some causal relationship between the employment and her injury. Caterpillar Tractor Co. v. Industrial Commission, I29 Ill. 2d 52, 63 (1998). Decisions of an Arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e).

Credibility is the quality of a witness which renders her evidence worthy of belief. The Arbitrator, whose province it is to evaluate witness credibility, evaluates the demeanor of the witness and any external inconsistencies with her testimony. Where a claimant's testimony is inconsistent with her actual behavior and conduct, the Commission has held that an award cannot stand. McDonald v. Industrial Commission, 39 Ill. 2d 396 (1968); Swift v. Industrial Commission, 52 Ill. 2d 490 (1972). While it is true that an employee's uncorroborated testimony will not bar a recovery under the Act, it does not mean that the employee's testimony will always support an award of benefits when considering all the testimony and circumstances shown by the totality of the evidence. Caterpillar Tractor Co. v. Industrial Commission, 83 Ill. 2d 213 (1980). The mere existence of testimony does not require its acceptance. Smith v. Industrial Commission, 98 Ill.2d 20, 455 N.E.2d 86 (1983). To argue to the contrary would require that an award be entered or affirmed whenever a claimant testified to an injury no matter how much her testimony might be contradicted by the evidence, or how evidence it might be that her story is a fabricated afterthought. U.S. Steel v. Industrial Commission, 44 Ill2d 207, 214, 254 N.E.2d 522 (1969); see also Hansel & Gretel Day Care Center v. Industrial Commission, 215 Ill. App. 3d 284, 574 N.E.2d 1244 (1991).

The Petitioner bears the burden of proving every aspect of her claim by a preponderance of the evidence. Hutson v. Industrial Commission, 223 Ill App. 3d 706 (1992). "Liability under the Workmen's Compensation Act may not be based on imagination, speculation, or conjecture, but must have a foundation of facts established by a preponderance of the evidence…" Shell Petroleum Corp. v. Industrial Commission, 10 N.E.2d 352 (1937). The burden of proof is on a claimant to establish the elements of her right to compensation, and unless the evidence considered in its entirety supports a finding that the injury resulted from a cause connected with the employment there is no right to recover. Revere Paint & Varnish Corp. v. Industrial Commission, 41 Ill.2d. 59 (1968). Preponderance of the evidence means greater weight of the evidence in merit and worth that which has more evidence for it than against it. Spankroy v.

Alesky, 45 Ill. App.3d 432 (1st Dist. 1977).

The Arbitrator observed Petitioner's demeanor at trial and finds that her manner of speech, easy and direct answers to questions, and overall presence to be indicative of sincerity. The Arbitrator finds that Petitioner's testimony was credible. The Arbitrator also finds that Petitioner's testimony was consistent with the histories, treatment and objective findings documented in the medical records, with particular importance noted to the consistency with the records from Concentra.

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

The Arbitrator finds Petitioner's condition of ill-being is causally related to the incident of 12/8/18. In reaching this determination, the Arbitrator relies on both the medical records admitted into evidence at trial and Petitioner's testimony.

Petitioner has been advised to proceed with a revision surgery involving her left knee. The original surgery was performed by Dr. Markarian in April of 2019. Dr. Markarian had cleared Petitioner to return to work without restriction in September of 2019. Petitioner was back to work for Respondent for only seven (7) weeks before the knee condition devolved to the point where Petitioner had to go back off work.

At its core, this issue involves determining whether the need for that revision surgery is correctly the responsibility of the workers compensation insurance carrier from the first claim or from the second claim. Respondent from the first claim has taken the position that Petitioner was cleared to return to work without restrictions, and that she had in fact done so successfully for seven (7) weeks before this issue arose. Respondent on the first claim argues further that Petitioner was asymptomatic following her release from care in September of 2019, and that any condition of ill being present in Petitioner's left knee currently is the result of the subsequent incident on 10/30/19.

Conversely, Respondent to the second claim notes the relative minor nature of the 10/30/19 incident. Petitioner noted that her knee became painful while in the process of pushing a medicine cart. Petitioner noted that she had pushed this medicine cart every work day without incident prior to this.

Furthermore, Respondent to the second claim highlights the fact that when Petitioner was released from care by Dr. Markarian, it was clearly anticipated that Petitioner's knee may not be fully stable and may require further treatment or surgery. Moreover, Respondent to the second claim would argue that the short length of time between Petitioner's release from care and this incident would support the proposition that Petitioner's knee wasn't at MMI when released in September of 2019

While each of the two Respondents present a reasonable argument as to why the other should be liable, there isn't any question that one of the two is properly liable.

Having reviewed all of the evidence, the Arbitrator finds that the condition of ill being currently present in Petitioner's knee is more likely than not an exacerbation of the 12/8/18 injury, as opposed to a new injury altogether. The Arbitrator relies on several pieces of evidence in support of this finding.

To begin with, it is worth noting that before 12/8/18 Petitioner had no issue with her left leg or knee. Petitioner had worked successfully in this industry and role for decades. Petitioner denied ever having received medical treatment related to her left leg/knee prior to 12/8/18. No evidence to suggest otherwise was presented by Respondent. Petitioner testified that prior to 12/8/18 she had never filed a workers compensation claim. No evidence was presented to suggest otherwise. The evidence suggests that Petitioner worked for Respondent without incident since beginning there in February of 2018. At the very least, this establishes that Petitioner's left knee issues began on 12/8/18.

While Petitioner had been cleared to return to work without restriction by Dr. Markarian in August of 2019, the record shows Petitioner was still dealing with some pain and other symptoms in her knee at that time. Petitioner testified at trial that she still had "a little pain" in her left knee at that time, which she rated as a 2 out of 10 on a scale of 1 to 10 (T. 17).

Furthermore, Petitioner and Dr. Markarian had discussed the potential need for further treatment and/or surgery when he released her from care in August of 2019. Most notably, Dr. Markarian stated, "It is estimated that she is stable, status post left knee arthroscopy, nanofracture and nerve stimulation procedure…We are going to discharge her. If she gets maximum medical improvement, she can return to work without restrictions. In the future, this lesion may break down. It may become worse and she may need future surgery related to breakdown and possible future arthritis." (Px. 6, pg 83).

Clearly, Dr. Markarian did not consider Petitioner to be at MMI as he qualifies his statements with "if" Furthermore, Dr. Markarian notes that he is only able to "estimate" that Petitioner's left knee is stable. Finally, Dr. Markarian notes Petitioner may need future surgery, that Petitioner's lesion may break down. The fact that Petitioner's left knee devolved to the point of requiring revision surgery within 7 weeks of Petitioner's return to work suggests that the knee was never fully stable.

The only medical opinion testimony to directly answer this question comes from Dr. Andrew Kim who performed an IME of Petitioner at Respondent's request. Dr. Kim noted that the question was difficult to answer, but that the "new pain in the left knee is more likely a temporary exacerbation of a prior knee condition. It most likely does not represent any new injury, as reflected by the most recent MRI indicating no new injury." (Rx. 2).

The Arbitrator highlights that Dr. Kim's opinion on this issue appears at least to be based on objective evidence in the form of MRI imaging. Dr. Kim noted that MRI imaging of Petitioner's left knee taken after the 10/30/19 incident did not depict an injury not present in the previous images.

Additionally, the Arbitrator finds it worth noting that the incident of 10/30/19 doesn't seem the type of incident capable of producing the condition of ill being present in Petitioner's left knee. Petitioner testified that on 10/30/19 her left knee became painful while pushing a medicine cart. Petitioner had pushed this same medicine cart without incident every day she worked. The fact that this activity produces pain in Petitioner's knee, within 7 weeks of Petitioner's return, suggest Petitioner's knee was highly unstable at that time.

Finally, the fact that the treatment being recommended is a revision surgery suggests to the Arbitrator that ultimately what is being addressed are issues stemming from the underlying surgery and/or Petitioner's failed response to said surgery. Had the initial surgery never been performed, a revision surgery simply would not be what is being recommended.

Put simply, the revision surgery being recommended at this time was foreseen by Petitioner's surgeons. The Petitioner and her doctors discussed the likelihood that future surgery may be needed and that the lesion may breakdown. Petitioner understood this. Within 7 weeks of having returned to her job, and while performing a task she had done every single work day without incident before, Petitioner's knee degenerated to the point of surgery.

There is simply no medical evidence in the record to suggest that Petitioner's need for revision surgery and further treatment is causally related to the 10/30/19 incident.

Taking all of the evidence as a whole, the Arbitrator finds that Petitioner has met her burden with regard to this issue.

Issue J: **Were the medical services that were provided to the Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?**

The Arbitrator finds Respondent has not paid for the reasonable and necessary medical services obtained by Petitioner. In so finding, the Arbitrator relies on the itemized billing statements offered into evidence at trial.

Each of the providers for which bills have been presented were either providers which Respondent had referred Petitioner to (Elmhurst Memorial, Concentra) or were within a single chain of providers selected by Petitioner.

The bills presented are related to surgery, post-operative therapy, and imaging of Petitioner's left knee.

Pursuant to the medical fee schedule and as provided in Sections 8(a) and 8.2 of the Act, Respondent shall satisfy the $34,109.11 in outstanding medical charges as itemized below and in Petitioner's Exhibits: 2, 5, 7, 8, 13, 15, 17, & 19 as said charges were for the reasonable and necessary medical treatment of Petitioner's 12/8/18 work-related injuries. Funds shall be issued directly to Petitioner's Counsel, who will then satisfy balances with each of the medical service providers/facilities.

1. Elmhurst Memorial Hospital..... $548.07
2. Advanced Physical Medicine..... $1,743.06
3. Chicago Sports Medicine Institute..... $2,456.28
4. Prescription Partners, LLC..... $5,752.70
5. APM Surgical Group $19,459.00
6. Berwyn Diagnostic Imaging $1,950.00
7. Archer Open MRI $1,950.00
8. American Diagnostic MRI..... $250.00

$34,109.11

Issue K: Is Petitioner entitled to further TTD benefits?

The Arbitrator finds Petitioner is entitled to temporary total disability benefits in connection with the injuries sustained on 12/8/18.

In so finding, the Arbitrator relies upon Petitioner's testimony, the medical records, and the light duty work accommodation paperwork introduced at trial.

Respondent shall pay Petitioner temporary total disability benefits of $650.97/week for 89 & 5/7 weeks, commencing 12/8/18 through 8/8/19, 10/30/19 through 2/20/20, & 2/1/21 through 11/12/21 as provided in Section 8(b) of the Act, for a total award of $58,401.31.

Respondent shall be given a credit of $17,904.16 for temporary total disability benefits that have already been issued. This amounts to an award of $40,497.15 in fresh TTD benefits.

Issue O: Is Petitioner entitled to further medical benefits under section 8(a) of the Act?

The Arbitrator finds that Petitioner is entitled to further section 8(a) medical benefits in connection with the injuries sustained on 12/8/18.

Respondent shall authorize further medical treatment related to Petitioner's left leg/knee injury. This shall include, but not be limited to, the surgical revision and left knee arthroscopy with possible resurfacing as recommended by Petitioner's surgeon Dr. Markarian.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC003100
Case Name	Jennifer Winfrey v. Oak Park Oasis, LLC
Consolidated Cases	18WC037322;
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	23IWCC0368
Number of Pages of Decision	17
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Michael Trybalski
Respondent Attorney	Lloyd McCumber

DATE FILED: 8/18/2023

/s/ Deborah Baker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JENNIFER WINFREY,

Petitioner,

vs. NO: 20 WC 03100

OAK PARK OASIS,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues[1] of whether Petitioner's current left knee condition is causally related to the October 30, 2019 work injury, entitlement to temporary disability benefits, and entitlement to incurred medical expenses as well as prospective medical care, and being advised of the facts and law, reverses the Decision of the Arbitrator, which is attached hereto. The Commission finds Petitioner's current left knee condition is not causally related to the October 30, 2019 incident.

PROLOGUE

The Commission observes Petitioner's personal identity information was unredacted from Petitioner's Exhibit 10. The Commission cautions Counsel to adhere to Supreme Court Rule 138. *Ill. S. Ct. R. 138* (eff. Jan. 1, 2018).

[1] Respondent's Petition for Review identifies accident, wages, and benefit rate as issues on Review, however Respondent did not advance an argument on those issues in its Statement of Exceptions or during oral arguments, and thus the Commission views the issues as forfeited.

CONCLUSIONS OF LAW

This case was consolidated for hearing with case number 18 WC 37322. Both cases involve injuries to Petitioner's left knee while Petitioner was in the employ of Oak Park Oasis: 18 WC 37322 involves an undisputed December 8, 2018 accident and 20 WC 3100 involves an accidental injury on October 30, 2019. Oak Park Oasis was covered by different workers' compensation insurance carriers on the two dates of accident. The crux of the issue at trial was whether the October 30, 2019 incident is an intervening accident that broke the chain of causation from the December 8, 2018 accident, thereby shifting liability for the recommended meniscal surgery from the carrier on the first date of accident ("Respondent/Carrier 1") to the carrier on the second date of accident ("Respondent/Carrier 2"). The Arbitrator authored two decisions, each finding Petitioner's current left knee condition causally related exclusively to the accidental injury therein and ordering both carriers to pay duplicative benefits. The Commission observes the two decisions are mutually exclusive and fail to resolve the carriers' intervening accident dispute.

We begin with a review of the applicable standard. Intervening accidents are evaluated under a "but for" standard:

> Every natural consequence that flows from a work-related injury is compensable under the Act unless the chain of causation is broken by an independent intervening accident. (Citations). Under an independent intervening cause analysis, compensability for an ultimate injury or disability is based upon a finding that the employee's condition was caused by an event that would not have occurred "but for" the original injury. (Citation). Thus, when an employee's condition is weakened by a work-related accident, a subsequent accident, whether work related or not, that aggravates the condition does not break the causal chain. (Citations). "For an employer to be relieved of liability by virtue of an intervening cause, the intervening cause must completely break the causal chain between the original work-related injury and the ensuing condition." *Global Products*, 392 Ill. App. 3d at 411. As long as there is a "but for" relationship between the work-related injury and subsequent condition of ill-being, the first employer remains liable. *Global Products*, 392 Ill. App. 3d at 412. *PAR Electric v. Illinois Workers' Compensation Commission*, 2018 IL App (3d) 170656WC, ¶ 63 (Emphasis added).

This is a difficult burden of proof, as in order for an incident to rise to the level of an independent intervening accident, the proponent must prove the subsequent condition of ill-being would have occurred even if the claimant's condition had not already been weakened by the work accident.

Turning to the evidence, the Commission finds it important to clarify Petitioner's clinical picture leading up to the October 30, 2019 accident, as well as the specific pathology for which surgery is recommended. On April 12, 2019, Dr. Gregory Markarian performed arthroscopy. The operative findings included, *inter alia*, a lateral meniscus tear and a "grade 4 chondral defect that was 8 x 8 mm…over the major weightbearing surface of the lateral femoral condyle." Pet.'s Ex. 6. The lateral meniscus tear was addressed with a "partial lateral meniscectomy…on the outer third" of the meniscus; the lesion was addressed with "chondroplasty…then a marrow stimulating procedure was done using the nanofracture." Pet.'s Ex. 6. Dr. Markarian's records reflect

Petitioner did well post-operatively; on June 19, 2019, "per protocol" at the three-month mark, the doctor ordered an MRI to evaluate cartilage. Pet.'s Ex. 6. The updated MRI was done June 21, 2019; when Dr. Markarian reviewed the MRI on July 10, 2019, he observed the "lesion was good on postop MRI" and recommended a final month of work hardening. Pet.'s Ex. 6. At the August 7, 2019 re-evaluation, Dr. Markarian noted Petitioner reported minimal residual symptoms and her examination findings included good quadriceps contracture, no extensor lag, full range of motion, and no swelling; Dr. Markarian further noted Petitioner's "lesion reconstituted postop, s/p [marrow] stimulation procedure," though he warned the lesion repair may not be permanent: "In the future, the lesion may break down. It may become worse and she may need future surgery related to breakdown and possible future arthritis." Pet.'s Ex. 6. Dr. Markarian discharged Petitioner from care; while the office note states, "If [*sic*] she gets maximum medical improvement, she can return to work without restrictions," the August 7, 2019 Work Status Report reflects Petitioner was "MMI D/C" and released with no restrictions. Pet.'s Ex. 6 (Emphasis added).

Petitioner thereafter returned to work, and per her testimony, her left knee did well; leading up to October 30, 2019, she performed her regular duties and experienced only occasional mild aches. T. 22, 38. On October 30, 2019, while pushing a medication cart, she had an acute onset of stabbing pain in her knee. T. 20. That day, Petitioner was evaluated by Dr. Markarian's colleague, Dr. Mona Clor, who ordered an updated MRI. Pet.'s Ex. 6. Dr. Markarian's records reflect he was "waiting" for that MRI for several months, and it was finally done on July 29, 2020; the scan was interpreted by the same radiologist who read the June 21, 2019 scan, Dr. Gregory Goldstein, and his impression was "1. Small effusion and mild tricompartment [*sic*] osteoarthritis; 2. Suspect horizontal tear within the body of the lateral meniscus." Pet.'s Ex. 16 (Emphasis added). On August 3, 2020, Dr. Markarian reviewed the MRI, noted Petitioner "has possibly got recurrent horizontal tear of the lateral meniscus," and recommended "revision arthroscopy with possible inlay resurfacing." Pet.'s Ex. 6. (Emphasis added). It is liability for this surgery that is in dispute.

In arguing the October 30, 2019 incident did not break the chain of causation, Respondent/Carrier 2 highlights Dr. Markarian's August 7, 2019 warning that the chondral lesion repair may fail and argues the October 30, 2019 incident was simply a manifestation of Dr. Markarian's prediction. The Commission emphasizes, however, it is not the lesion that Dr. Markarian seeks to repair; instead, the doctor diagnosed Petitioner with a recurrent meniscal tear. The record reflects Petitioner's left knee was compromised by the December 8, 2018 accident and "but for" the initial lateral meniscus tear, the benign maneuver on October 30, 2019 would not have caused a recurrent meniscal tear. Therefore, the Commission finds the October 30, 2019 accident does not constitute an intervening accident, and Petitioner's left knee condition remains causally related to the December 8, 2018 accident. Consistent with our resolution of the causation issue, the Commission vacates the award of benefits in the instant case 20 WC 3100.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 27, 2022 is hereby reversed.

IT IS FURTHER ORDERED BY THE COMMISSION that all benefits awarded under the instant case 20 WC 03100 are hereby vacated.

The bond requirement in Section 19(f)(2) is applicable only when "the Commission shall have entered an award for the payment of money." *820 ILCS 305/19(f)(2)*. Based upon the denial of compensation herein, no bond is set by the Commission. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

August 18, 2023

/s/ *Deborah J. Baker*

DJB/mck

O: 7/12/23

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/s/ *Stephen J. Mathis*

/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC003100
Case Name	Jennifer Winfrey v. Oak Park Oasis, LLC
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	12
Decision Issued By	Charles Watts, Arbitrator

Petitioner Attorney	Michael Trybalski
Respondent Attorney	Lloyd McCumber

DATE FILED: 7/27/2022

THE INTEREST RATE FOR THE WEEK OF JULY 26, 2022 2.92%

/s/Charles Watts, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF **Cook**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Jennifer Winfrey Case # **20** WC **3100**
Employee/Petitioner

v.

Oak Park Oasis, LLC
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Charles Watts**, Arbitrator of the Commission, in the city of **Chicago**, on **11/12/21**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **10/30/19**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**8,411.00**; the average weekly wage was $**1,051.37**.

On the date of accident, Petitioner was **43** years of age, ***single*** with **2** dependent children.

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

Petitioner is entitled to, and Respondent liable for, further medical care and benefits under section 8(a) of the Act

Respondent is liable for TTD benefits during the periods of: 10/30/19-2/20/20, and 2/1/21 – current (11/12/21), for a total of 54 & 6/7 weeks at a weekly rate of $700.91.

Respondent shall be given a credit of $**0.00** for TTD, $**0** for TPD, $**0** for maintenance, and $ for other benefits, for a total credit of $**0.00**.

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

ORDER

Medical benefits

Pursuant to the medical fee schedule and as provided in Sections 8(a) and 8.2 of the Act, Respondent shall satisfy the **$4,656.28** in outstanding medical charges as itemized below and in Petitioner's Exhibits: 7, 17, & 19 as said charges were for the reasonable and necessary medical treatment of Petitioner's 10/30/19 work-related injuries. Funds shall be issued directly to Petitioner's Counsel, who will then satisfy balances with each of the medical service providers/facilities.

1. Chicago Sports Medicine Institute. $2,456.28
2. Archer Open MRI $1,950.00
3. American Diagnostic MRI $250.00

$4,656.28

Respondent shall authorize further medical treatment related to Petitioner's left leg/knee injury, as has been recommended by Petitioner's surgeon Dr. Markarian. This shall include, but not be limited to, the revision surgery and left knee arthroscopy with possible resurfacing, as well as any attendant pre-operative and post-operative treatment/therapy.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of ***$700.91***/week for ***54 & 6/7*** weeks, commencing ***10/30/19*** through ***2/20/20***, & ***2/1/21*** through ***current (11/12/21*** as provided in Section 8(b) of the Act, for a total award of $38,449.92.

Respondent shall be given a credit of ***$0.00*** for temporary total disability benefits that have already been issued.

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

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

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

JULY 27, 2022

Signature of Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION
DECISION

Jennifer Winfrey,	)	
	)	
Petitioner,	)	Case No.: 20 WC 3100
	)	Related Matter: 18 WC 37322
v.	)	
	)	Arbitrator: Charles Watts
Oak Park Oasis, LLC,	)	
	)	
Respondent.	)	

Pursuant to Petitioner's motion for hearing under section 19(b) of the Illinois Workers' Compensation Act, and by agreement of the parties, matters 18 WC 37322 and 20 WC 3100 proceeded to a hearing under section 19(b) of the Act before the Honorable Arbitrator Charles Watts of the Illinois Industrial Commission on 11/12/21, in the city of Chicago, IL.

The record relating to matter 18 WC 37322 consisting of: One (1) exhibit offered by Arbitrator Charles Watts (Herein after, Arb. Ex.1), three (3) exhibits offered by Respondent (Herein after, Rx.1 – Rx.3), and Nineteen (19) exhibits offered by Petitioner (Px.1 – Px.19).

The record relating to matter 20 WC 3100 consisting of: One (1) exhibit offered by Arbitrator Charles Watts (Herein after, Arb. Ex.2), One (1) exhibit offered by Respondent (Herein after, Rx.4), and Nineteen (19) exhibits offered by Petitioner (Px.1 – Px.19).

The parties agree to the following: (Arb. Ex. #2)

A.) As of October 30, 2019 (10/30/19) Respondent was operating under and subject to the Illinois Workers' Compensation or Occupational Disease Act,

B.) The relationship of Petitioner and Respondent on 10/30/19 was one of employee and employer.

D.) The date of the alleged accident was 10/30/19.

E.) Timely notice of the alleged accident was provided to the Respondent.

H.) On 10/30/19 Petitioner was 43 years old.

I.) On 10/30/19 Petitioner was unmarried with two (2) minor dependents.

L.) The nature and extent of Petitioner's injuries are not in dispute.

M.) There is no claim for penalties or fees being asserted by either party.

N.) Respondent makes no claim for a disputed credit.

The parties dispute the following: (Arb. Ex. #2)

C.) Whether an accident did occur that arose out of and in the course of Petitioner's employment by Respondent.

F.) Whether Petitioner's current condition of ill-being is causally related to the injuries of 10/30/19.

G.) The correct calculation of Petitioner's average weekly age (*A.W.W.*) pursuant to the Illinois Workers' Compensation Act.

J.) Whether the medical services which were provided to Petitioner were reasonable and necessary. Whether Respondent has paid all appropriate charges for the reasonable and necessary medical services.

K.) Whether Petitioner is entitled to further TTD benefits.

O.) Whether Respondent is liable for further medical benefits under section 8(a) of the Act.

FINDINGS OF FACT

On October 30, 2019 (10/30/19), Ms. Jennifer Winfrey (herein after "Petitioner") was employed by Oak Park Oasis, LLC. (herein after "Respondent").

Petitioner was employed as a licensed practical nurse (T. 9). In this role Petitioner was responsible for the care and treatment of between 30 and 36 residents. Typical duties for Petitioner included: assigning patient nurses, updating doctors on patient status, scheduling patient appointments, administering medication, etc. (T. 9-10).

Petitioner testifiedshe used a cart while administering medication to patients (T. 20). Petitioner estimated the size of the cart as roughly three (3) feet wide by five (5) to six (6) feet long and weighing over one hundred and ten pounds (110 lbs.) (T. 20).

Petitioner testified she has been employed as a nurse since 1994. From1994 until March of 2012 Petitioner worked as a certified nursing assistant (CNA). Since March of 2012 Petitioner has been employed as a certified practical nurse. Petitioner's employment for Respondent began in February of 2018 (T. 10).

Petitioner's typical shift while working for Respondent was from 11:00 PM until 7:00 AM (T. 10).

Petitioner alleges she injured her left leg/knee while at work on October 30, 2019 (T. 19). According to Petitioner, around 5:30 AM that day she was "in the middle of doing my medication administration pushing the medicine cart . . . and as I was pushing the cart and parking it alongside the wall, I felt a sharp pain in my left knee…" (T. 19). Petitioner described what felt like a stabbing pain in her left knee (T. 19).

Petitioner stated she informed the night supervisor immediately (T. 19). Petitioner identified the night supervisor she spoke with as a woman named Blessing. Petitioner was unsure of Blessing's last name spelling or pronunciation but stated it began with the letter "A" (T. 22-23). Petitioner testified that after the incident and while still at work, she and Blessing A applied ice to Petitioner's knee and contacted the administrator (T. 23).

Petitioner testified she left work and presented to the emergency room at Loyola Hospital that same morning. While in the ER, Petitioner was able to contact Dr. Markarian's office to schedule an appointment (T. 23-24). Petitioner left the Loyola Hospital ER before being seen (T. 23).

Later that day Petitioner was examined by Dr. Markarian (Px. 6, pg. 87). Petitioner noted left knee pain which had begun earlier that morning at work. The history notes Petitioner was pushing her medication cart and suddenly developed a very sharp pain in the medial aspect of the left knee" (Px. 6, pg. 87).

Dr. Markarian recommended updated X-ray and MRI imaging of Petitioner's left knee be obtained. Petitioner was advised to remain off of work entirely, and to return for follow up on 11/20/19 (Px. 6, pg. 88-89).

The notes from Petitioner's 10/30/19 visit document that "At her last visit on 8/7/19, Dr. Markarian had discharged her and she had returned to work without restrictions, but he did note that in the future if her pain may become worse, then she may need further surgery related to the breakdown of the lesion.

As of 12/4/19 the MRI imaging requested by Dr. Markarian had not yet been approved. Dr. Markarian noted in his records on 12/4/19 that Petitioner "is status post arthroscopy and she re-injured herself at work" (Px. 6, pg 95). Further therapy and off work status were reiterated.

On 1/8/20 Dr. Markarian recommended proceeding with injections of the left knee.

On 2/5/20, 3/4/20, 7/21/20 Dr. Markarian reiterated his recommendation for the injections and repeat MRI imaging (Px. 6, pg. 104).

On 7/29/20 updated MRI imaging of Petitioner's left knee was obtained at Archer Open MRI (Px. 16). The radiology report from that date indicates "suspect horizontal tear within the body of the lateral meniscus" (Px. 16, pg. 5).

On 8/3/20 Dr. Markarian reviewed the updated MRI imaging and noted the possible presence of "recurrent horizontal tear of the lateral meniscus" It was recommended that Petitioner proceed with a "revision arthroscopy with possible inlay resurfacing" (Px. 6, pg. 118).

Dr. Markarian reiterated this recommendation for revision surgery on 10/6/20 (Px. 6, pg. 121).

Petitioner has continued to treat with Dr. Markarian. As of the time of trial, the most recent date of service was 10/6/21 (Px. 6, pg. 141). At that time, Dr. Markarian was still recommending the revision surgery. As of the trial date, Petitioner had completed neither the injections nor the revision surgery which had been requested by Dr. Markarian for nearly a year.

Petitioner asserts the further medical treatment which has been recommended for her left leg/knee is something she would like to proceed with, should it be authorized by Respondent (T. 25). Petitioner expressed her wish to proceed with surgery "to fix my knee so I can get back to work" (T. 25).

When asked about the current condition of her left knee, Petitioner responded "My knee hurts every day. I can't really tell you the level of pain, but I can tell you where it ranges from day to day because the level of pain is not the same from day to day. But it's never below a 6, and its gotten as high as where I'm in tears" (T. 26).

Respondent has denied Petitioner's claim from the outset. At the time of the trial, zero medical, TTD, TPD, or other benefits had been issued by Respondent.

CONCLUSIONS OF LAW

The above findings of fact are incorporated into the following conclusions of law as are the findings of fact and conclusions of law for 18 WC 37322, to which this case was consolidated.

Issue C: Whether an accident did occur that arose out of and in the course of Petitioner's employment by Respondent.

The Arbitrator finds that an accident arising out of, and in the course of, Petitioner's employment for Respondent did occur on 10/30/19. In reaching this determination, the Arbitrator relies on both the medical records admitted into evidence at trial and Petitioner's testimony.

Petitioner testified that the incident occurred while at work, early in the morning of 10/30/19. Petitioner claimed that her injuries occurred while pushing a medicine cart in order to administer medication to the resident patients.

There is zero evidence presented to suggest that Petitioner was not working at the time alleged. Nor is there any evidence to dispute that Petitioner was in the performance of her job

duties while pushing the medicine cart. Petitioner estimated that the weight of the medicine cart was over one hundred and ten pounds.

It is feasible to the Arbitrator that such activity could put enough strain and stress on Petitioner's left leg/knee to produce the condition of ill being alleged.

The Arbitrator notes further that the activity of pushing this medicine cart in order to administer medication to the residents is clearly a risk inherent to the job. The general public would not face the same risk as the general public is not required to push a 110 lbs cart every single working day.

Petitioner testified that after the incident she immediately notified the night supervisor, Blessing A. Petitioner testified that the facility administrator was also informed immediately afterwards. Respondent offered zero testimony or reason to doubt the veracity of this claim.

Further, the medical record supports Petitioner's claim. The medical records document a course of medical treatment beginning immediately after the alleged incident of 10/30/19. The Arbitrator notes that the history provided to the various providers by Petitioner is consistent throughout. Petitioner described the incident the same way to each doctor she saw.

Finally, the Arbitrator finds Petitioner was being truthful, having had a chance to observe, and hear her testimony in person.

Taking all of the evidence as a whole, the Arbitrator finds that Petitioner has met her burden with regard to this issue.

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

The Arbitrator finds that Petitioner's condition of ill-being is causally-related to the incident of 10/30/19. In reaching this determination, the Arbitrator relies on both the medical records admitted into evidence at trial and Petitioner's testimony.

Although Petitioner had a medical history involving the left leg and knee prior to the incident of 10/30/19, it's also clear that this incident resulted in a worsening of that condition of ill being.

Petitioner had undergone left knee surgery in April of 2019. By August of 2019 Petitioner had been cleared to return to her usual, unrestricted work duties. Petitioner had in fact returned to work in August of 2019.

Petitioner testified that when she was released from care by Dr. Markarian, her left knee was largely asymptomatic. Petitioner rarely experienced pain or other symptoms in her left knee.

Furthermore, upon returning to work in August of 2019 Petitioner was able to successfully complete her job duties for a period of seven (7) weeks without incident. Petitioner

testified that she rarely had any symptoms of pain in her left leg/knee during this period of time. Petitioner testified that she was able to perform all of her usual job duties and that her pay rate had remained the same.

An employer accepts an employee as they are. While Petitioner's knee was not perfect on 10/30/19, it was operable. Since this incident, Petitioner has been unable to walk or work. There was a clear acceleration of the condition of ill-being present in Petitioner's knee.

Respondent has not had Petitioner examined by a medical provider, nor offered any medical opinion on the question of causation. Nor has Petitioner's surgeon clearly weighed in on the topic.

Taking all of the evidence as a whole, the Arbitrator finds that Petitioner has met his burden with regard to this issue.

Issue G: **What is the correct calculation of Petitioner's average weekly age (A.W.W.) pursuant to the Illinois Workers' Compensation Act.**

The Arbitrator finds the correct calculation of Petitioner's average weekly wage (AWW) under the Act to be $1,051.37.

Petitioner alleges a 10/30/19 date of injury. As such, the relevant 52 week period would be 10/30/18 – 10/30/19.

Petitioner has alleged an earlier work injury involving the same employer with a 12/8/18 date of loss. Petitioner was off of work entirely or working in some restricted capacity as a result of the 12/8/18 incident at various points between 12/8/18 and September of 2019 when she was cleared to return to work.

The parties to the 12/8/18 incident have stipulated that Petitioner's average weekly wages were $976.45.

In this matter, Petitioner claims the same average weekly wage amount of $976.45 (Arb. Ex. 2). Respondent disputes this calculation. In support of this dispute Respondent offers a wage statement (R. Ex. 1).

The document provided notes wages paid on dates ranging from 11/2/18 through 10/18/19. There are no wages reflected for the period of 2/8/19 – 6/28/19, nor from 7/12/19 – 8/23/19.

Other checks reflect only partial hours worked, including checks dated 2/8/19, 6/28/19, 7/12/19, & 8/23/19.

There is nothing reflecting TTD benefits issued to Petitioner during the relevant time period.

Given the above, the Arbitrator has based his calculation on the most recent period of time when Petitioner was working her full hours. That period of time being 9/6/19 – 10/18/19. Over the course of this eight (8) week period Petitioner earned $8,411.00 in wages. Averaged out, this amounts to $1,051.37 per week.

Issue J: **Were the medical services that were provided to the Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?**

The Arbitrator incorporates the above-referenced findings of fact and conclusions of laws as is fully restated herein, and finds that Respondent has not paid for the reasonable and necessary medical services obtained by Petitioner. In so finding, the Arbitrator relies on the itemized billing statements offered into evidence at trial.

Pursuant to the medical fee schedule and as provided in Sections 8(a) and 8.2 of the Act, Respondent shall satisfy the $4,656.28 in outstanding medical charges as itemized below and in Petitioner's Exhibits: 7, 17, & 19 as said charges were for the reasonable and necessary medical treatment of Petitioner's 10/30/19 work-related injuries. Funds shall be issued directly to Petitioner's Counsel, who will then satisfy balances with each of the medical service providers/facilities.

1. Chicago Sports Medicine Institute. $2,456.28
2. Archer Open MRI $1,950.00
3. American Diagnostic MRI $250.00

$4,656.28

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

Issue K: **Is Petitioner entitled to further TTD benefits?**

Respondent shall pay Petitioner temporary total disability benefits of $650.97/week for 54 & 6/7 weeks, commencing 10/30/19 through 2/20/20, & 2/1/21 through current (11/12/21 as provided in Section 8(b) of the Act, for a total award of $35,710.35.

Respondent shall be given a credit of $0.00 for temporary total disability benefits that have already been issued. This amounts to an award of $35,710.35 in fresh TTD benefits.

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

Issue O: **Is Petitioner entitled to further medical benefits under section 8(a) of the Act?**

The Arbitrator incorporates the above-referenced findings of fact and conclusions of laws as is fully restated herein, and finds that Petitioner is entitled to further section 8(a) medical benefits in connection with the injuries sustained on 10/30/19.

Respondent shall authorize further medical treatment related to Petitioner's left leg/knee injury. This shall include, but not be limited to, the surgical revision and left knee arthroscopy with possible resurfacing as recommended by Petitioner's surgeon Dr. Markarian.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC029831
Case Name	Ashley Zimmerman v. Walters Trucking Inc
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0369
Number of Pages of Decision	24
Decision Issued By	Amylee Simonovich, Commissioner

Petitioner Attorney	Ryan Meikamp
Respondent Attorney	Colin Mills

DATE FILED: 8/18/2023

/s/Amylee Simonovich, Commissioner

Signature

DISSENT: /s/Amylee Simonovich, Commissioner

Signature

23IWCC0369

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Ashley Zimmerman,

Petitioner,

vs. NO: 20 WC 29831

Walters Trucking, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by Petitioner herein and notice given to all parties, the Commission, after considering causal connection, medical expenses, prospective medical treatment, and temporary disability benefits, and being advised of the facts and law, clarifies the Decision of the Arbitrator. The Commission clarifies the credit Respondent is due for previously paid temporary total disability (TTD) benefits. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission affirms all the Arbitrator's conclusions regarding the disputed issues and seeks only to clarify the credit Respondent is due for TTD benefits it paid Petitioner. Petitioner's condition of ill-being was causally related to the March 1, 2020, work accident through October 14, 2020. Thus, Petitioner is entitled to TTD benefits for 32-3/7 weeks from March 2, 2020, through October 14, 2020, totaling $22,577.07. The parties stipulated that Respondent paid TTD benefits totaling $25,759.40. The Commission finds Respondent has paid an excess of TTD benefits in the amount of $3,182.33. Credit for this overage shall be applied to Respondent's liability, if any, regarding a future permanency award.

The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on March 7, 2022, is modified as stated herein.

IT IS FURTHER ORDERED that Petitioner's current condition of ill-being is not causally related to the work accident. Petitioner's condition of ill-being was causally related to the March 1, 2020, work accident through October 14, 2020.

IT IS FURTHER ORDERED that Petitioner is entitled to temporary total disability benefits of $696.20/week for 32-3/7 weeks, commencing March 2, 2020, through October 14, 2020, as provided in Section 8(b) of the Act. Respondent shall receive credit for TTD benefits previously paid to Petitioner in the amount of $25,759.40. The $3,182.33 overage in TTD benefits paid by Respondent shall be applied to Respondent's liability, if any, regarding a future permanency award in this matter.

IT IS FURTHER ORDERED that Respondent shall pay reasonable and necessary medical charges, as provided in Sections 8(a) and 8.2 of the Act. Respondent is not liable for any expenses for medical treatment provided after October 14, 2020. `

IT IS FURTHER ORDERED that the requested prospective medical treatment is hereby denied.

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

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

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

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

August 18, 2023

o: 7/11/23
AHS/jds
51

/s/ *Maria E. Portela*
Maria E. Portela

/s/ *Kathryn A. Doerries*
Kathryn A. Doerries

DISSENT

I respectfully dissent from the opinion of the majority and would reverse the Decision of the Arbitrator. After carefully considering the totality of the evidence, I believe Petitioner met her burden of proving her current condition of ill-being is causally related to the accident on March 1, 2020.

Petitioner was involved in a catastrophic 100-vehicle pileup on the interstate. She credibly testified that the truck she was driving sustained three separate impacts during the accident. T. 9. The driver who rear-ended her died. As such, I find Dr. Kube's opinion that this is a very standard mechanism for an SI joint condition most credible. T. 293. Dr. Kube credibly testified that he sees this mechanism of injury very regularly. *Id*. Even Dr. Van Fleet, Respondent's Section 12 examiner, admitted it was possible that "…if the accident…led to her vehicle moving away from straight-on in a perpendicular fashion…" the mechanism could aggravate Petitioner's SI joint to become symptomatic. T. 434.

While Petitioner admitted to pre-existing back symptoms, there is no evidence that she previously underwent treatment related to her SI joint condition. A comparison of the locations of Petitioner's pre-accident pain complaints with her pain complaints at the ER on the date of accident shows Petitioner's 2019 injury affected a different area of her back. For example, a July 25, 2019, pain diagram showed Petitioner's pain was in her upper back. However, the pain diagram Petitioner completed on the date of accident illustrated pain across the low back, at the top of her buttocks. T. 34, 489. The evidence also shows Petitioner was placed at MMI for her prior lumbar sprain on August 26, 2019. There is no evidence that Petitioner sought treatment for her preexisting back condition from August 26, 2019, until the March 1, 2020, accident.

I believe the credible evidence shows Petitioner's ongoing complaints relate to her SI joint. Petitioner's primary care provider began documenting SI joint pain on April 2, 2020. T. 78-79. There is plenty of objective evidence corroborating Petitioner's reports of continued SI joint pain. For example, Petitioner reported significant temporary relief following the SI joint injections her doctors performed. Dr. Baha performed a right SI joint injection on May 29, 2020. T. 133. On that date, he documented SI area pain and tenderness. *Id*. Petitioner reported this injection provided relief for approximately two weeks before her pain returned. T. 146. Similarly, Petitioner reported bilateral SI joint injections performed by Dr. Baha on July 21, 2020, reduced her pain for three days. *Id*.; T. 247. Petitioner reported the right SI joint injection Dr. Kube administered on August 24, 2020, temporarily relieved 75% of her pain. T. 192, 194.

After considering the evidence, I found Dr. Kube more credible than Dr. Van Fleet. Dr. Kube regularly treats SI joint disorders. Notably, Dr. Kube performed the first minimally invasive SI joint fusion. T. 326. Dr. Van Fleet admittedly does not perform this surgery. Dr. Kube recommended a right SI joint fusion primarily due to Petitioner's response to the SI joint injections. He credibly testified that two separate SI joint injections with pain relief are the "gold standard" for confirming a diagnosis of SI joint dysfunction. T. 303. By contrast, Dr. Van Fleet was surprisingly unable to assess the relief provided by the injections because pre- and post-injection pain scores were not recorded. T. 432. The credible evidence overwhelmingly supports a finding that Petitioner met her burden of proving her current condition of ill-being is causally related to the March 1, 2020, accident. She also met her burden of proving Dr. Kube's recommended right

SI joint fusion is reasonable, necessary, and related to the work accident.

For the foregoing reasons, I would reverse the Decision of the Arbitrator.

/s/ *Amylee H. Simonovich*
Amylee H. Simonovich

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC029831
Case Name	ZIMMERMAN, ASHLEY v. WALTERS TRUCKING, INC.
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	19
Decision Issued By	Kurt Carlson, Arbitrator

Petitioner Attorney	Ryan Meikamp
Respondent Attorney	Colin Mills

DATE FILED: 3/7/2022

THE INTEREST RATE FOR THE WEEK OF MARCH 1, 2022 0.67%

/s/Kurt Carlson, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF **Peoria**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Ashley Zimmerman Case # **20** WC **029831**
Employee/Petitioner /

v.

Walters Trucking, Inc.
Employer/Respondent /

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Kurt Carlson**, Arbitrator of the Commission, in the city of **Peoria**, on **December 15, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **March 1, 2020**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**54,303.60**; the average weekly wage was $**1,044.30**.

On the date of accident, Petitioner was **23** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of $**25,759.40** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**25,759.40**.

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

ORDER

THE ARBITRATOR FINDS THAT PETITIONER'S CURRENT CONDITION OF ILL-BEING IS NOT CAUSALLY RELATED TO THE INJURY AND FURTHER TTD AND MEDICAL BENEFITS (INCURRED AND PROSPECTIVE) ARE DENIED. IN SUPPORT OF THIS FINDING, THE ARBITRATOR RELIES, AMONG OTHER THINGS, THE UPON THE OPINIONS OF DR. TIMOTHY VANFLEET, RESPONDENT'S SECTION 12 EXAMINER, AS DETAILED IN THE ATTACHED RIDER TO THIS DECISION.

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.

Kurt A. Carlson

Kurt A. Carlson

MARCH 7, 2022

ICArbDec19(b)

STATE OF ILLINOIS	)	
	)	ss
COUNTY OF PEORIA	)	

BEFORE THE WORKERS' COMPENSATION COMMISSION
OF THE STATE OF ILLINOIS

ASHLEY ZIMMERMAN,	)	
	)	
Petitioner,	)	
	)	No. 20 WC 029831
v.	)	
	)	Arbitrator Kurt Carlson
WALTERS TRUCKING, INC.,	)	
	)	
Respondent.	)	

RIDER TO MEMORANDUM OF DECISION OF ARBITRATOR

I. STATEMENT OF FACTS

This matter was heard on December 15, 2021 before Arbitrator Kurt Carlson in Peoria, Illinois. At hearing, the parties stipulated that WALTERS TRUCKING, INC., hereinafter referred to as Respondent, was operating under the Illinois Workers' Compensation Act on March 1, 2020, the alleged date of accident, that ASHLEY ZIMMERMAN, hereinafter referred to as Petitioner, was employed by Respondent on March 1, 2020, that Petitioner sustained an accident that arose out of and in the course of her employment on March 1, 2020, and that Respondent was given proper notice of said accident pursuant to the Act. The parties further stipulated that Petitioner's average weekly wage as of March 1, 2020 was $1,044.30.

Otherwise, the following issues are in dispute: (1.) medical causal connection, (2.) Petitioner's entitlement to incurred and prospective medical benefits, and (3.) Petitioner's entitlement to temporary total and temporary partial disability benefits.

(i.) Testimony of Petitioner

Petitioner testified at hearing that she was involved in a roughly 100 vehicle pileup while driving a semi on route for a delivery to Salt Lake City, Utah. The motor vehicle accident occurred in Wyoming. (T. 8-9).

Specifically, Petitioner testified that she was able to stop her vehicle without hitting any other drivers but was rear-ended by another semi that was hauling other semis. Petitioner testified that when rear-ended, it caused her vehicle to jog to the left a little bit and hit another semi. On second impact, her vehicle went back straight and hit another semi in front of her. (T. 9-10).

Petitioner testified that she went to the Emergency Room as soon as the Interstate was cleared with pain in her lower back. Petitioner reported that the pain started while stuck on the Interstate and then spread from the impact of the vehicles and that her whole body was aching by the time that she arrived at the Emergency Room. (T. 11-12).

Petitioner then testified that she went to a hotel for a few days and then returned to Illinois and followed up with her family doctor. At that time, she had the same pain that she had when in Wyoming, however, she noted that it was worse as she had a "bulging disc" and a lot of nerve and sharp pain. (T. 12).

Petitioner testified that she began physical therapy and had some steroid injections, which did not alleviate her pain so much. However, Petitioner testified that physical therapy ended up getting the "bulging disc back in place." Petitioner further testified that she had two to three injections into her SI joint. (T. 13).

Following the first SI joint injection, Petitioner testified that she tried to return to work but was unable to do so after only a few hours. Petitioner testified that she was still seeing Dr. Baha at that time, had one more injection and then sought out Dr. Kube. At the time of seeing Dr. Kube, Petitioner testified that the nerve pain was a little bit less severe "after the bulging disc", though she still had numbness and sharp pains in the legs and back but not all of the symptoms that the bulging disc had. (T. 14).

Petitioner testified that Dr. Kube performed another SI joint injection which did not last for the two or three months that she believed it was supposed to. Dr. Kube then recommended that Petitioner undergo an SI joint fusion on the right side. (T. 15).

Petitioner testified that she was able to obtain a part-time, commission-based job in March 2021. The job allowed her to work from home, and the job was very flexible with regard to doctors' appointments. (T. 16).

Petitioner testified that she continued to have pain in the area of the SI joint and continued to have radiating symptoms down mostly the right leg at the time of Arbitration hearing. (T. 16-17).

On cross-examination, Petitioner testified that she had a previous back injury, suffered in June 2019. She reported that she pulled a muscle unloading freight. Petitioner was asked regarding her records from the hospital stay which reflect that she reported this previous back injury and that it had not fully recovered. (T. 18).

Regarding her prior injury, Petitioner testified that she was working for US Express in 2019 when that low back injury/accident occurred. Petitioner further testified that despite the contents of the hospital records, she did not recall saying that her back had not fully recovered. She also did not recall even being asked the question. When asked if she had any reason to doubt the contents of the medical records as per reported by the providers at the Emergency Room, she reported and testified that she never said that she was not fully recovered and did not know why that was contained in the medical record. (T. 19).

Petitioner also testified that, despite the contents of her medical records while at the hospital, she was not offered an MRI. She declined pain medications with regard to the drug screen associated with her CDL. (T. 20-21).

On re-direct examination, Petitioner testified that her symptoms from the March 2020 accident were different from the symptoms from the 2019 injury. (T. 22).

On re-cross examination, Petitioner was asked how she came to see Dr. Kube and she testified that she researched him online and sought his evaluation following her research. She did not believe that she was referred by a physician. (T. 23). Finally, Petitioner testified that perhaps her treating physician did refer to Dr. Kube. (T. 24).

(ii.) Petitioner's Medical History

Pre-Accident

On June 21, 2019 Petitioner was seen OSF in Hopedale. She had complaints of back pain as she felt as if she pulled a muscle after unloading her trailer. She reported that she had gone to the ER and was diagnosed with a back strain. She denied numbness and tingling in the lower extremities and current sciatica though she did have that from time to time. She also denied lower extremity weakness. She was diagnosed with a back sprain at this appointment and was to start Prednisone, tapered over 12 days. Cyclobenzaprine was refilled and Tramadol was ordered. (RX 4).

On June 21, 2019, Petitioner was returned to work as of July 8, 2019 with a 5 pound lifting restriction. (PX 8).

Petitioner returned to her doctor on July 5, 2019 in follow up of her low back muscle strain that occurred on June 13, 2019 while unloading a trailer. Pain had improved and was now classified as a "soreness." She had a few sessions of PT and wanted a release to work with a lifting restriction. Petitioner was diagnosed with acute bilateral back pain without sciatica, a strain of the muscle, fascia and tendon of the lower back and a low back sprain. (RX 4).

On July 5, 2019, Petitioner was released by OSF to no lifting greater than 10 pounds until August 5, 2019. (PX 8).

Petitioner returned to the doctor on July 25, 2019 with complaints of worsening back pain. She had been dusting at work when her back started to spasm (she was working TTE). She would treat conservatively with medication and PT. The noted impression was a recurrence of lumbar strain with left paraspinal muscle spasm. (RX 4).

On July 25, 2019, Petitioner was taken off work until August 1, 2019 and deemed able to return to work on August 2, 2019 with a 10 pound lifting restriction. (PX 8).

As of her August 9, 2019 appointment Petitioner had increased walking, running, and attending the gym with little to no pain at all. She was to start a new job (with Respondent)

which involves less contact with direct lifting. She was to have a 20 pound lift restriction for two weeks and then return to work with no restrictions. (PX 8/RX 4).

Post-Accident

On March 1, 2020, Petitioner was seen at Memorial Hospital of Carbon County, Wyoming after the motor vehicle accident. She was diagnosed with a low back strain and prescribed Hydrocodone and Acetaminophen. She was also prescribed ibuprofen. X-rays of the lumbar spine were read to reveal no acute fracture or listhesis. X-rays of the pelvis were read to reveal no acute fracture or malalignment within the pelvis. At the time the accident, Petitioner was able to walk, but her back was painful. She also had discomfort in her lower ribs. The pain was confined to the lower back. She had no neck pain and no mid back pain. She denied abdominal or chest pain or any extremity pain at the time. Petitioner was belted at the time of the accident and restrained appropriately. She did note a previous back injury that she had not fully recovered from which was related to lifting a lot of boxes and unloading a truck. IT is noted that Petitioner reported that she had still been having problems. The doctor explained that most back pain improved with physical therapy and conservative treatment, but sometimes an MRI would be considered. Petitioner declined the MRI and would return to the Emergency Room if she worsened before leaving town. (PX 3).

Petitioner was then seen at OSF in Hopedale on March 12, 2020. Petitioner was to continue off work and reported that her whole back hurt, worse in the lower back. She reported that when sitting too long, her lower back and the top of her legs would go numb and then when she laid down, her toes would go numb. It was difficult for her to walk and she would get sharp pains if she stood for more than a few minutes. Pain was bearable with medication. Petitioner was diagnosed with acute left-sided low back pain without sciatica, numbness of both lower extremities, and an MRI the lumbar spine would be ordered to further evaluate pain in the numbness. Petitioner was deemed unable to work from March 1, 2020 through further notice. (PX 4).

Petitioner underwent an MRI of the lumbar spine without contrast at OSF Healthcare in Morton on March 17, 2020. The MRI was read to reveal mild disc degeneration at L3–L4. The L3–L4 intervertebral disc demonstrated diffuse broad-based posterior disc bulging with a small central disc protrusion. No encroachment on the neural elements and no central canal stenosis or exit neural foraminal encroachment. (RX 4).

Petitioner returned to OSF Hopedale on March 19, 2020. She noted that Norco was the only thing that was helping her pain and she could barely stand and when she did not take it. Petitioner was diagnosed with acute midline low back pain with bilateral sciatica and numbness and tingling. Physical therapy was ordered, and Gabapentin was ordered to treat the nerve pain. Petitioner would follow-up in two to four weeks. (PX 4).

Petitioner returned the OSF on April 2, 2020 for a one-week follow-up of low back pain with numbness and tingling. Physical therapy had yet to begin but would hopefully start within the next week or so. She was planning to undergo physical therapy at Unity Point Health in Pekin. Petitioner would undergo x-rays of the hips to evaluate sacroiliac pain. A Gaenslen's test re-produced severe pain across the back. (PX 4). Petitioner was to remain off work until April 20, 2020. (PX 8).

April 2, 2020 x-rays of the bilateral hips and pelvis were read to reveal no acute fracture. (PX 4).

Petitioner saw Dr. Baha on April 9, 2020. She reported that her back and leg still hurt following the motor vehicle accident. The pain radiated to the hip area and also to the anterior aspect of the thigh. She had a history of back pain for the last three years, though it noted that the recent motor vehicle accident **exacerbated her pain** which she described as aching and sharp with numbness and tingling. She had started physical therapy and the doctor reviewed the MRI. He opined that the MRI revealed a broad-based disc bulge at L3–L4 with a small disc protrusion. He recommended an epidural steroid injection and since the pain was more the right side, then a transforaminal epidural steroid injection on the right at L3–L4 and L4–L5 would be beneficial. Petitioner was diagnosed with lumbar disc disease with radiculopathy, acute midline low back pain with bilateral sciatica, a lumbar disc herniation, and sacroiliac pain. (PX 5).

Petitioner underwent the right transforaminal epidural steroid injection and L3-L4 and L4-5 under fluoroscopy injection on April 16, 2020. (PX 5).

Petitioner returned to OSF on April 23, 2020 and reported that since the injection her pain worsened and that she had now developed sciatica in the right leg following the epidural. She had a shooting, sharp pain on the back of the right side of her butt and right leg intermittently. She was still taking Gabapentin, Ibuprofen, and Norco to treat the pain. She was now reporting headaches anytime she moved her head over the last four days. Petitioner should return to Dr. Baha after having the injection to let him know her status and find out a treatment plan. There was also a referral to Neurosurgery to evaluate the need for further intervention and as her symptoms were persisting and not improving. They believed the headaches were due to dehydration and hypertension. Petitioner would follow-up in four weeks with this provider. A Gaenslen's test re-produced mild pain across the back. Diagnoses included lumbar disc disease without radiculopathy, lumbar disc herniation, and sacroiliac pain. (PX 4).

Petitioner was able to return to work on May 20, 2020 or when her injury resolved. (PX 8).

Petitioner returned to OSF on May 8, 2020 for follow-up of her back injury. Pain from the epidural injection had resolved, and physical therapy was recommended that she continue three more weeks, three times per week. Headaches had resolved and she was to see an SI joint specialist in five days. Pain was still mostly in the lower back and right hip, and she was starting to wean off of the Gabapentin and the Norco. The impression was that the low back pain had greatly improved and that her range of motion was back to normal. She was still non-tender. She would continue physical therapy and would see the SI joint specialist. A Gaenslen's test was negative and the straight leg test was negative. Petitioner was non-tender with palpation of the spine and musculature of the back. Active range of motion of the back was normal and she was without difficulty or pain. Petitioner would follow-up in four weeks. (PX 4).

Petitioner had a telephone visit with OSF in Hopedale on May 13, 2020. Pain was now localized that the right sacroiliac region in the right low back. Petitioner also noted that she had similar right SI joint region pain over the last 3 years when jarred. She reported that her primary care examination was negative regarding compression, distraction and Faber's testing. Testing was positive for Fortin's finger and Gaenslen's. They agreed with weaning Gabapentin as is was

not helping. Petitioner would continue physical therapy and see Dr. Baha. There was no surgical indication at this time. (PX 6).

On May 29, 2020, Petitioner returned to Dr. Baha and complained of right hip pain. She reported that the initial injection did not help much, but that physical therapy was helping the back pain and lower extremity pain. She still had the sacroiliac pain. Petitioner underwent the right sacroiliac joint injection and was diagnosed right sacroiliac joint pain, lumbar disc herniation, and lumbar disc disease with radiculopathy. (PX 5).

Petitioner returned to OSF on June 2, 2020. She continued therapy and was now done if allowed to return to work. She also had the right SI injection, which helped significantly with pain. The doctor noted that the low back pain continued to improve, was nearly resolved, her range of motion was back to normal, and she was nontender. She could return to work with restrictions of no lifting more than 15 pounds for the next four weeks. The neurological exam was normal, and the impression of memory deficit was residual from the Gabapentin or lack of routine. She would return in four weeks, or as needed if worsening symptoms. Petitioner was non-tender with palpation of the spine and musculature of the back. Active range of motion of the back was normal and she was without difficulty or pain. Diagnoses included acute bilateral low back pain without sciatica. (PX 4).

Petitioner was returned to work restricted to no lifting more than 15 pounds for four weeks. She could then return to work without lifting restrictions if symptom free. (PX 8).

Petitioner returned to OSF on July 2, 2020 in follow-up for the low back pain and right hip pain. She was feeling better initially but returned to work and rode in the truck for one job, which ended up being less than four hours. However, she had low back pain and right hip pain and pain in the back on the left side as well. She had not seen Dr. Baha yet because she was not sure if she needed another injection. She had been taking a muscle relaxer, Ibuprofen, and Tylenol and undergoing therapy. Pain returned when she went back to work so she did not know what to do next. Straight leg test was negative, and she had no tenderness with palpation of the right hip or groin. Petitioner was diagnosed with continued bilateral low back pain without sciatica and right SI joint pain following the accident. She would now start Naproxen and Cyclobenzaprine. She would see the SI joint specialist for an additional injection and follow-up with therapy. (PX 4).

Petitioner was deemed unable to return to work and should remain off work until it is determined that she can return safely. (PX 8).

On July 21, 2020, Petitioner returned to Dr. Baha. She reported that the right sacroiliac injection helped for about two weeks and then her pain started to return. She also complained of left hip pain and tenderness of the left and right sacroiliac area. Petitioner underwent bilateral sacroiliac joint injections. (PX 5).

Petitioner was seen at OSF on July 27, 2020. Petitioner complained of swelling and heat to the touch following her bilateral SI joint injections. Physical examination revealed no bony tenderness of the cervical, thoracic, or lumbar spinous or tremors processes. There was mild soft tissue swelling with decreased lumbar lordosis increased warmth of the skin tissues upon palpation. There was no evidence of arrhythmia, rash, lesions, or muscular contracture present.

No point tenderness of the SI joint. There was decreased range of motion in all planes with slow change of positions secondary to lumbar discomfort. Full range of motion bilateral lower extremities with neurovascular examination intact. Petitioner was diagnosed with bilateral low back pain without sciatica with unspecified chronicity, localized warmth of the skin and low back. (PX 7).

Petitioner returned to OSF on August 6, 2020. Initially, Petitioner had sweating issues and trouble sleeping following the injection, but that had resolved. She noticed that the pain was starting to come back and that most of the pain was in the right lower back. She did not believe physical therapy was helping, and she remained off work. She recently went to Prompt Care for a Toradol injection, which helped for a couple of hours. They would continue to monitor the pain and treatment with Naproxen, Ibuprofen and Cyclobenzaprine. She was referred to Dr. Kube in Peoria for evaluation and treatment of persistent low back pain that had failed conservative treatment. (PX 4).

Petitioner was seen at the Prairie Spine and Pain Institute on August 18, 2020. She was seen by the Physicians' Assistant and complained of axial low back pain. She described the accident and treatment to that date. The Physicians' Assistant recommended a right sacroiliac joint injection, prescribed Celebrex, and kept Petitioner off work until the follow-up visit. He also recommended a lumbar vertebral motion analysis to look for any instability that might have been sustained during the accident. (PX 7).

Petitioner underwent a lumbar vertebral motion analysis scan on August 19, 2020. The study revealed instability at L3–L4. Specifically, excessive angulation of 17°. At all other levels, no other motion anomalies were detected. The images in this study were exclusively analyzed for motion assessment and sagittal alignment of the lumbar spine. Radiographic assessment beyond this motion analysis was not performed. (PX 7).

Petitioner also underwent a right sacroiliac joint injection and arthrogram with radiographic interpretation on August 24, 2020. (PX 7).

Petitioner returned to Dr. Kube on August 25, 2020. He opined that Petitioner's presentation was consistent with sacroiliitis and Petitioner noted that the right injection she had the day prior improved pain by 75%. However, the sacroiliac joint series and pelvic series obtained and reviewed at this visit demonstrated normal alignment of the sacroiliac joint. There appeared to be a low sacral slope noted with a small S1 aperture noted as well. She had relatively normal pelvic alignment. There was a small S1 root region. No arthritic change of any significance was noted. Otherwise there was good alignment. The doctor also looked at the motion analysis scan and there was discussed angular instability at L3-4. While looking at her discs, and as blant and as tall as they are and her age, it was more likely just a normal variant rather than an instability in that area. She did not seem to have clinical findings at the level of L3-4 and the findings were all around the sacroiliac joint on the right side. The doctor wanted a CT scan and they had a discussion about the minimally invasive sacroiliac joint fusion. (PX 7).

Petitioner saw Dr. Kube again on September 29, 2020. She complained of back pain, leg pain, and leg weakness. The doctor was very confident that they would be able to do the joint sacroiliac joint fusion. She had a broad joint present. There was good width looking at the actual

plane. Additionally, when looking at coronal plane, the screw trajectories were going to be fine. (PX 7).

On October 14, 2020, Petitioner saw Dr. Timothy VanFleet at the request of Respondent for a Section 12 Examination. Petitioner described of the motor vehicle accident and reported that she began having pain across her back at that point in time. Physical examination revealed no paraspinal muscle tenderness. Fortin's finger test over the area of the SI joint was negative bilaterally. She was able to forward flex and touch her fingers to the level of her knees. She did have difficulty with extension. Petitioner had good range of motion at the hips and knees. She had a negative Faber's test bilaterally. She had a negative distraction test, as well as pelvic compression test and a negative Gaenslen's test. She had symmetric reflexes at the knees and the ankles without evidence of a tension sign. The doctor reviewed a CT scan of the pelvis dated September 18, 2020 which demonstrated no evidence of any abnormality. (RX 1, Ex. 2).

Dr. VanFleet opined that Petitioner had relatively nonspecific findings following his examination and review of her records and films. He did not feel that she had sacroiliac joint mediated pain. He indicated that, unfortunately, the injections had not delineated the amount of improvement that she experienced with the injection at the time with pre-or post-procedure pains scores. He also did not find in the clinical notes any provocative findings that would indicate SI joint pain on the right side nor did he find any provocative tests on examination being positive that would confirm SI joint pain. He felt that Petitioner had very nonspecific low back ache and that she was experiencing difficulty with her back prior to the March 1, 2020 injury. (RX 1, Ex. 2).

Dr. VanFleet opined that with regard to the accident, Petitioner suffered a back strain. He did not feel that the mechanism of injury was consistent with SI joint pathology as she was belted and did not sustain any side-impact mechanism for the injury. The doctor felt that the physical therapy that Petitioner underwent was appropriate and the attempted injections were appropriate. However, he did not recommend any further treatment and felt that Petitioner could return to work full duty without restriction and was at maximum medical improvement. (RX 1, Ex. 2).

Petitioner returned to Dr. Kube on January November 3, 2020. He wished to continue moving forward toward surgical intervention. (PX 7).

Petitioner returned to OSF on January 12, 2021 for evaluation of back pain. It was manageable as long as she stayed home and did not overdo it. She could not carry anything or go up and down stairs too many times. She would return to Kube on February 3, 2021. (PX 4).

OSF noted that Petitioner could returned to work with a 15 pound lifting restriction with the ability to rest frequently. (PX 8).

Petitioner saw Dr. Kube on February 2, 2021. Petitioner was not really exhibiting any kind of pain on the hip examination and there was no greater trochanter region pain. There was no pain with the lateral femoral cutaneous nerve. The doctor again recommended surgery. (PX 7).

Petitioner called OSF on March 29, 2021 and reported that she needed a note that she could work with restrictions from April 2020 through December 2020 and was given the work slip at her request. It was reported that she was using this for unemployment benefits. (PX 4).

Dr. VanFleet issued a second report on April 10, 2021 following review of records from Prairie Spine and Pain Institute, the MRI image from March 17, 2020, radiographs of the lumbar spine from August 18, 2020, X-rays of hips from April 2, 2020, and sacroiliac joint series dated August 25, 2020. The doctor's opinion remained unchanged following his review of same. Of note, the doctor's opinion regarding the sacroiliac joint series from August 25, 2020 was read to reveal no evidence of any pelvic semi-migration or evidence of disruption of the pelvic ring. There was no sclerosis nor evidence of any arthrosis. (RX 1, Ex. 3).

With regard to the x-rays of the hips from April 2020, there was no evidence of any pelvic disruption, the hips demonstrated no evidence of any osteoarthrosis, SI joints appeared to be unremarkable, and no evidence of sclerosis was noted. (RX 1, Ex. 3).

Petitioner's saw Dr. Kube again on May 4, 2021. Petitioner was noted to still have the sacroiliac joint injury and pain and required the fusion. However, there was no physical examination, or imaging noted in this treatment note. (PX 7). Petitioner was taken off work. (PX 8).

Petitioner saw Dr. Kube on July 26, 2021. Without description, it was noted that her examination was still consistent with the sacroiliac joint and they would move forward with the procedure as soon as she obtained coverage. (PX 7).

Petitioner saw Dr. Kube on October 26, 2021. There was no physical examination or imaging noted in the treatment record. (PX 7). Petitioner was taken off work. (PX 8).

Petitioner returned to Dr. Kube on November 30, 2021. There was no physical examination or imaging noted in the treatment records. Otherwise, the doctor refilled Tramadol and Cyclobenzaprine. (PX 7). Petitioner was taken off work. (PX 8).

(ii.) Testimony of Dr. Richard Kube (PX 10)

Dr. Kube's evidence deposition took place on June 3, 2021. Dr. Kube, a spine surgeon, testified that Petitioner presented to his office on August 18, 2020 with complaints of back pain. She reported being involved in a semitruck pileup motor vehicle accident. (PX 10, p. 6). Following the examination conducted by his Physicians' Assistant, Dr. Kube opined that she had some sensory changes bilaterally at S-1 and on the left side consistent with either L4, the anterior thigh which could also be lateral femoral cutaneous nerve. There was tenderness at the lumbar midline, limited flexion in the spine. Petitioner had some bilateral buttock pain, was tender midline and tender bilaterally over the SI joints with the right being worse than the left. There were no tension or provocative signs positive at that time. (PX 10, p. 8).

Dr. Kube testified that the Physicians' Assistant reviewed images and read them to reveal an L3-4 grade 1 retrolisthesis and a and L2- 3 grade 1 retrolisthesis. There was no fracture. He noted that the MRI was relatively clean with maybe a small bulge at L3-4. The plan was to set

her up for a second specific diagnostic right SI joint injection to try to rule the diagnosis in or out. (PX 10, p. 8).

Dr. Kube opined that Petitioner's presentation at her next visit was consistent with sacroiliitis. The doctor jumped to surgical planning and ordered an additional CAT scan as he opined that she had a diagnosis consistent with SI joint dysfunction and pain. (PX 10, p. 10).

Dr. Kube testified regarding the CT scan taken in September 2020 but only testified to the extent that there was adequate width in the region of the sacrum and the sacroiliac joint to get screw trajectories for appropriate fixation. He admitted that the CT scan was done merely for surgical planning and not for diagnostics. (PX 10, p. 11).

On cross-examination, Dr. Kube testified essentially that he was unclear of Petitioner's position in the truck at the time of the accident. (PX 10, p. 17).

Dr. Kube also testified that he did not review Petitioner's medical records that predated March 1, 2020 but was unaware of her having a previous diagnosis of sacroiliac joints function. Dr. Kube also testified that he certainly did not review anything outside of his own record. (PX 10, p. 18).

When asked about the Fortin's finger test, Dr. Kube testified that he believed that test consisted of the patient pointing. to where the pain is located. (PX 10, p. 20).

Dr. Kube was questioned about his physical examination of Petitioner and the lack of recording of same in his records. Dr. Kube was unable to answer definitively that he performed a physical examination of Petitioner. While he explained what different tests consisted of, he never admitted performing any physical examinations. (PX 10, pp. 19-23).

(iii.) Testimony of Dr. Timothy VanFleet (RX 1)

Dr. VanFleet's evidence deposition took place on April 21, 2021. Dr. VanFleet, a board-certified orthopedic surgeon with a subspecialty in spinal surgery, testified that he examined Petitioner on October 14, 2020 at the request of respondent. (RX 1, p. 7) Petitioner reported to him that she was involved in a multivehicle pileup while driving as an over-the-road trucker on March 1, 2020. Specifically, she described that she was slowing on the highway and was rear-ended by another big rig and began having pain across her back following this event. (RX 1, p. 9),

Dr. VanFleet examined Petitioner and noted that she ambulated across the floor with a slightly antalgic gait favoring the right side. She had no paraspinal muscles tenderness or spasm. He performed a Fortin's finger test over the area of the SI joint which was noted to be negative on both sides. (RX 1, p. 10).

Petitioner, upon examination, was also able to forward flex and touch her fingers to the level of her knees. She had some difficulty with extension, and she reported some discomfort across her low back. She also had good range of motion when assessing her hips and her knees. (RX 1, p. 11).

Petitioner had a negative Faber's test which tests flexion, abduction, and external rotation at the hip joint. The doctor testified that this was a good test to evaluate range of motion in the hip joint and also a good test to evaluate provocation for the SI joint. Petitioner had negative distraction testing a negative pelvic compression test and a negative Gaenslen's test. The doctor testified that all three of those tests were specifically to provoke the SI joint. Some of these tests, if not all of the tests should be positive or basically derive a positive response in terms of pain from the individual at the time of the examination if they have sacroiliitis or some kind of sacral joint dysfunction. Petitioner also had symmetric reflexes at the knees and ankles without evidence of a tension sign. (RX 1, p. 11).

The point of the testing was to try to confirm Petitioner's diagnosis of sacroiliac joint dysfunction. When describing the Fortin's finger test, the doctor described that he put his finger in the SI joint and pushed the joint. If the joint is inflamed, then a positive response would follow. This test was negative because there were no complaints of pain following the test. (RX 1, p. 13).

The Faber's test is good to look at the hip joint in particular, but it also applies pressure across the SI joint so if there is no pain (if pain is not reproduced) then there is no indication that pain is coming from the SI joint. (RX 1, p. 14). There was also no pain from the distraction test that the doctor performed. (RX 1, p. 15).

Dr. VanFleet also testified that he reviewed the CT scan of the pelvis taken in September 2020. He opined that it was a normal study. Dr. VanFleet opined that following his examination of Petitioner, review of records and films, and physical examination, he diagnosed Petitioner with a strain - typical after a motor vehicle accident. He did not believe that her mechanism was consistent with SI joint pathology. He testified that SI joint pathology was more consistent of someone who gets broadsided in their car and they get more of a lateral compression type injury. Occasionally one who is rear-ended will sustain significant pelvic trauma, but typically that is from being thrown around the car. (RX 1, p. 16).

Dr. VanFleet testified that he did not believe Petitioner had an SI joint problem but more of a soft tissue injury to the back. He likened it to a whiplash injury to the neck only in the lumbar spine. (RX 1, p. 16).

Dr. VanFleet believed that this was the only diagnosis plausible in terms of an explanation for her symptoms at that point in time. He described it as a self-limiting problem that should improve over time. Dr. VanFleet testified that Petitioner was at maximum medical improvement at the time of his examination and that no further treatment would be necessary. He also opined that she could return to work full duty and without restrictions. (RX 1, p. 17).

Dr. VanFleet also testified that Petitioner had some back pain that was nonspecific prior to the accident and noted that she had a lifting injury that predated the March 1, 2020 accident. (RX 1, p. 18).

Subsequent to his evaluation of Petitioner, Dr. VanFleet was provided more information including medical records and films. Following his review of those records and films, his opinions as noted did not change. (RX 1, p. 20). Specifically, Dr. VanFleet reviewed radiographs

of the hips, pelvis, and SI joint, and an MRI of the lumbar spine. The imaging studies revealed a relative paucity of findings of abnormality in the vicinity or in the zone of the SI joint. (RX 1, p. 20).

Dr. VanFleet was then asked about Dr. Kube's utilization of a vertebral motion analysis. Dr. VanFleet testified that he had never utilized such a test and knew nobody that did besides Dr. Kube. He testified that he believed that there was a suspicion on Dr. Kube's part that perhaps he was able to evaluate segmental instability with the study. (RX 1, pp. 20-21).

Dr. VanFleet testified that he had no use for the test as there is no merit in the medical literature that offers benefit of the study over what is utilized currently in most clinical practices. He did review the report nonetheless and found nothing of significance. (RX 1, p. 21).

Upon cross-examination, Dr. VanFleet agreed that the Emergency Room records contained a pain diagram completed by Petitioner which referenced an area of pain covering the area of the SI joint. (RX 1, p. 22). Dr. VanFleet also agreed that Petitioner continued to complain of SI joint pain when returning from Wyoming and seeing Dr. Baha. (RX 1, p. 23). However, Dr. VanFleet noted that there was no pre- or post-procedure pain score noted by Dr. Baha after the right SI joint injection on May 29, 2020. That said, he could not determine whether or not Petitioner's pain went away for a period of time and then came back following the injections. (RX 1, p. 24).

Dr. VanFleet also testified that Petitioner's diagnoses were SI joint area pain which was more commonly referred to as the lumbodorsal fashion area and was the most common source of pain in the low back as it pertained to any source or etiology of lumbar pathology. So, to say that pain occurred over the SI joint did not mean that pain was coming from the SI joint. It merely meant the location of pain which could be anything from paraspinal muscle spasm to infection of the disc space. (RX 1, p. 25).

Dr. VanFleet also opined that the mechanism of injury would not indicate significant trauma through the SI joint and there was no description of any lateral compression over the area. The real mechanisms for SI joint pathology was not there and terms of the description. (RX 1, p. 26).

Dr. VanFleet testified that the accident could not have caused an SI joint sprain or strain nor cause a previously asymptomatic SI joint issued to become symptomatic. Dr. VanFleet took from the medical records that Petitioner had nonspecific low back pain before the accident as much as she still had when he evaluated her. (RX 1, p. 27).

Upon redirect examination, Dr. VanFleet testified that Petitioner had no objective findings and certainly none that would be consistent with SI joint dysfunction. Her nonspecific low back pain was consistent with findings consistent with nonspecific low back pain which was none. (RX 1, p. 29).

Finally, Dr. VanFleet testified that there was no evidence that warranted the surgery recommended by Dr. Kube. He specifically noted that Dr. Kube conducted no testing of the SI

joint in his physical examination that indicated that Petitioner had physical examination findings that would be supportive of SI joint dysfunction. (RX 1, p. 30).

II. CONCLUSIONS OF LAW

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

Petitioner must prove by the preponderance of the credible evidence that his injuries are causally related to the employment accident. Peoria County Nursing Home v. Industrial Comm'n, 115 Ill.2d 524 (1987). When the question is one specifically within the purview of experts, expert medical testimony is mandatory to show that the claimant's work activities caused the condition of which the employee complains. See, e.g., Nunn v. Industrial Comm'n, 157 Ill.App.3d 470. 478 (4th Dist. 1987), citing Westinghouse Elec. Co. v. Industrial Comm'n, 64 Ill.2d 257 (1976).

In this matter, the Arbitrator finds that Petitioner failed to meet her burden of proof in establishing that her current condition of ill-being is causally related to the March 1, 2020 accident. In support of this finding, the Arbitrator finds that the opinions of Dr. VanFleet, Respondent's Section 12 Examiner, are vastly more credible and convincing than those of Dr. Kube, Petitioner's most recent treating physician.

Regarding the opinions of Dr. VanFleet, they are first based on Petitioner's report of the mechanism of injury in that she was rear-ended by another semi-truck, as Petitioner also testified to at hearing. (RX 1, p. 9/T. 9-10). Dr. VanFleet testified credibly that this mechanism of injury would not indicate significant trauma through the SI joint as there was no description of any lateral compression over the area. (RX 1, p. 26).

Dr. VanFleet also testified in great detail with regard to his physical examination of Petitioner:

- No paraspinal muscle tenderness or spasm (RX 1, p. 10);
- Negative Fortin's finger test over the SI joint, bilaterally (RX 1, p. 10);
- Negative Faber's test (RX 1, p. 11);
- Negative distraction testing (RX 1, p. 11);
- Negative pelvic distraction testing (RX 1, p. 11);
- Negative Gaenslen's testing (RX 1, p. 11); and
- Symmetric reflexes at the knees and ankles without evidence of a tension sign (RX 1, p. 11).

While all tests were negative at his October 14, 2020 examination, Dr. VanFleet testified that some of these tests, if not all, should be positive of or derive a positive in response in terms of pain if one has sacroiliitis or some kind of sacral joint dysfunction. (RX 1, p. 11).

Dr. VanFleet further testified that Petitioner's September 2020 CT scan was normal (RX 1, p. 16) and that the radiographs of the hips, pelvis, and SI joint, and MRI of the lumbar spine revealed "a paucity of findings of abnormality in the area of the SI joint." (RX 1, p. 20).

Dr. VanFleet also testified that his review of the vertebral motion analysis (which he had never utilized, knew of no one other that Dr. Kube to utilize, and found to have no merit in the medical literature or offer any benefit), revealed no findings of any significance. (RX 1, pp. 20-21). Dr. VanFleet was also able to explain that merely because Petitioner complained of pain *over* the SI joint did not mean that pain was coming *from* the SI joint and would be an explanation for a diagnosis of a paraspinal muscle spasm. (RX 1, p. 25). Dr. VanFleet also astutely noted (as he had reviewed Petitioner's medical records that pre-dated the March 1, 2020 accident) that Petitioner had non-specific low back pain before the accident, just as she did at the time of his October 14, 2020 examiantion. (RX 1, p. 27).

Conversely, Dr. Kube offered absolutely no testimony, rationale, reasoning, or explanation whatsoever for the basis of his recommended SI joint fusion. For instance, Dr. Kube did not perform a physical examination of Petitioner at her initial visit to his office on June 3, 2021 (this was performed by his Physicians' Assistant), and Dr. Kube opined that while Petitioner was tender bilaterally over the SI joints, there were no tension or provocative signs positive at that time. (PX 10, p. 8). Dr. Kube merely testified that Petitioner's "presentation" was consistent with sacroiliitis, and that the CT scan ordered was for strictly for surgical planning (screw placement) and not for diagnostic purposes. (RX 10, pp. 10-11).

Dr. Kube further testified: (i.) that he was unclear of Petitioner's position in the truck at the time of the accident; (ii.) that he did not review Petitioner's medical records that pre-dated March 1, 2020, (iii.) that he also did not review any medical records other than his own; and (iv.) that he believed the Fortin's finger test consisted of the patient pointing to where the pain is located. (PX 10, pp. 17-20). It is troubling that a doctor who holds himself out to be an "expert" in SI joint treatment is unable to identify or explain a well-known and often used test performed on patients with perceived SI joint problems. Finally, Dr. Kube was unable to definitely confirm that he ever actually performed a physical examination of Petitioner (PX 10, pp. 19-23).

As such, when considering the opinions of Dr. VanFleet and Dr. Kube, the Arbitrator relies on and adopts the opinions of Dr. VanFleet in that Petitioner sustained a lumbar strain as a result of the March 1, 2020 accident, that Petitioner had reached maximum medical improvement as of his October 14, 2020 examination, and that Petitioner could return to work full duty and without restrictions of the October 14, 2020 examination in support of this denial of any further benefits to Petitioner (prospective medical, outstanding incurred medical, temporary partial and/or temporary total). The Arbitrator finds that Dr. VanFleet's opinions are credible and convincing based on his understanding of the mechanism of injury, his thorough physical examination of Petitioner, and his complete review of Petitioner's treatment records and diagnostic studies. The Arbitrator does not otherwise find the opinions of Dr. Kube, including but not limited to his diagnosis and treatment recommendations, to be credible or convincing whatsoever.

In further support of this denial of additional benefits to Petitioner, the Arbitrator also relies on Petitioner's own medical treatment records. Specifically, the Arbitrator notes the that Dr. Baha opined on April 9, 2020 that Petitioner had a history of back pain for the last three years and that the March 1, 2020 accident merely *exacerbated her pain.* (Emphasis added). Dr. Baha did not opine that the accident *caused, aggravated or accelerated her condition*. (PX 5). Further, Petitioner reported to OSF on May 13, 2020 that she had similar right SI joint region

pain over the last three years. (PX 6). As of July 27, 2020, Petitioner had no point tenderness of the SI joint and was diagnosed with "bilateral low back pain without sciatica with unspecified chronicity." (PX 7). It was at this point she went to see Dr. Kube.

Finally, the Arbitrator does not find Petitioner to be credible. For instance, Petitioner testified at hearing that, essentially, the contents of the certified records of Memorial Hospital of Carbon County (PX 3) were erroneous. Specifically, Petitioner testified that she did not recall reporting that her previous back injury had not fully recovered and that she did not recall being offered and declining an MRI of the lumbar spine. (T. 19-20). The Arbitrator does not find this plausible. In further support of the Arbitrator's finding that Petitioner is not credible, the Arbitrator cites the March 29, 2021 note contained in the records of OSF (PX 4) which indicates that Petitioner called, at the direction of her attorney, to request (and was provided) a note from the doctor that she could indeed work with restrictions between April 2020 and December 2020 (despite being paid TTD benefits through November 2020 and being off work completely during the vast majority of this period), for the purpose of applying for unemployment benefits. Curiously, this requested work note was not contained in these "certified" records.

For all of reasons as articulated above, the Arbitrator finds that: (i.) Petitioner sustained a lumbar strain as a result of the March 1, 2020 accident; (ii.) that Petitioner had reached maximum medical improvement as of Dr. VanFleet's October 14, 2020 examination; and (iii.) that Petitioner could return to work full duty and without restrictions of Dr. VanFleet's October 14, 2020 examination. As a result, the Arbitrator does not award any further benefits to Petitioner, including further payment of incurred medical benefits, payment of temporary total disability benefits, payment of temporary partial benefits, and payment of prospective medical benefits.

J. Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

In light of the Arbitrator's findings with regard to the medical causal connection, as detailed above, the Arbitrator finds that Respondent is not liable for payment of any outstanding medical benefits, as it has paid all reasonable and necessary medical benefits through Dr. VanFleet's October 14, 2020 examiantion. (RX 2). The treatment rendered through the October 14, 2020 Section 12 Examination is otherwise found to have been reasonable and necessary.

K. Is Petitioner entitled to any prospective medical care?

In light of the Arbitrator's findings with regard to medical causal connection, as detailed and discussed above, and that Petitioner has reached maximum medical improvement, the Arbitrator finds that Respondent is not liable for payment of any prospective medical benefits, including but not limited to the surgery recommended by Dr. Kube.

L. What temporary total/temporary partial disability benefits are in dispute?

Petitioner is claiming to be entitled to 52-5/7 weeks of TTD benefits (03/02/2020 through 03/07/2021), totaling $36,699.49, subject to credit for TTD benefits paid by Respondent during the period of 03/02/2020 through 11/15/2020 (37 weeks) totaling $25,759.40. (RX 3). However, in light of the Arbitrator's findings with regard to medical causal connection, the Arbitrator finds that Respondent is not liable for the payment of further temporary total disability benefits.

Likewise, Respondent is not liable for the payment of temporary partial disability benefits during the period of 03/08/2021 through 12/15/2021 (40-2/7 weeks), totaling $21,705.78, as claimed by Petitioner.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC024427
Case Name	Lawanda Comer v. Arbor Rose
Consolidated Cases	18WC024431; 18WC024555;
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0370
Number of Pages of Decision	6
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Danielle Cain
Respondent Attorney	Kenneth Reifsteck

DATE FILED: 8/18/2023

/s/Stephen Mathis, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF CHAMPAIGN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Lawanda Comer,

Petitioner,

vs. No. 18 WC 24427

Arbor Rose,

Respondent.

DECISION AND OPINION ON REVIEW

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

Having carefully examined the petitions for review filed in this case and the relevant records in CompFile, the Commission notes that Petitioner did not properly file a timely cross-review. The Commission has jurisdiction pursuant to Respondent's petition for review. The Commission has considered, among the issues raised in the petition for review, the nature and extent of Petitioner's disability, which is the only issue argued by Petitioner. Accordingly, Petitioner's failure to properly file a timely cross-review does not affect the outcome of the case.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 6, 2022, is hereby affirmed and adopted.

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

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

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

August 18, 2023
SJM/sk
o-07/26/2023
44

/s/ *Stephen J. Mathis*
Stephen J. Mathis

/s/ *Deborah J. Baker*
Deborah J. Baker

/s/ *Deborah L. Simpson*
Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC024427
Case Name	Lawanda Comer v. Arbor Rose
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	3
Decision Issued By	Edward Lee, Arbitrator

Petitioner Attorney	Danielle Cain
Respondent Attorney	Kenneth Reifsteck

DATE FILED: 9/6/2022

THE INTEREST RATE FOR THE WEEK OF AUGUST 30, 2022 3.23%

/s/Edward Lee, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF **CHAMPAIGN**)

☐ 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

Lawanda Comer
Employee/Petitioner
v.

Arbor Rose
Employer/Respondent

Case # **18** WC **024427**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Champaign**, on **July 20, 2022.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **May 7, 2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**11,490.84**; the average weekly wage was $**374.63**.

On the date of accident, Petitioner was **40** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0.00** for other benefits, for a total credit of $**0**.

ORDER

See Decision 18wc024555 for Findings, Conclusions and Awarded Benefits.

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

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

Edward Lee
Signature of Arbitrator

SEPTEMBER 6, 2022

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC024431
Case Name	Lawanda Comer v. Arbor Rose
Consolidated Cases	18WC024427; 18WC024555;
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0371
Number of Pages of Decision	6
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Danielle Cain
Respondent Attorney	Kenneth Reifsteck

DATE FILED: 8/18/2023

/s/Stephen Mathis, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF CHAMPAIGN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Lawanda Comer,

Petitioner,

vs. No. 18 WC 24431

Arbor Rose,

Respondent.

DECISION AND OPINION ON REVIEW

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

Having carefully examined the petitions for review filed in this case and the relevant records in CompFile, the Commission notes that Petitioner did not properly file a timely cross-review. The Commission has jurisdiction pursuant to Respondent's petition for review. The Commission has considered, among the issues raised in the petition for review, the nature and extent of Petitioner's disability, which is the only issue argued by Petitioner. Accordingly, Petitioner's failure to properly file a timely cross-review does not affect the outcome of the case.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 6, 2022, is hereby affirmed and adopted.

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

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

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

August 18, 2023

SJM/sk
o-07/26/2023
44

/s/ *Stephen J. Mathis*
Stephen J. Mathis

/s/ *Deborah J. Baker*
Deborah J. Baker

/s/ *Deborah L. Simpson*
Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC024431
Case Name	Lawanda Comer v. Arbor Rose
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	3
Decision Issued By	Edward Lee, Arbitrator

Petitioner Attorney	Danielle Cain
Respondent Attorney	Kenneth Reifsteck

DATE FILED: 9/6/2022

THE INTEREST RATE FOR THE WEEK OF AUGUST 30, 2022 3.23%

/s/Edward Lee, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF CHAMPAIGN)

☐ 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

Lawanda Comer
Employee/Petitioner
v.

Case # **18** WC 024431

Arbor Rose
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Champaign**, on **July 20, 2022.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **March 1, 2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**11,490.84**; the average weekly wage was $**374.63**.

On the date of accident, Petitioner was **40** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0.00** for other benefits, for a total credit of $**0**.

ORDER

See Decision 18wc024555 for Findings, Conclusions and Awarded Benefits.

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

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

Edward Lee
Signature of Arbitrator

SEPTEMBER 6, 2022

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC024555
Case Name	Lawanda Comer v. Arbor Rose
Consolidated Cases	18WC024427; 18WC024431;
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0372
Number of Pages of Decision	11
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Danielle Cain
Respondent Attorney	Kenneth Reifsteck

DATE FILED: 8/18/2023

/s/Stephen Mathis, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF CHAMPAIGN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Lawanda Comer,

Petitioner,

vs. No. 18 WC 24555

Arbor Rose,

Respondent.

DECISION AND OPINION ON REVIEW

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

Having carefully examined the petitions for review filed in this case and the relevant records in CompFile, the Commission notes that Petitioner did not properly file a timely cross-review. The Commission has jurisdiction pursuant to Respondent's petition for review. The Commission has considered, among the issues raised in the petition for review, the nature and extent of Petitioner's disability, which is the only issue argued by Petitioner. Accordingly, Petitioner's failure to properly file a timely cross-review does not affect the outcome of the case.

The Arbitrator's decision on page 2 states the wrong date of accident. The Commission corrects the date of accident to June 27, 2018.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 6, 2022, is hereby affirmed with changes.

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

August 18, 2023

SJM/sk
o-07/26/2023
44

/s/ *Stephen J. Mathis*
Stephen J. Mathis

/s/ *Deborah J. Baker*
Deborah J. Baker

/s/ *Deborah L. Simpson*
Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC024555
Case Name	Lawanda Comer v. Arbor Rose
Consolidated Cases	
Proceeding Type	Request for Hearing
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	8
Decision Issued By	Edward Lee, Arbitrator

Petitioner Attorney	Danielle Cain
Respondent Attorney	Kenneth Reifsteck

DATE FILED: 9/6/2022

/s/Edward Lee, Arbitrator
Signature

INTEREST RATE WEEK OF AUGUST 30, 2022 3.23%

Comer v. Arbor Rose 18 WC 024555

STATE OF ILLINOIS)
)SS.
COUNTY OF CHAMPAIGN)

☐ 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

Lawanda Comer
Employee/Petitioner
v.

Case # **18** WC **024555**

Arbor Rose
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Champaign**, on **July 20, 2022.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **March 1, 2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**11,490.84**; the average weekly wage was $**374.63**.

On the date of accident, Petitioner was **40** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0.00** for other benefits, for a total credit of $**0**.

ORDER

Respondent shall pay Petitioner permanent partial disability benefits 30% person as a whole, as provided in Section 8(d)2 of the Act.
The Respondent shall pay Petitioner medical bills as set forth in Petitioner's Exhibits 6, 7, 8, 9, and 10.
The Respondent shall pay Petitioner TTD benefits from June 28, 2018 through April 26, 2019.

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

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

_Edward Lee_____

Signature of Arbitrator **September 6, 2022**

FINDINGS OF FACT

Petitioner, a 40-year-old certified nursing assistant, sustained an accidental injury that arose out of and in the course of her employment with Respondent, Arbor Rose, on March 1, 2018 (18 WC 024331), on May 7, 2018 (18 WC 024427) and June 27, 2018 (18 WC 024555). On each date, Petitioner injured the left side of her neck and shoulder while lifting residents or their furniture.

Petitioner testified that she worked as a Certified Nursing Assistant for Arbor Rose, an assisted living facility, beginning in November 2017. (T. 8-9) Petitioner testified that she worked full time and that her general job responsibilities included resident care including bathing, dressing, transporting, feeding, serving, laundry, household cleaning, moving furniture, restocking shelves, cleaning linen closets and taking care of the entire home. (T. 8-9)

Petitioner testified that prior to March 1, 2018, she did not have any physical limitation preventing her from performing her job duties at Arbor Rose. (T. 9) She testified that prior to March 1, 2018, she did not have any pain in the left side of her neck. (T. 9) She further testified that prior to March 1, 2018, she was not actively seeking medical care and she had not had any previous incidents where she injured the left side of her neck. (T. 9) Petitioner further testified she was able to perform her job duties without physical limitation on May 7, 2018 and June 27, 2018. (T. 10). She also testified that she had a prior cervical fusion at a higher level when she was 18 years old, more than twenty years prior. (T.35).

Petitioner testified that on March 1, 2018, she was working at Arbor Rose. (T. 11) On March 1, 2018, she was transferring a patient from one area of the facility to another when he had a muscle spasm. (T. 11-12) While she was lifting his foot into the footrest of his wheelchair, his muscle spasm caused his leg to jerk down on her arm. (T.11-12). She immediately felt a burning, tingling pain radiating through her left shoulder down to her elbow. (T. 12-13) Petitioner reported the incident to Mercedes at Arbor Rose that day, but she chose not to seek immediate medical treatment. (T. 13)

Petitioner testified that on May 7, 2018, she was working at Arbor Rose. (T. 14) On May 7, 2018, she was transferring a resident from his bed to his chair when he had a total body spasm. (T. 14) She had to reach and catch the resident before he struck the floor. (T.14) Petitioner immediately felt the same burning, tingling pain radiating through her left shoulder down to her elbow as well as her lower back. (T.14) Again, Petitioner reported this incident to Mercedes at Arbor Rose, but she did not seek medical treatment. (T. 15)

Petitioner then testified that on June 27, 2018, she was working at Arbor Rose. (T. 16). She testified that a new resident had moved into a model room and she needed to transfer the mock furniture out to allow for the resident's hospital bed to come into the room. (T.16) Petitioner testified that she did not feel immediate pain, but when she woke up the next morning her arm was tingling in pain. (T. 17) She reported her injury to Sambria Walker via text message and attempted to report to work. (T. 19-20)

On June 28, 2018, Petitioner presented to SafeWorks Illinois for left shoulder pain (PX 1. Pg. 2). Petitioner indicated she initially hurt her left shoulder when transferring a resident that jerked down on her left arm. *Id.* She reported she worked through her pain since that injury in March 2018. (PX 1. Pg. 6)

She underwent an x-ray of her left shoulder, which did not show significant degenerative disease. (PX 1. Pg. 7) Petitioner was diagnosed with an unspecified strain of her left shoulder joint. (PC 1. Pg. 8). She was placed on restricted duty to limit overhead work and restricting lifting, pushing and pulling to 5 pounds or less. *Id.* She was instructed to ice/heat her shoulder, take Aleve, start physical therapy and follow up in three weeks. *Id.*

Petitioner followed up on July 9, 2018, with ongoing left shoulder pain. (PX 1. Pg. 21). Petitioner indicated her pain was a 5 on a scale of 10. *Id.* She further indicated her pain was worse at night and following physical therapy. *Id.* Petitioner was instructed to follow up with Dr. Fletcher, continue physical therapy, take Medrol dose and Tramadol, and to continue her work restrictions. (PX 1. Pg. 24)

On July 20, 2018, Petitioner followed up with Dr. Fletcher as instructed. (PX 1. Pg. 32) Petitioner underwent a Pain Disability Questionnaire, which found she was moderate disability. (PX 1. Pg. 35) She was recommended additional physical therapy, additional imaging, and continued work restrictions (PX 1. Pg. 36-37). She was diagnosed with Unspecified sprain of left shoulder joint and cervical disc disorder with radiculopathy, mid-cervical region. *Id.* Petitioner was referred to OSF to undergo an MRI of her cervical spine with and without contrast. (PX 1. Pg. 40-41).

On August 10, 2018, Petitioner followed up with Dr. Fletcher as instructed. (PX 1. Pg. 46) Petitioner was advised to continue with her work restrictions. (PX 1. Pg. 50).

On August 21, 2018, Petitioner underwent an MRI of her cervical spine. (PX 1. Pg. 56) The MRI revealed a herniation at C7-T1. (PX 1. Pg. 57).

On August 31, 2018, Petitioner followed up with Dr. Fletcher. (PX 1. Pg. 61) She continued to suffer left radiculopathy and was referred back to physical therapy. (PX 1. Pg. 64-67) Dr. Fletcher further made a referral for surgical consultation. *Id.*

On September 19, 2018, Petitioner presented to Dr. Nitin Kukkar at Orthopedic and Sports Enhancement Center for consultation. (PX 2. Pg. 69). Dr. Kukkar recommended a decompression and fusion via Anterior Cervical Discectomy Fusion at C7-T1, as all conservative treatment had failed. (PX 2. Pg. 71). Petitioner again reported the initial March 1, 2018 initial onset of pain when she lifted a patient and he jerked her shoulder suddenly. *Id.* Petitioner's insurance was not taken by Dr. Kukkar and she had to pursue an additional surgical consultation. (T. 24)

On December 10, 2018, Petitioner presented to Dr. Jason Seibly at Central Illinois Neurohealth Sciences for surgical consultation. (PX 3. Pg. 74). Petitioner underwent a physical examination, which revealed discomfort with palpation and left C8 radiculopathy. (PX 3. Pg. 77). She had a positive Tinel's sign, a positive Spurling sign, and radiculopathy symptoms that were of cervical etiology. *Id.* Petitioner again reported her work injury and was recommended to proceed with a cervical fusion. (PX 3. Pg. 77-78)

On January 16, 2019, Petitioner present to Dr. Jason Seibly at Advocate BroMenn Medical Center for her Anterior Cervical Discectomy Fusion. (PX 4. Pg. 88-115)

On February 4, 2019, Petitioner followed up with Dr. Seibly for a post-surgical visit. (PX3 Pg. 82) Petitioner underwent an x-ray of her neck. (PX3 Pg. 82) She was instructed to stay off of work and not to lift anything more than 10-15 pounds. (PX 3. Pg. 83)

On March 22, 2019, Petitioner followed up again with Dr. Seibly for her post-surgical examination. (PX 3. Pg. 85) Physical examination revealed that her radiculopathy had been resolved. (PX 3. Pg 86) Dr. Seibly related her injury and his treatment to her work injury. (PX 3. Pg. 86). Petitioner was instructed to remain off work for the next 5 weeks. (PX3. Pg. 86)

On August 29, 2019, Petitioner returned to ATI for physical therapy. (PX 5. Pg. 123) Petitioner's injury was notated as being caused at Arbor Rose. *Id.* She was recommended to attend therapy three times a week for 4 weeks. *Id.*

On October 4, 2019, Petitioner underwent a Functional Capacity Evaluation, which reflected mixed, maximal effort and recommended a home exercise program for overall conditioning and flexibility. (PX 6. Pg. 127)

On March 11, 2021, Respondent's Section 12 independent medical examiner, Dr. Li, issued an IME report. (PX4) Dr. Li relied on medical reports and the operative report of the surgery Petitioner underwent on February 4, 2020, which was performed by Dr. Bane. Dr. Li opinion that Petitioner's level of impairment pursuant to the sixth edition of the AMA guidelines is 2% of the lower extremity and 1% person as a whole.

PETITIONER'S TESTIMONY

Petitioner testified that she is unable to lift overhead without pain. (T. 31) She is unable to lift heavy weight, she cannot comb her own hair, she loses grip in her left side, and cannot sleep laying flat. (T.31-32) Petitioner cannot work as a CNA anymore, and now cares for children that are old enough to walk so she does not have to lift them. (T.29)

Petitioner testified that she reached out to Arbor Rose several times to return to light duty work, but she was denied the opportunity to return. (T. 29)

CONCLUSIONS

With respect to disputed issue C and F, the Arbitrator makes the following conclusions of law:

The arbitrator concludes that Petitioner did suffer a work- related injury that arose out of and in the course of her employment on March 1, 2018. Respondent was given notice as required by the Workers' Compensation Act, which is not disputed. Specifically, it is quite clear Petitioner's injury arose from a risk peculiar to Petitioner's employment. Namely, that risk was lifting and transferring residents with known muscle spasms. Having considered the totality of the evidence at hearing, the Arbitrator finds that an accident did occur that arose out of and in the course of Petitioner's employment by Respondent. Further, the chain of events and the unrebutted medical records reveal that Petitioner's current condition of ill being is causally connected to the accidents on March 1, 2018, May 7, 2018 and June 27, 2018 Petitioner's only delays in treatments were because of her medical benefits being denied by Respondent.

With respect to disputed issue J, the Arbitrator makes the following conclusions of law:

Petitioner sought medical treatment beginning in June 2018 and followed all directions from her providers. All medical submitted appears reasonably necessary to treat her injury. Therefore, the Arbitrator awards Respondent to pay the bills reflected in Petitioner's exhibits 6, 7, 8, 9 and 10, subject to the fee schedule.

With respect to disputed issue K, the Arbitrator makes the following conclusions of law:

It is undisputed that Petitioner was placed on restricted duty until the January 2019 when she was taken off of work. It is further undisputed that Arbor Rose did not offer her light duty employment. The Arbitrator finds that Petitioner is entitled to Temporary Total Disability for the period of June 28, 2018 through April 26, 2019.

With respect to disputed issue L, the Arbitrator makes the following conclusions of law:

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

(b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors:

(i) the reported level of impairment pursuant to subsection (a);
(ii) the occupation of the injured employee;
(iii) the age of the employee at the time of the injury;
(iv) the employee's future earning capacity; and
(v) evidence of disability corroborated by the treating medical records.

No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order. *Id.*

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

First, the AMA Level of impairment was 2% of the lower extremity and 1% person as a whole. The Arbitrator assigns some weight to this factor.

Second, the evidence established that Petitioner was employed as a Certified Nursing Assistant at the time of the accident. The Arbitrator finds Petitioner's testimony regarding her work duties to be credible. The Arbitrator finds Petitioner's occupation at the time of her accident required significant use of her left arm and shoulder. The Arbitrator notes Petitioner was unable to return her occupation following surgery. As this evidence is uncontroverted, the Arbitrator assigns significant weight.

Third, the parties stipulated that Petitioner was 40 years old on the date of the accident. The evidence shows that Petitioner did not have any complaints with regard to her cervical region in over 5 years. The Arbitrator notes Petitioner has over twenty years remaining in her working life until she reaches the retirement age of 67. Petitioner is unable to return to her occupation as a Certified Nursing Assistant. Petitioner indicated she cannot lift overhead. The Arbitrator assigns this factor significant weight.

Fourth, there is no evidence showing Petitioner suffered decreased earning capacity as a result of her injury. Thus, no weight is assigned to this factor.

Fifth, the treating medical records reflect that Petitioner underwent medical treatment that included physical therapy and an Anterior Cervical Discectomy Fusion. Petitioner testified that she is able to perform her duties with some restrictions but that her treatment was successful in alleviation the majority of her symptoms. Petitioner continues to feel pain and an aching. Thus, the Arbitrator assigns moderate weight**.**

Based on all of the foregoing, and in consideration of the factors enumerated in Section 8.1b, which does not simply require a calculation, but rather a measured evaluation of all five factors of which no single factor is conclusion on the issue of permanency, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 30% loss of man of a whole pursuant to Section 8(d)2 of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC013591
Case Name	Jeana Renee Copp v. FedEx Freight Inc
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0373
Number of Pages of Decision	22
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Thomas C Rich
Respondent Attorney	Jennifer Kiesewetter

DATE FILED: 8/18/2023

/s/Stephen Mathis, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF WILLIAMSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jeana Renee Copp,

Petitioner,

vs. NO. 20WC 13591

FedEx Freight,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19b having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, prospective medical care, causal connection, notice, award of vocational benefits and maintenance, and temporary total disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 1, 2022, is hereby affirmed and adopted.

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

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

August 18, 2023

SJM/sj
o-7/26/2023
44

/s/ *Stephen J. Mathis*
Stephen J. Mathis

/s/ *Deborah J. Baker*
Deborah J. Baker

/s/ *Deborah L. Simpson*
Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC013591
Case Name	COPP, JEANA RENEE v. FEDEX FREIGHT, INC.
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	19
Decision Issued By	Linda Cantrell, Arbitrator

Petitioner Attorney	Jeffrey Frederick
Respondent Attorney	Shirley Lydia San

DATE FILED: 6/1/2022

THE INTEREST RATE FOR THE WEEK OF JUNE 1, 2022 1.58%

/s/Linda Cantrell, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF WILLIAMSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

JEANA RENEE COPP
Employee/Petitioner

v.

FEDEX FREIGHT, INC.
Employer/Respondent

Case # **20** WC **013591**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Linda J. Cantrell**, Arbitrator of the Commission, in the city of **Herrin,** on **March 25, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **May 7, 2020**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**69,096.24**; the average weekly wage was $**1,328.77**.

On the date of accident, Petitioner was **55** years of age, ***married*** with **0** dependent children.

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

Respondent shall be given a credit of $**65,838.69** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**65,838.69**.

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

ORDER

Respondent shall pay the medical expenses contained in Petitioner's Group Exhibit 1, directly to the medical providers per the Illinois medical fee schedule, as provided in Section 8(a) and Section 8.2 of the Act. Respondent shall be given credit for any amounts previously paid under Section 8(a) of the Act for medical benefits and indemnify and hold Petitioner harmless from any expenses for which it claims credit. The parties stipulate that Respondent paid no medical bills through its group medical plan for which it would be entitled to a credit under Section 8(j) of the Act.

The Arbitrator further finds Petitioner is entitled to receive the additional care recommended by Dr. Gornet, in addition to vocational rehabilitation and training. Therefore, Respondent shall authorize and pay for prospective medical treatment, including, but not limited to, conservative treatment and medication management as recommended by Dr. Gornet, and job placement and computer training recommended by Tim Kaver.

Respondent shall pay Petitioner temporary total disability benefits of $**885.85**/week for **70** weeks, commencing **5/8/20 through 9/9/21**, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner maintenance benefits of $**885.85**/week for **28-1/7th** weeks, commencing **9/10/21 through 3/25/22**, as provided in Section 8(a) of the Act.

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

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

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

JUNE 1, 2022

Arbitrator Linda J. Cantrell

ICArbDec19(b)

STATE OF ILLINOIS)
) SS
COUNTY OF WILLIAMSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

JEANA RENEE COPP,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	Case No.: 20-WC-013591
	)	
FEDEX FREIGHT,	)	
	)	
Employer/Respondent.	)	

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Herrin on March 25, 2022 pursuant to Section 19(b) of the Act. Prior to testimony, Petitioner voluntarily dismissed consolidated Case No. 20-WC-013590. On 11/19/20, Petitioner filed an Amended Application for Adjustment of Claim alleging she sustained accidental injuries to her back, left leg, left hip, neck, and body as a whole as a result of picking up a dolly on 5/7/20. (AX2). The issues in dispute are accident, notice, causal connection, medical bills, temporary total disability benefits, prospective medical care, and vocational rehabilitation benefits. All other issues have been stipulated.

TESTIMONY

Petitioner called Scott Riches as an adverse witness. Mr. Riches has been employed by Respondent for sixteen years and is the Service Center Manager. He hired Petitioner as a driver in 2009 and stated she was a good, honest, hardworking employee. Mr. Riches identified a Manager's Injury Investigation Report and stated Petitioner reported her accident on 5/7/20 to him and Operations Manager, Dallas Orsborn. (PX14) Mr. Riches testified that Petitioner could have reported her accident to any of the seventeen supervisors, three operations managers, or himself. He stated there was doubt as to whether Petitioner sustained a work injury because she reported it after she was being investigated for destruction of a fuel pump screen and they asked her for her badge and keys. He testified that Petitioner was terminated five or six days after the investigation concluded. He testified that Respondent had video surveillance depicting Petitioner punching the fuel pump screen and shattering it.

Mr. Riches testified that Petitioner filled out an accident report stating she picked up a dolly from the front of the trailer to put it in the dolly pool. He stated this activity was part of her job duties. He admitted there was nothing other than poor timing and circumstance that made Petitioner's claim suspicious. Mr. Riches testified that after he demanded Petitioner turn in her

badge and keys, Petitioner had a smirk on her face and said, “Well, I have an injury.” Mr. Riches testified that Petitioner had earlier opportunities to report her injury than when she did. She could have reported it when she turned in her handheld in the road dispatch area, where there is always a supervisor present. She could also have reported her accident to leadership if she had paperwork to turn in at the end of her shift. He stated Petitioner reported her injury at 4:30 p.m. and he did not know what time her alleged injury occurred. Mr. Riches testified he has not reviewed any of Petitioner’s medical records.

Mr. Riches was recalled to testify in Respondent’s case-in-chief. Mr. Riches testified that on 5/4/20 he was notified by the shop manager there was damage to fuel pump screen No. 5. He viewed video footage and took photos of the shattered screen that day. Mr. Riches identified photos that depict the shattered fuel pump screen as he observed it on 5/4/20. (RX7, 8, and 9) Mr. Riches observed video surveillance dated 5/1/20 at 4:01 p.m. (RX11) He testified that Petitioner is depicted in the video trying to activate her fuel card and punched the screen in frustration. He testified that Respondent has a zero-tolerance policy for destruction of company property. Mr. Riches testified he communicated with Petitioner on the handheld radio on 5/7/20 to come to the front office after she completed her work shift. He stated that Petitioner entered the conference room where he and Dallas Orsborn were waiting. He told Petitioner to return her badge and keys while they completed an investigation in destruction of company property. He stated Petitioner responded with a smirk on her face and said, “Well, I have an injury to report, also.” Mr. Riches stated Petitioner did not report her injury prior to the conversation. He stated they were not wearing masks at the time of the meeting. Mr. Riches stated Petitioner was not terminated at the meeting because such action had to go through a review process.

Mr. Riches stated Petitioner told him she injured her back while maneuvering a dolly. He stated that drivers move their trailers close to the dolly pool, so they do not have to move them far. They have to lift the dolly up with appropriate grab and move it approximately 5 to 7 feet if they backed up their trailer close enough. They grab the dolly slightly below waist level and squat to lift it in proper position. He state there is no shoulder level or above motion required to move the dolly. Mr. Riches testified that employees have to lift 110 pounds maximum.

On cross-examination, Mr. Riches testified he viewed the surveillance video of Petitioner at the fuel pump on 5/4/20 or 5/5/20 and it was not brought to Petitioner’s attention until the day she injured herself. He stated the delay was due to an ongoing investigation. He testified that the meeting with Petitioner occurred in the conference room, and they sat 6 feet apart so they did not have to wear a mask. He stated that the only time employees had to wear a mask in May 2020 was if they were within six feet of each other.

Petitioner was 55 years old, married, with no dependent children at the time of accident. She testified she was employed by Respondent as a driver for over ten years and had to load and unload her truck. Petitioner testified that on 5/7/20 she lifted a dolly out of the back of her truck when it became overbalanced and flipped up on her and she tried to hold it. She was able to unload the dolly and felt pain from the back of her neck down into her leg. She proceeded to drop her front trailer, turned in her handheld, and went to the front office to speak to Mr. Riches. There were no witnesses to her accident. Petitioner stated she has not been involved in any accidents since her work injury. She stated she was working full duty without restrictions and was not receiving medical treatment or taking medication for her back prior to her accident.

Petitioner testified she has to swipe her fuel card and enter her driver number, truck number, and mileage before pumping gas. She stated she did not get disciplined for allegedly punching the screen and did not know about the incident until 5/7/20. Petitioner testified she was fired on Monday following her accident for destruction of property. Petitioner testified she has photos on her phone that depict the card readers to operate Respondent's fuel pumps. The photos were taken by her husband who is also employed by Respondent. Petitioner stated she has not seen the video footage of her allegedly punching the fuel screen. She testified she did not smack or destroy the screen in any way.

Petitioner testified she had a prior work accident involving her low back in 2015 when she fell out of her truck at the fuel island. She treated with Dr. Gornet for that injury. Petitioner testified she went to Dr. Li following her accident on 5/7/20 and followed up with Dr. Gornet. She received workers' compensation benefits following her accident. She stated that Section 12 examiner Dr. deGrange placed more stringent work restrictions on her than Dr. Gornet. She testified she was not able to return to work as a truck driver with her restrictions by Dr. Gornet or Dr. deGrange. She underwent injections that provided temporary relief. She received no relief from physical therapy. She was referred to Dr. Paletta who did not recommend treatment.

Petitioner testified that her workers' compensation benefits were terminated after she was examined by Dr. Daniel Kitchens who prescribed no work restrictions. Petitioner testified that surgery has not been recommended and she has permanent restrictions. She met Tim Kaver for a vocational evaluation and is currently undergoing vocational rehabilitation and taking computer classes. Petitioner testified she had no computer skills or training prior to her work accident. She dropped out of high school at the age of 14 to work full-time. She obtained her GED at the age of 32. Petitioner testified she has never met Jacqueline Bethell who performed a labor market survey at the request of Respondent.

Petitioner identified the Manager's Injury Investigation Report. (PX14) She stated she was not questioned about the timing of the report when it was completed. She testified she reported the accident within 15 minutes of its occurrence and the incident occurred at approximately 4:15 or 4:20 p.m. at the end of her work shift. She stated that at the end of every shift she unhooks the rear trailer, drops the dolly off that is in the front trailer, unhooks the front trailer, turns in the handheld and paperwork at a "pod" located halfway down the terminal, and parks her truck before leaving the facility. Petitioner testified that after she parked her truck on 5/7/20, Mr. Riches told her he needed to speak to her, and she said I need to file a report too. Petitioner stated that Mr. Riches did not respond and walked off. Petitioner testified she went to the office and was wearing a mask due to the COVID-19 pandemic. She stated everyone was required to wear a mask while in the terminal. She denied smirking at Mr. Riches and states she was in too much pain to do so. She stated that Mr. Riches and Mr. Orsborn were also wearing masks when she met with them in the office.

On cross-examination, Petitioner testified the Manager's Injury Investigation Report was completed by Dallas Orsborn and she signed it on 5/7/20 attesting she reviewed the document and agreed to its accuracy. She testified she told Mr. Orsborn she injured her neck, but the report states back and leg. Petitioner testified that her injuries are limited to her lumbar spine only. She

stated she went to the emergency room the day after her accident and reported immediate left side pain radiating down her left leg. She agreed she did not report cervical pain.

Petitioner agreed she was provided an updated copy of Respondent's conduct policy in January 2020. She stated she did not review the updated policy. Petitioner agreed she received a copy of the employee handbook in 2005 and attested she would abide by all company policies and procedures. She agreed the policy forbids destruction of company property. Petitioner testified she did not break the fuel pump screen or anything on the fuel pump. She testified she denied destroying the fuel pump screen when confronted by Mr. Riches and Mr. Orsborn on 5/7/20.

Petitioner provided rebuttal testimony stating Mr. Riches came to her truck and told her he needed to speak to her. She agreed it was her in the video and it depicted her trying to get the keypad to work. She stated she swiped her card and entered the information at least three times and could not get it to work. She denied destroying the screen. She testified she was never told about the fuel screen incident between 5/4/20 and 5/7/20. She agreed she received a message from Mr. Riches on her handheld on 5/7/20 ordering her to meet him inside the facility. She stated messages do not pop up on the handheld until the truck is turned off.

The Arbitrator notes that the surveillance video of the alleged destruction of the fuel pump screen is 1 minute, 39 seconds. (RX11) The video depicts Petitioner swiping her card three times and forcefully pressing buttons on a keypad after each swipe. Petitioner appeared aggravated that the machine would not work properly. After Petitioner swiped her card the second time, she leaned forward and to the left as she struck the machine with the lateral side of her closed right fist. It is difficult to discern how much force Petitioner used to strike the machine as she did not wind her arm back but jabbed the machine with her fist starting in front of her right shoulder/chest area. The video is taken from an aerial angle, and it is not discernable if Petitioner struck the screen or keypad. The condition of the fuel screen before or after Petitioner attempted to use it is not visible on the video. The Arbitrator notes that the photos of the fuel screen admitted into evidence as Respondent's 7, 8, and 9, do not depict a "shattered" screen as one would expect from a striking blow. The screen appears very old, weathered, and discolored, with dozens of perfectly vertical cracks rather than cracks radially dispersed from a central point of impact.

MEDICAL HISTORY

On 5/7/20, Petitioner signed a Manager's Injury Investigation Report completed by Dallas Orsborn. (RX14) Petitioner reported picking dolly up off front trailer to put in dolly pool and felt pain in back/leg. She reported pain in her back shooting down through her left leg.

On 5/8/20, Petitioner presented to the emergency room at St. Anthony's Memorial Hospital. (PX3) She reported she lifted something heavy at work yesterday that caused immediate left-sided back pain. She stated her symptoms were worsening and radiated sharply into her left leg. She had taken Tylenol without relief. Petitioner reported she had a compression fracture at L2 and a back operation many years ago but had no recent injections or chronic steroids. Physical examination revealed tenderness to palpation at approximately L2, worse on the left-sided paraspinal muscles, and positive straight leg testing on the left. CT scan of the

lumbar spine revealed a bulging disc with mild endplate spurring and mild facet hypertrophy at L2-3 and L3-4, a bulging disc with facet hypertrophy, ligamentum flavum thickening, mild thecal sac compression, and mild to moderate foraminal narrowing at L4-5, and mild disc bulging and endplate spurring at L5-S1. The reading neuro-radiologist assessed compression fracture of the L2 superior endplate with mild loss of vertebral height and chronic postoperative and degenerative changes. Petitioner was given morphine and Toradol and discharged with prescriptions of Hydrocodone and Cyclobenzaprine. Petitioner was placed off work until follow up with orthopedics.

On 5/15/20, Petitioner presented to Dr. Lawrence Li for evaluation of her bilateral shoulder pain. (PX4) Petitioner reported she had been having bilateral shoulder pain for the last year. She reported that each day at work, she has to connect a dolly to a trailer, then crank the trailer down so she can link the fifth wheel on the dolly to the trailer. She did that two times per day which took one to five minutes. Dr. Li viewed photos of the dolly, trailers, and crank, and watched Petitioner demonstrate how she used the crank to raise and lower the trailer. He noted she had to use a lot of force to lower the trailer. Dr. Li noted she used both arms to use the crank and due to her height, the apex of the crank was often above her shoulder level.

Dr. Li also noted that on March 7, 2020 Petitioner was picking up a dolly that started to drop and when she tried to catch it she injured both her shoulders and her back. Although Dr. Li stated in the body of his note that the accident occurred on March 7, 2020, the top of his office note states, “Date/Time Injury: 5/7/20” and “Dates you missed work: 5/8/20 to present”. Dr. Li noted Petitioner reported her accident, went home and tried to sleep but had continued symptoms, causing her to go to the emergency room the next day for chief complaints of back pain. Petitioner admitted she had a history of back treatment four years prior, but she was doing well until the work incident. She stated she is scheduled to see her previous surgeon. Dr. Li noted Petitioner’s shoulder pain has persisted and she has tremendous trouble raising her arms and reaching. Her pain was severe, constant, dull, and aching and she has numbness, stiffness, and weakness in her shoulders. She reported she had trouble sleeping and washing her hair due to her shoulder pain. She reported she did not participate in any activities outside of work that would require her to raise her arm repeatedly or use her arms above chest level.

Physical examination of the lumbar spine revealed pain in the back and left leg with Straight Leg Raise testing. Examination of her shoulders revealed decreased strength testing in the supraspinatus and with external rotation, as well as positive Cross-Arm Adduction, Neer and Hawkins Impingement, Biceps Load, and O’Brien tests. Dr. Li diagnosed a left shoulder rotator cuff tear with impingement syndrome and AC joint dysfunction, a partial thickness right shoulder rotator cuff tear with AC joint dysfunction and impingement syndrome, and a lumbar strain superimposed on her previous lumbar surgery. Dr. Li recommended MRIs of both shoulders, prescribed Cyclobenzaprine, and fit Petitioner with a lumbar sacral orthosis to give her stability until she could see a back specialist. Dr. Li placed Petitioner off work.

A right shoulder MRI was performed that day and revealed moderate supraspinatus tendinosis with partial thickness fraying of the bursal-sided fibers at the footplate and AC osteoarthritis with findings compatible with clinical rotator cuff impingement. (PX4) Petitioner underwent a left shoulder MRI on 5/20/20 that revealed moderate grade partial articular-sided tearing of the subscapularis tendon at the lesser tuberosity insertion, AC osteoarthritis with

findings compatible with clinical rotator cuff impingement and tearing of the superior labrum from 12 to 9 o'clock. (PX4)

On 5/20/20, Dr. Li found the MRIs showed a right shoulder partial thickness bursal-sided tear of the supraspinatus tendon with impingement syndrome and a left shoulder partial articular surface tear of the subscapularis, impingement syndrome, and a SLAP tear. Petitioner was prescribed Noltaren Gel as other non-narcotic options were not controlling her pain adequately. Dr. Li performed a left shoulder Kanlog/Lidocaine injection in the left subacromial bursa. He placed Petitioner off work until reevaluated in five weeks.

Petitioner received an occupational therapy evaluation for her bilateral shoulder pain on 5/20/20. (PX4) The therapist noted that on 5/7/20 Petitioner was taking a connection dolly off and felt pain in both shoulders and low back which has persisted. Functional activity evaluation showed Petitioner had severe impairments with reaching, managing her hair, and sleeping, with moderate impairments dressing, bathing, housework, and yardwork, and mild impairments with driving. It was noted she had a L2 fracture five to six years prior and a left total hip arthroplasty. Physical evaluation revealed severe tenderness to palpation over the left long head biceps tendon, left AC joint, right long head biceps tendon, and right subacromial space and mild tenderness over the left subacromial space and right AC joint. Petitioner demonstrated decreased range of motion in her bilateral shoulders for flexion, abduction, and external rotation, right shoulder internal rotation, and weakness in the bilateral shoulders to all planes of motion. Petitioner reported increased pain in both shoulders with elevation and lying on either shoulder. The therapist noted Petitioner's signs and symptoms were consistent with impingement of the rotator cuff and she was limited functionally secondary to her deficits. She was assessed to benefit from occupational therapy to her bilateral shoulders. She was to begin a home exercise program and possibly follow up with therapy sessions at a clinic closer to her home.

On 6/18/20, Petitioner presented to Dr. Matthew Gornet for back pain. (PX5) Dr. Gornet noted Petitioner was an established patient and previously underwent lumbar surgery on 1/15/16. She additionally had a left total hip replacement and returned to work and was working full duty with no restrictions since April 2017. Petitioner reported her current problem began on 5/7/20 while she was uncoupling two trailers using a converting dolly mechanism. She reported that when the mechanism began to shift, she held it quickly, and she felt immediate pain in her low back, mid back, and shoulders. Dr. Gornet found she had continued back pain to her bilateral sides, buttocks, hips, and down both legs with tingling, bilateral shoulder pain radiating up to her neck, and pain between her shoulder blades. Her left side was worse than her right. Dr. Gornet noted his last note prior to 5/7/20, Petitioner stated her back was doing well. Since 5/7/20 Petitioner has had constant pain that increased with prolonged sitting, standing, bending, and lifting.

Physical examination was positive for bilateral shoulder, upper back, and trapezial pain, and severe bilateral low back pain radiating into the lower extremities. Motor examination revealed decreased biceps and wrist dorsiflexion on the left and decreased lower extremity sensation with paresthesias on both sides in her feet to light touch consistent with discogenic symptoms. Dr. Gornet recommended a new lumbar MRI and CT scan, a cervical MRI, and potentially an MRI arthrogram of the left shoulder. Dr. Gornet noted that if he ruled out any cervical spine problem, he would refer Petitioner to a shoulder specialist.

On 6/18/20, Dr. Gornet noted a clear annular tear and disc pathology at L4-5 which was not present on the 2015 scan, and L2-3 and L3-4 pathology and instrumentation. (PX5, 6, 7) The cervical MRI revealed central disc annular tears at C4-5 and C6-7, with C4-5 endplate spurring, but no significant herniation; C5-6 central-right foraminal protrusions resulting in right foraminal stenosis, and bilateral foraminal protrusions with spurring at C3-4 resulting in bilateral foraminal stenosis. He recommended an MRI arthrogram of Petitioner's shoulder and a referral to Dr. Paletta. He recommended epidural steroid injection at L4-5, placed Petitioner off work, and referred her for physical therapy. Dr. Gornet opined that Petitioner's current symptoms and need for treatment were causally related to the work accident of 5/7/20.

On 6/26/20, Petitioner returned to Dr. Li who noted the cortisone injection provided only four days of relief. (PX4) Petitioner continued to have bilateral shoulder pain. Dr. Li prescribed Cyclobenzaprine and administered another right-sided corticosteroid injection.

On 8/11/20, Petitioner was examined by Dr. Timothy Farley pursuant to Section 12 of the Act. (PX16) He noted the history of Petitioner's accident while trying to remove a trailer connection dolly, after which she felt immediate back pain. He reviewed Petitioner's pre- and post-accident medical records and noted positive orthopedic tests of the right and left shoulders. He stated that although Petitioner's condition predated the 5/7/20 work injury, it was at least an aggravating factor in her persistent symptoms. He found Petitioner's treatment to date reasonable and necessary and recommended physical therapy and possibly surgery if Petitioner did not improve. Dr. Farley found no concern of symptom magnification.

On 8/25/20, Petitioner was examined by Dr. Donald deGrange pursuant to Section 12 of the Act. (PX17) He noted the history of Petitioner's prior lumbar injury and stated Petitioner had no injuries or treatments since 2016 up until her recent work accident. Physical examination revealed tenderness at the lumbosacral junction, limited range of motion, positive straight leg raising test on the left, increased pain with passive left ankle dorsiflexion, and decreased sensation over several aspects of Petitioner's left foot and ankle. He assessed a cervical strain and L4-5 disc degeneration. He believed that Petitioner experienced a very heavy instantaneous axial load which appeared to have aggravated her asymptomatic L4-5 intervertebral disc degeneration. Dr. deGrange believed Petitioner had reached MMI with respect to her cervical spine. He opined that Petitioner's treatment to date was reasonable and necessary, and agreed she would benefit from therapy and injection for her lumbar spine. He also believed Petitioner required restrictions of no lifting greater than 25 pounds, no prolonged sitting or standing, and no repetitive bending or twisting. He opined that Petitioner's condition and need for treatment were the result of her 5/7/20 work accident.

On 10/23/20, Petitioner was examined by Dr. George Paletta. (PX11) He reviewed the MRI scan of Petitioner's shoulder and found no evidence of significant shoulder pathology and believed Petitioner's symptoms were cervical in origin.

On 11/2/20, Dr. Gornet referred Petitioner to pain management. He again stated his belief that Petitioner suffered a new disc injury at L4-5 and potentially aggravated her underlying degenerative condition. He noted that Dr. deGrange opined Petitioner's current condition was

best described as an aggravation of previously asymptomatic degeneration at L4-5 and he felt Petitioner was at MMI regarding her cervical condition.

Petitioner began pain management on 11/17/20 and underwent epidural injections at L4-5 on 11/17/20, 3/2/21, and 3/16/21 without significant relief. (PX9) Petitioner returned to Dr. Gornet on 5/5/21 and underwent a discogram that showed a non-provocative disc at L5-S1, and a provocative disc at L4-5 with multiple annular tears, including an anterior annular tear, a right-sided tear, and a left-sided posterior tear. (PX5, 7) Dr. Gornet stated Petitioner's condition was complex and he would likely at a minimum recommend disc replacement at C4-5 and C6-7, and potentially C5-6. He recommended a simple steroid injection at C6-7 on the left prior to surgery. Dr. Gornet stated that even if he fixed L4-5, which he is convinced is a new disc injury, it does not completely account for the possibility that she aggravated or irritated the segments at L2-3 and L3-4, which were tolerable. He opined he would prefer to place Petitioner on permanent restrictions if her symptoms could be made tolerable. He noted that Petitioner's pain significantly affected her quality of life. We recommended the injection at C6-7 and a functional capacity evaluation.

The FCE was performed at Apex Physical Therapy on 8/25/21 which limited Petitioner to a light physical demand level. (PX13) During the exam, Petitioner's pain ratings demonstrated consistency between subjective pain ratings and observed movement patterns. Unmet job demands for Respondent included sitting tolerances needed to drive over the road and decreased pushing and pulling tolerances for loading and dolly handling.

On 9/9/21, Dr. Gornet placed permanent restrictions on Petitioner of no lifting greater than 15 pounds, no repetitive bending or lifting, alternate sitting and standing as needed, and no overhead work. He noted Petitioner still had significant headaches likely secondary to her cervical spine. He advised Petitioner should return as needed and placed her at MMI. He opined that tentatively Petitioner would at least require disc replacements at C4-5, C5-6, and C6-7 if her symptoms were not tolerable.

Dr. Matthew Gornet testified by way of evidence deposition on 11/4/21. (PX15) Dr. Gornet is a board-certified orthopedic surgeon who specializes in treatment and surgery of the spine. He testified that he performed surgery for placement of a spinous process distractor on Petitioner in January 2016. He stated Petitioner was able to return to work full duty without restrictions following surgery. The last time he saw Petitioner before her current work injury was for a long-term follow-up in 2018.

Dr. Gornet testified that following Petitioner's work accident he noted a consistent mechanism of injury of handling of a converting dolly. He noted that the dolly began to shift, and Petitioner was worried it would fall and break. She held it quickly and felt immediate pain in her shoulders, mid-back, and low back. Through direct comparison of prior lumbar imaging studies from 2015, he concluded Petitioner suffered disc injury at L4-5, along with disc injury at C4-5 and C6-7. Dr. Gornet reaffirmed his opinion that Petitioner's condition and need for restrictions was the result of her work accident. He testified the discogram showed concordant back pain typical of Petitioner's symptoms without any evidence of arthritis. He testified that he had a unique perspective, having treated Petitioner before and after her work accident, and was

well acquainted with the change in Petitioner's quality of life as a result of her most recent work accident.

On cross-examination, Dr. Gornet testified that anything that exceeds what a disc can structurally tolerate can cause an annular tear. He testified that Petitioner's tears were not caused by degeneration. He testified that Petitioner's use of muscle relaxants and medication was preferable to surgery. He noted that while Petitioner's symptoms have hope to subside with medication and activity limitation, her torn disc would not heal.

On 10/4/21, Petitioner was examined by Dr. Daniel Kitchens pursuant to Section 12 of the Act. (RX1, Ex. 2) Dr. Kitchens testified by way of evidence deposition on 12/22/21. (RX1) He noted a history of Petitioner's accident, reviewed some of Petitioner's treatment records, and conducted a physical examination, which he found to be essentially normal. Dr. Kitchens reviewed Petitioner's 2015 and 2020 lumbar spine MRIs and found no substantial changes. He found no significant pathology outside of degenerative findings on Petitioner's cervical spine MRI. He concluded Petitioner suffered from symptomatic degeneration of her cervical and lumbar spine unrelated to the 5/7/20 work accident. He acknowledged that Petitioner's subjective complaints were consistent with her pathology, but again stated these were unrelated to her work accident, as he saw no evidence of acute injury. He opined that none of Petitioner's treatment was reasonably necessary or related to the accident. Dr. Kitchens opined Petitioner did not require permanent restrictions because he did not see evidence of a neurological/spinal cord injury. He felt Petitioner could return to work full duty, without restrictions.

On cross-examination, Dr. Kitchens admitted that Dr. Gornet had an advantage by virtue of his treating Petitioner before and after her work accident. He acknowledged that his causation opinion was an outlier, and further acknowledged that while he disagreed with the opinions of Dr. deGrange, he respected him as an orthopedic surgeon. He agreed he was provided no records from Dr. Gornet's office predating Petitioner's work accident. However, he remained of the opinion that Petitioner's condition was entirely unrelated to her work accident.

Respondent obtained a utilization review of Tizanidine prescribed by Dr. Gornet. (RX4). The requested medication was not certified as reasonable or necessary.

Petitioner conducted a self-directed job search from 9/27/21 through 11/12/21. (PX19). On 11/19/21, Petitioner met with Timothy Kaver of England & Company for a vocational evaluation. (PX19, p. 25) Mr. Kaver testified by way of deposition on 3/22/22. (PX20) Mr. Kaver is a nationally certified vocational rehabilitation counselor with a master's degree in sociology with an emphasis in Occupations and Professions. In addition to helping claimants in independent, non-litigation settings and workers' compensation claims, he occasionally performs evaluations for the Social Security Administration.

Mr. Kaver noted Petitioner's past employment background consisted of truck driving, aside from 2.5 years of bartending. Petitioner obtained the highest certifications possible and was able to pull double and triple HAZMAT trailers. She worked for Respondent for approximately 11 years performing heavy strength demand work. There were times Petitioner had to move cargo that weighed as much as 100 pounds without the assistance of a forklift. Her former job duties exceeded the permanent restrictions placed on Petitioner which limited her to sedentary

level work. Mr. Kaver was retained to assist Petitioner in finding a suitable alternative career utilizing the Occupational Outlook Handbook. Mr. Kaver also performed extensive testing using the Wide-Range Achievement Test to determine Petitioner's academic ability, which determined Petitioner was at high school level reading ability, fourth grade arithmetic ability, and fourth grade spelling ability. After considering Petitioner's background, her GED, her brief, uncompleted education at Alaska State University and University of Nebraska in the mid-1980s, and her lack of computer skills, he recommended that Petitioner first attempt to acquire basic computer skills through free programs. He opined that without such skills, Petitioner would not only have difficulty competing in the job marketplace, but would struggle to complete online applications, as she lacked knowledge of how to submit an electronic resume as an attachment. He opined that the only jobs Petitioner qualified for without computer training were in labor positions she could no longer perform. Mr. Kaver planned to begin job placement services for Petitioner as soon as she completed training. Mr. Kaver testified that he found Petitioner to be a very motivated individual, and he stated she was doing well in her computer classes.

Mr. Kaver testified that he reviewed a report authored by a vocational counselor hired by Respondent and disagreed in part with the conclusions stated therein. He testified that he has filled many dispatching jobs over the years and stated it would be impossible for Petitioner to get a job as a trucking dispatcher without basic computer skills. He explained that to perform logistics, which a dispatcher must do for most dispatch positions, you need a computer to log information to assist drivers in determining the best route. There is a lot of data entry, electronic attachments, multiple screens, and a keypad. He testified that without basic computer skills, one would be lost. He testified that an employer is more willing to train a person who at least has basic computer skills.

Mr. Kaver testified the average entry level wage for Petitioner was $14.54, rather than $15.41. He believed Petitioner would likely start out at a salary between $12 and $15 an hour. He agreed that Petitioner would likely be confined to an entry-level job position that allowed for on-the-job training since it would be a new career for her.

On cross-examination, Mr. Kaver testified he conducted research through the Department of Labor publications, the Occupational Outlook Handbook, and the Dictionary of Occupational Titles to determine specific job duties that Petitioner could pursue which did not require additional training outside of basic computer skills.

On 3/14/22, Ms. Jacqueline Bethell was retained by Respondent to perform a Labor Market Survey. (RX2, Ex. 2) Mrs. Bethell testified by way of deposition on 3/18/22. (RX2). She primarily conducts vocational assessments in workers' compensation claims which represents 98% of her practice. Mrs. Bethell reviewed Petitioner's restrictions, Respondent's independent medical examiners' reports, and Mr. Kaver's vocational report. Mrs. Bethell conducted a labor market survey and opined Petitioner could obtain employment with an entry-level wage of $15.41 per hour, or approximately $32,000 per year. She agreed that Petitioner would benefit from additional training, but she did not believe Petitioner needed to complete said training prior to job placement. Mrs. Bethell agreed that it was reasonable for Petitioner to receive outside assistance in her job search.

CONCLUSIONS OF LAW

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

To obtain compensation under the Act, an injury must "arise out of" and "in the course of" employment. 820 ILCS 305/1(d). An injury arises out of one's employment if its origin is in a risk connected with or incidental to the employment so that there is a causal relationship between the employment and the accidental injury. *Orsini v. Indus. Comm'n*, 117 Ill.2d 38, 509 N.E.2d 1005 (1987). In order to meet this burden, a claimant must prove that the risk of injury is peculiar to the work or that he or she is exposed to the risk of injury to a greater degree than the general public. Id. "In the course of employment" refers to the time, place and circumstances surrounding the injury. *Lee v. Industrial Comm'n*, 167 Ill. 2d 77, 656 N.E.2d 1084 (1995); *Scheffler Greenhouses, Inc. v. Industrial Comm'n*, 66 Ill. 2d 361, 362 N.E.2d 325 (1977). That is to say, for an injury to be compensable, it generally must occur within the time and space boundaries of the employment. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203, 797 N.E.2d 665, 671 (2003)

Petitioner testified that the accident occurred at approximately 4:15 or 4:20 p.m. on 5/7/20. She signed a Manager's Injury Investigation Report completed the same day and reported she was lifting a dolly off her front trailer and felt pain in her back/leg. She reported pain in her back shooting down through her left leg. She testified she reported the accident within 15 minutes of its occurrence. The injury report states the accident occurred at 4:30 p.m., however, the report was prepared by Operations Manager Dallas Orsborn.

Petitioner presented to the emergency room the next day where she reported lifting something heavy at work yesterday that caused immediate left-sided back pain. Her symptoms radiated sharply into her left leg. On 5/15/20, Petitioner presented to Dr. Lawrence Li and reported that on 5/7/20 she was picking up a dolly that started to drop and when she tried to catch it, she injured both her shoulders and her back. Petitioner also sought treatment from Dr. Li for shoulder injuries related to the repetitive nature of her job duties. The Arbitrator notes that Petitioner dismissed this repetitive trauma claim (Case No. 20-WC-013590) on the day of arbitration. Dr. Li noted Petitioner reported her accident, went home and tried to sleep but had continued symptoms, causing her to go to the emergency room the next day for chief complaints of back pain. On 6/18/20, Petitioner presented to Dr. Matthew Gornet for back pain. She reported that her current problem began on 5/7/20 while she was uncoupling two trailers using a converting dolly mechanism. She stated the mechanism began to shift and she held it quickly, causing immediate pain in her low back, mid back, and shoulders.

Respondent attempts to question Petitioner's credibility as to whether she in fact sustained a work accident because she allegedly did not report it until she was accused of destroying company property. Petitioner testified she completed her end of shift assignments and entered the terminal to file an accident report and meet with Mr. Riches pursuant to his request. It is disputed whether Petitioner mentioned her accident to Mr. Riches prior to entering the terminal. The Arbitrator notes that Respondent's facility appeared to be adequately surveillanced as it produced video footage of the fuel pump station. There were no videos admitted into evidence that depicted Petitioner perform any of her end of shift duties on 5/7/20, including unhooking her trailers, moving the dolly to the dolly pool, parking her truck, turning in her

handheld and paperwork, entering the building, etc. There were no videos that depicted Petitioner's physical appearance or gait following her alleged accident. Mr. Riches did not testify as to Petitioner's demeaner or whether she appeared injured when he met with her immediately following her accident. Petitioner was not told she was being accused of destruction of property until she met with Mr. Riches and Mr. Orsborn that afternoon in the conference room.

After reviewing the surveillance video of 5/1/20 and photos of the property allegedly destroyed by Petitioner, the Arbitrator does not find the evidence supports Petitioner fabricated her work injury as Respondent suggests. Petitioner's testimony was consistent with the injury report and medical records, and the subjective and objective medical evidence supports injury to Petitioner's lumbar spine. Therefore, the Arbitrator finds that Petitioner met her burden in proving that she sustained an accident that arose out of and in the course of her employment with Respondent.

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

The Act states that notice shall be given to the employer as soon as practicable, but not later than 45 days after the accident. 820 ILCS 305/6(c) (emphasis ours). The purpose of the notice requirement of the Act is to enable an employer to investigate an alleged accident, and to protect an employer from unjust or fraudulent claims. *Gano Electrical Contracting v. Indus. Comm'n*, 631 N.E.2d 724, 727 (Ill. App. 4th Dist., 2004); *Thrall Car Manufacturing Co. v. Indus. Comm'n*, 356 N.E.2d 516 (1976). A claim is only barred if no notice whatsoever has been given. *Gano supra*. Because the legislature has mandated a liberal construction on the issue of notice, if some notice has been given, although inaccurate or defective, then the employer must show that he has been unduly prejudiced. *Gano supra*; *Thrall supra.*

The evidence supports that Petitioner provided verbal and written notice of her work accident within fifteen minutes of its occurrence. This evidence is undisputed, despite Respondent's denial that an accident occurred. The Arbitrator thus finds that Petitioner provided timely notice of her accident to Respondent.

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

Circumstantial evidence, especially when entirely in favor of the Petitioner, is sufficient to prove a causal nexus between an accident and the resulting injury, such as a chain of events showing a claimant's ability to perform manual duties before accident but decreased ability to still perform immediately after accident. *Pulliam Masonry v. Indus. Comm'n*, 77 Ill. 2d 469, 397 N.E.2d 834 (1979); *Gano Electric Contracting v. Indus. Comm'n*, 260 Ill.App.3d 92, 96–97, 631 N.E.2d 724 (1994); *International Harvester v. Indus. Comm'n*, 93 Ill.2d 59, 442 N.E.2d 908 (1982).

When a preexisting condition is present, a claimant must show that "a work-related accidental injury aggravated or accelerated the preexisting [condition] 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." *St. Elizabeth's Hospital v. Workers' Comp. Comm'n*, 371 Ill. App. 3d 882, 888, 864 N.E.2d 266, 272 (2007). Accidental injury need only be a causative factor in the resulting condition of ill-

being. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill. 2d 193, 205, 797 N.E.2d 665, 673 (2003) (emphasis added). Even when a preexisting condition exists, recovery may be had if a claimant's employment is a causative factor in his or her current condition of ill-being. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill. 2d 193, 797 N.E.2d 665 (2003). Allowing a claimant to recover under such circumstances is a corollary of the principle that employment need not be the sole or primary cause of a claimant's condition. *Land & Lakes Co. v. Indus. Comm'n*, 359 Ill. App. 3d 582, 834 N.E.2d 583 (2005). Employers are to take their employees as they find them. *A.C. & S. v. Industrial Comm'n*, 304 Ill. App. 3d 875, 710 N.E.2d 837 (1999) citing *General Electric Co. v. Industrial Comm'n*, 89 Ill. 2d 432, 434, 433 N.E.2d 671, 672 (1982). The law is clear that if a preexisting condition is aggravated, exacerbated, or accelerated by an accidental injury, the employee is entitled to benefits. *Rock Road Constr. v. Indus. Comm'n*, 227 N.E.2d 65, 67-68 (Ill. 1967), 37 Ill. 2d 123; see also *Illinois Valley Irrigation, Inc. v. Indus. Comm'n*, 66 Ill. 2d 234, 362 N.E.2d 339 (1977).

Although Petitioner clearly suffered from a pre-existing condition in her lumbar spine, which required surgery on 1/15/16, followed by a left total hip replacement, she has worked full duty without restrictions since April 2017. The objective diagnostic imaging fully supports the opinions of Dr. Gornet, who had the benefit of being familiar with Petitioner's condition before and after the May 2020 work accident. Dr. Gornet noted that Petitioner's pathology at L4-5 was new when compared to previous studies. Both of Respondent's first and second independent medical examiners, Drs. Farley and deGrange, opined that Petitioner's condition was aggravated as a result of her work accident. Only Respondent's third examiner, Dr. Kitchens, felt Petitioner's condition was unrelated to her work accident. The Arbitrator does not find his opinion persuasive or supported by the evidence. The Arbitrator also finds Dr. Kitchens' opinion lacking given he had no records outside of an imaging study that predated Petitioner's work incident.

Therefore, the Arbitrator finds Petitioner's current condition of ill-being in her lumbar spine is causally connected to her work accident on 5/7/20.

Issue (J): Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

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

Upon establishing causal connection and the reasonableness and the necessity of recommended medical treatment, employers are responsible for necessary prospective medical care required by their employees. *Plantation Mfg. Co. v. Indus. Comm'n*, 294 Ill.App.3d 705, 691 N.E.2d. 13 (1997). This includes treatment required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 325 Ill. App. 3d 527, 758 N.E.2d 18 (2001).

Based upon the above findings as to accident and causal connection, the Arbitrator finds Petitioner's medical treatment has been reasonable and necessary to treat her work-related injuries. Dr. Gornet testified it is more reasonable to manage Petitioner's condition conservatively for as long as possible. He testified that Petitioner's use of muscle relaxants and

medication, while preferable to surgery, will only control her symptoms and not heal the torn disc.

With respect to vocational services, the Arbitrator notes that the Act treats vocational rehabilitation as a medical expense, providing that vocational rehabilitation shall be paid for along with physical and mental rehabilitation. *Butts v. Salem Mfg. and Modular Homes*, 18 MR 0064 (Ill. 4th Cir. Marion Cnty. Ct., Nov. 7, 2018); *Daniels v. M-Class Mining*, 18 MR 0063 (Ill. 2nd Cir. Franklin Cnty. Ct., Oct. 31, 2018). "Generally, a claimant has been deemed entitled to rehabilitation where he sustained an injury which caused a reduction in earning power and there is evidence rehabilitation will increase his earning capacity." *Howlett's Tree Serv. v. Indus. Comm'n of Illinois*, 160 Ill. App. 3d 190, 194, 513 N.E.2d 82, 84 (1987) citing *National Tea Co. v. Industrial Comm'n*, 97 Ill.2d 424, 454 N.E.2d 672 (1983). In determining reasonableness of rehabilitation award, factors to consider include relative costs and benefits to be derived from program, employee's work-life expectancy, his ability and motivation to undertake the program, and his prospects for recovering work capacity through medical rehabilitation or other means. *Nat'l Tea Co. v. Indus. Comm'n*, 97 Ill. 2d 424, 454 N.E.2d 672 (1983). These factors, however, are not exclusive factors. *Howlett's Tree Serv. v. Indus. Comm'n of Illinois*, 160 Ill. App. 3d 190, 195, 513 N.E.2d 82, 85 (1987).

The Arbitrator places significant weight on the fact that both Petitioner's and Respondent's vocational counselor agree Petitioner would benefit from additional training. It was noted that Petitioner was motivated in vocational training and was doing well in her computer classes. The Arbitrator, however, does not find persuasive Mrs. Bethell's opinion that job placement should begin prior to said training, as this would mean Petitioner would likely be rejected by prospective employers and unnecessarily struggle to complete the application process without general computer skills. The Arbitrator finds it reasonable for Petitioner to follow Mr. Kaver's plan to focus her attention on completing her training rather than prematurely engaging in needlessly frustrating job placement efforts.

Respondent shall therefore pay the expenses contained in Petitioner's Group Exhibit 1, directly to the medical providers per the Illinois medical fee schedule, as provided in Section 8(a) and Section 8.2 of the Act. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits and indemnify and hold Petitioner harmless from any expenses for which it claims credit. The parties stipulate that Respondent paid no medical bills through its group medical plan for which it would be entitled to a credit under Section 8(j) of the Act.

The Arbitrator further finds Petitioner is entitled to receive the additional care recommended by Dr. Gornet, in addition to vocational rehabilitation and training. Therefore, Respondent shall authorize and pay for prospective medical treatment, including, but not limited to, conservative treatment and medication management as recommended by Dr. Gornet, and job placement and computer training recommended by Tim Kaver.

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

The law in Illinois holds that "[a]n employee is temporarily totally incapacitated from the time an injury incapacitates him for work until such time as he is as far recovered or restored as

the permanent character of his injury will permit." *Archer Daniels Midland Co. v. Indus. Comm'n*, 138 Ill.2d 107, 561 N.E.2d 623 (Ill. 1990). The ability to do light or restricted work does not preclude a finding of temporary total disability. *Archer Daniels Midland Co. v. Indus. Comm'n*, 138 Ill.2d 107, 561 N.E.2d 623 (Ill., 1990) citing *Ford Motor Co. v. Industrial Comm'n*, 126 Ill. App. 3d 739, 743, 467 N.E.2d 1018, 1021 (1984). Where a claimant undertakes vocational rehabilitation, he or she is entitled to maintenance. *Nascote Indus. v. Indus. Comm'n*, 353 Ill. App. 3d 1067, 1075, 820 N.E.2d 570, 577 (2004). Termination of employment for reasons unrelated to the work injury does not sever the employer's responsibility to pay such benefits. *Interstate Scaffolding, Inc. v. Illinois Workers' Comp. Comm'n*, 236 Ill. 2d 132, 923 N.E.2d 266 (2010).

Dr. Gornet placed Petitioner at MMI on 9/9/21 with permanent restrictions of no lifting greater than 15 pounds, no repetitive bending or lifting, alternate sitting and standing as needed, and no overhead work. Based upon the above findings, the Arbitrator awards temporary total disability benefits from 5/8/20 through 9/9/21, representing 70 weeks, and maintenance benefits from 9/10/21 through 3/25/22, representing 28-1/7th weeks. Respondent shall receive credit for temporary total disability benefits paid in the amount of $65,838.69.

This award shall in no instance be a bar to further hearing and determination of any additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

Linda J. Cantrell

_____ _____

Arbitrator Linda J. Cantrell DATE

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC008982
Case Name	Salathiel Morgan v. United Piping Inc
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0374
Number of Pages of Decision	11
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Laura Cole
Respondent Attorney	Peter Sink

DATE FILED: 8/18/2023

/s/Stephen Mathis, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Salathiel Morgan,

Petitioner,

vs. NO. 20 WC 008982

United Piping, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 19, 2022, 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 Respondent shall have credit for all amounts paid, if any, to or on behalf of 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 party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

August 18, 2023

SJM/sj
o-7/26/2023
44

/s/ *Stephen J. Mathis*
Stephen J. Mathis

/s/ *Deborah J. Baker*
Deborah J. Baker

/s/ *Deborah L. Simpson*
Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC008982
Case Name	Salathiel Morgan v. United Piping Inc
Consolidated Cases	
Proceeding Type	Request for Hearing
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	8
Decision Issued By	William Gallagher, Arbitrator

Petitioner Attorney	Laura Cole
Respondent Attorney	Peter Sink

DATE FILED: 8/19/2022

/s/William Gallagher, Arbitrator
Signature

INTEREST RATE WEEK OF AUGUST 16, 2022 3.02%

STATE OF ILLINOIS)
)SS.
COUNTY OF Madison)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Salathiel Morgan
Employee/Petitioner

v.

United Piping, Inc.
Employer/Respondent

Case # 20 WC 08982

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Collinsville, on June 30, 2022. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On March 9, 2020, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $n/a; the average weekly wage was $3,931.83.

On the date of accident, Petitioner was 61 years of age, single with 0 dependent child(ren).

Petitioner has received all reasonable and necessary medical services.

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

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

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

ORDER

Respondent shall pay reasonable and necessary medical services provided to Petitioner, as identified in Petitioner's Exhibit 7, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

Respondent shall pay Petitioner temporary total disability benefits of $1,549.07 per week for 43 weeks commencing March 19, 2020, through January 14, 2021, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $836.69 per week for 43 weeks because the injury sustained caused the 20% loss of use of the right leg, as provided in Section 8(e) 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.

William R. Gallagher, Arbitrator **August 19, 2022**

ICArbDec p. 2

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained an accidental injury arising out of and in the course of his employment by Respondent on March 9, 2020. According to the Application, Petitioner "fell through door in the floor" and sustained an injury to his "right knee, man as a whole" (Arbitrator's Exhibit 2). Respondent disputed liability on the basis of accident and causal relationship. In regard to temporary total disability benefits, Petitioner claimed he was entitled to temporary total disability benefits of 43 weeks, commencing March 19, 2020, through January 14, 2021 (Arbitrator's Exhibit 1).

Petitioner was a laborer and worked out of the union hall. He would go to the hall, be assigned a job and then be laid off once the job was completed. Petitioner would then return to the union hall for a new assignment. At the time Petitioner sustained the accident, he was working on a mud reclaimer machine which mixed slurry to keep the drill running properly. Petitioner worked the 7:00 PM to 7:00 AM shift. On March 9, 2020, around midnight, Petitioner was using a squeegee on the mud reclaimer. At that time, Petitioner's left foot fell through an open hole in the deck which then caused Petitioner's right knee to strike the steel deck. There was a hole in the deck because the trap door which was used to cover the hole had been left open. Petitioner testified he did not see any mud in the opening and his left foot did not come in contact with any mud. Respondent tendered into evidence photographs of the deck and trap door, one with the trap door closed and one with the trap door open (Respondent's Exhibits 1 and 2).

Petitioner immediately experienced pain in his right knee at the time of the accident. He was able to get his left leg/foot out of the hole and reported the accident to Luke Wade, his supervisor. Shortly thereafter, Petitioner reported the accident to Michael Burns, the field safety lead.

An accident report was prepared and signed by Petitioner on April 7, 2020. According to the report, Petitioner was cleaning with a squeegee when his left leg fell through an opening which caused his right leg to come down on the steel deck. Further, the report also noted Petitioner was told that the door to the opening he fell through was not working properly and had to be left open (Respondent's Exhibit 11).

Michael Burns was deposed on June 3, 2022, and his deposition testimony was received into evidence at trial. On direct examination, Burns testified that at the time Petitioner sustained the accident, he was the field safety lead, but he was no longer employed by Respondent. He confirmed Petitioner reported the accident to him and Petitioner informed him he stepped into a viscosity box. He stated the hole measured approximately six inches by eight inches, but he did not measure it (Respondent's Exhibit 3; pp 8-9, 15-17).

Burns testified the viscosity box contained a wet solution which consisted of bentonite, a powdered substance which is mixed with water. When mixed, it is a beige colored substance. Burns testified he did not observe any mud or bentonite on Petitioner's boots/pants. He also said Petitioner's foot size was larger than his 10 1/2 shoe size and Petitioner could not have fallen into the viscosity box in the manner Petitioner reported. He also testified that he had Petitioner roll up his pants and did not observe any swelling, Petitioner's right knee was not sensitive to the touch and Burns testified Petitioner felt no pain (Respondent's Exhibit 3; pp 19-24).

Petitioner did not seek any medical treatment immediately following the accident and continued to work. However, Petitioner did not perform his regular job duties, his right knee was swollen and he was limping. Petitioner testified he had no right knee problems prior to the accident.

Petitioner initially sought medical treatment at the ER of St. Anthony's Hospital on March 12, 2020. At that time, Petitioner complained of right knee and left hip pain which started three days prior when he fell through an open door at work. Petitioner advised he was cleaning around the door and fell into the door hitting his right knee and left foot. X-rays of the right knee and left hip were obtained which were normal. Petitioner was diagnosed with right knee and left hip pain, prescribed medication and discharged (Petitioner's Exhibit 2).

Petitioner was subsequently evaluated by Dr. William Bartley, his family physician, on March 19, 2020. The appointment with Dr. Bartley was scheduled prior to the accident because it was an annual physical. Petitioner informed Dr. Bartley of the accident of March 8, 2020 (not March 9, 2020) and complained of right knee and left hip pain. On examination, Dr. Bartley noted effusion in the right knee with a small amount of fluid present (Petitioner's Exhibit 3).

At the direction of his attorney, Petitioner was examined by Dr. Corey Solman, an orthopedic surgeon, on May 13, 2020. At that time, Petitioner advised Dr. Solman of the accident of March 9, 2020, and that his left leg fell into a hole which caused his right knee to hyperflex and strike a steel floor. Dr. Solman's examination of Petitioner's right knee was consistent with a tear of the medial meniscus and he opined this occurred as a result of the accident of March 9, 2020. He ordered an MRI scan of Petitioner's right knee and authorized Petitioner to be off work (Petitioner's Exhibit 1; Deposition Exhibit 2).

The MRI was performed on May 23, 2020. When Dr. Solman saw Petitioner on June 3, 2020, he reviewed the MRI and opined it revealed a tear of the posterior horn of the medial meniscus. Dr. Solman recommended Petitioner undergo arthroscopic surgery on the right knee (Petitioner's Exhibit 1; Deposition Exhibit 2).

Dr. Solman performed arthroscopic surgery on Petitioner's right knee on August 18, 2020. The procedure consisted of debridement of the torn medial meniscus (Petitioner's Exhibit 4).

Following surgery, Petitioner continued to be treated by Dr. Solman. When Dr. Solman saw Petitioner on August 28, 2020, he ordered physical therapy. Petitioner received physical therapy from August 30, 2020, through November 11, 2020 (Petitioner's Exhibit 1; Deposition Exhibit 2; Petitioner's Exhibit 5).

When Dr. Solman saw Petitioner on January 6, 2021, Petitioner advised he had not been able to go to physical therapy because of insurance issues. Petitioner's knee condition was improved and the swelling had decreased; however, Petitioner continued to experience the pain when going up/down stairs. Dr. Solman offered Petitioner a steroid injection which Petitioner declined. Dr. Solman authorized Petitioner to return to work on January 14, 2021 (Petitioner's Exhibit 1; Deposition Exhibit 2).

Dr. Solman again saw Petitioner on February 10, 2021, and March 10, 2021. On both occasions, Petitioner complained of stiffness in the right knee. When seen on March 10, 2021, Dr. Solman recommended Petitioner undergo another MRI scan. The MRI scan was not performed (Petitioner's Exhibit 1; Deposition Exhibit 2).

Dr. Solman was deposed on May 11, 2021, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Solman's testimony was consistent with his medical records and he reaffirmed the opinions contained therein. Specifically, Dr. Solman testified he diagnosed Petitioner with a torn right medial meniscus and he performed arthroscopic surgery on Petitioner's right knee. In regard to causality, Dr. Solman testified the work accident was the cause of the pathology he diagnosed and treated (Petitioner's Exhibit 1; pp 9-11, 17).

On cross-examination, Dr. Solman was questioned about degenerative changes in Petitioner's right knee and he opined they were not that severe. He stated Petitioner engaging in normal daily activities such as walking would not cause a meniscal tear (Petitioner's Exhibit 1; pp 25-26).

Petitioner testified he was able to return to work as a laborer when Dr. Solman released him to do so. However, Petitioner continues to experience right knee pain on a daily basis. Petitioner's occupation as a laborer requires him to be on his feet for most of a workday and Petitioner stated he exercises caution and is careful with how he moves his right leg/knee.

Conclusions of Law

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

The Arbitrator concludes Petitioner sustained an accidental injury arising out of and in the course of his employment by Respondent on March 9, 2020.

In support of this conclusion the Arbitrator notes the following:

Petitioner's testimony that he had no right knee problems prior to the accident of March 9, 2020, was credible and unrebutted.

Petitioner credibly testified as to the circumstances of the accident of March 9, 2020.

The histories of the accident contained in the report of injury, the ER record of St. Anthony's Hospital, Dr. Bartley and Dr. Solman were consistent with one another and Petitioner's testimony at trial.

The Arbitrator was not persuaded by the testimony of Michael Burns. Burns was not present at the time Petitioner sustained the accident and his testimony that Petitioner's foot was too large to fall through the hole was not credible. Further, Burns also testified he did not observe any swelling of Petitioner's right knee and testified Petitioner was not in pain. Obviously, Burns is not a physician and there was no way he could determine whether or not Petitioner was experiencing pain.

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

The Arbitrator concludes Petitioner's current condition of ill-being is causally related to the accident of March 9, 2020.

In support of this conclusion the Arbitrator notes the following:

Dr. Solman opined there was a causal relationship between the accident of March 9, 2020, and the right knee condition he diagnosed and treated. There was no contrary medical opinion.

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

The Arbitrator concludes that all of the medical treatment provided to Petitioner was reasonable and necessary and Respondent is liable for payment of the medical bills incurred therewith.

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 7 as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

In support of this conclusion the Arbitrator notes the following:

There was no dispute regarding the reasonableness and necessity of the medical services provided to Petitioner.

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

The Arbitrator concludes Petitioner is entitled to temporary total disability benefits of 43 weeks commencing March 19, 2020, through January 14, 2021.

In support of this conclusion the Arbitrator notes the following:

Petitioner was under active medical treatment and authorized to be off work during the aforestated period of time.

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

The Arbitrator concludes Petitioner has sustained permanent partial disability to the extent of 20% loss of use of the right leg.

In support of this conclusion the Arbitrator notes the following:

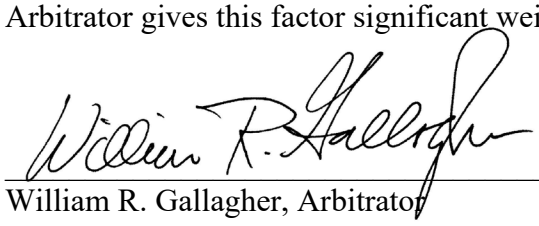
Neither Petitioner nor Respondent tendered an AMA impairment rating. The Arbitrator gives this factor no weight.

Petitioner was employed as a laborer at the time he sustained the injury and was able to return to work to that job. This job is physically demanding and requires Petitioner to be on his feet for most of the work day. The Arbitrator gives this factor significant weight.

Petitioner was 61 years old at the time he sustained the accident and almost 64 years old at the time of trial. Petitioner will attain normal retirement age in approximately three to four years. The Arbitrator gives this factor minimal weight.

There was no evidence the injury had any effect on Petitioner's future earning capacity. The Arbitrator gives this factor moderate weight.

Petitioner sustained a torn medial meniscus as a result of the accident which required arthroscopic surgery. Petitioner continues to have symptoms consistent with the injury he sustained. The Arbitrator gives this factor significant weight.



William R. Gallagher, Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC007932
Case Name	Maria Rodriguez v. Executive Mailing Services
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0375
Number of Pages of Decision	21
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Paul Coghlan
Respondent Attorney	W. Britt Isaly

DATE FILED: 8/18/2023

/s/Stephen Mathis, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Maria Rodriguez,

Petitioner,

vs. NO. 16WC 007932

Executive Mailing Services,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 21, 2022, 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 party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

August 18, 2023

SJM/sj
o-8/9/2023
44

/s/*Stephen J. Mathis*
Stephen J. Mathis

/s/ *Deborah J. Baker*
Deborah J. Baker

/s/ *Deborah L. Simpson*
Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC007932
Case Name	Maria Rodriguez v. Executive Mailing Services
Consolidated Cases	
Proceeding Type	
Decision Type	***Corrected*** Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	18
Decision Issued By	Ana Vazquez, Arbitrator

Petitioner Attorney	Paul Coghlan
Respondent Attorney	W. Britt Isaly

DATE FILED: 12/21/2022

THE INTEREST RATE FOR THE WEEK OF DECEMBER 20, 2022 4.55%

/s/Ana Vazquez, Arbitrator

Signature

32
STATE OF ILLINOIS)
)SS.
COUNTY OF **Cook**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION

Maria Rodriguez
Employee/Petitioner

v.

Executive Mailing Services
Employer/Respondent

Case # **16** WC **007932**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Ana Vazquez**, Arbitrator of the Commission, in the city of **Chicago**, on **July 22, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **November 9, 2015**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**17,160.00**; the average weekly wage was $**330.00**.

On the date of accident, Petitioner was **42** years of age, ***married*** with **2** dependent children.

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

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

Respondent shall be given a credit of $**69,784.00** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**69,784.00**.

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

ORDER

Respondent shall pay for the reasonable and necessary vocational rehabilitation services provided by Thomas Grzesik, in the amount of **$3,815.62**, as provided in Px1, pursuant to Section 8(a) of the Act.

Respondent shall pay to Petitioner temporary total disability benefits of **$286.00/week** for **249 weeks**, commencing January 26, 2017 through November 3, 2021, as provided in Section 8(b) of the Act. Per the Parties' stipulation, Respondent is entitled to a credit in the amount of **$69,784.00** for temporary total disability benefits paid to Petitioner.

Respondent shall pay Petitioner permanent and total disability benefits of **$517.40/week for life**, commencing **November 4, 2021**, as provided in Section 8(f) of the Act. Commencing on the second July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the Rate Adjustment Fund, as provided in Section 8(g) of the Act.

Respondent shall pay **$715.00** in penalties pursuant to Section 19(k) of the Act, **$8,880.00** in penalties pursuant to Section 19(l) of the Act, and **$286.00** in attorneys fees pursuant to 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.

Ana Vazquez

Signature of Arbitrator

December 21, 2022

PROCEDURAL HISTORY

This matter proceeded to arbitration on July 22, 2022 in Chicago, Illinois before Arbitrator Ana Vazquez on Petitioner's Request for Hearing. The issues in dispute include (1) causal connection, (2) unpaid medical bills, (3) temporary total disability ("TTD") benefits, (4) the nature and extent of the injury, and (5) penalties/attorney's fees under Sections 19(k), 19(l), and 16.

FINDINGS OF FACT

Petitioner testified in Spanish through an interpreter. Petitioner was born in Mexico and attended school in Mexico through the sixth grade. Transcript of Proceedings at Arbitration ("Tr.") at 14. Petitioner did not receive any further education in the United States. Tr. at 15.

Petitioner testified that on November 9, 2015, she was employed by Respondent, and had been employed by Respondent for approximately two years. Tr. at 13, 32. Petitioner testified that her job duties included taking out the mail and lifting up the mail to weigh it. Tr. at 13. Petitioner testified that this was a Spanish-speaking only job and that she was not required to speak English. Tr. at 32. Prior to working at Respondent, Petitioner testified that she worked as a waitress at a seafood restaurant for about two years, then testified that she worked as a waitress for six or seven months. Tr. at 14, 33. Petitioner testified that the waitress position was also a Spanish-speaking only position and that she was not required to speak English with patrons. Tr. at 33.

Petitioner testified that on November 9, 2015, while she was taking out mail and putting it in a box, she felt a "pulling" in her right shoulder. Tr. at 15. Petitioner testified that prior to November 9, 2015, she had never had any problems with her right shoulder and had never been under any medical treatment for either of her shoulders. Tr. at 15-16. Respondent sent Petitioner to Little Company of Mary State Care Station ("LCM") in Oak Lawn, Illinois after the work accident. Tr. at 16-17.

Medical Records Summary

On November 9, 2015, Petitioner presented at LCM. Px4 at 54-59. Petitioner's history was pain in the right hand and arm that radiated up into her right shoulder after picking up a heavy colander at work. Discoloration and swelling near the right wrist were noted. Petitioner was diagnosed with myalgias and right arm pain, and she was given restrictions of no lifting over five pounds and no pulling and/or pushing over five pounds. Petitioner was provided with a prescription for Naprosyn and Flexeril. Petitioner testified that she continued working light duty. Tr. at 17.

Petitioner followed up at LCM on November 16, 2015. Px4 at 48-52. Petitioner reported that her pain was unchanged. Petitioner was diagnosed with right arm pain and myalgias. Petitioner's Flexeril prescription was refilled, and Petitioner was also prescribed Tylenol #1. Petitioner was maintained on restrictions consisting of no lifting, pushing, or pulling with the right arm and no work with the right arm.

On November 23, 2015, Petitioner returned to LCM. Px4 at 41-46. Petitioner reported continued pain with movement, with pain mostly in her upper arm area. Petitioner was diagnosed with right shoulder pain and tendinitis, and she was referred to orthopedist, Dr. Sujal G. Desai. Petitioner was placed on restrictions, including no overhead work and no work with the right arm.

On December 3, 2015, Petitioner was seen by Dr. Desai's associate, Dr. Yousuf. Px5 at 76-81. Petitioner reported that it was difficult for her to perform overhead activity, and that she also had difficulty with range of motion. X-rays were obtained and demonstrated no significant abnormality in the right shoulder. Px4 at 40; Px5 at 82-83. Dr. Yousuf diagnosed Petitioner with biceps tendinitis of the right shoulder and recommended physical therapy. Dr. Yousuf also noted that he may consider having Petitioner undergo an MRI and a possible injection if Petitioner's symptoms persisted.

Petitioner was seen by Dr. Desai on January 25, 2016. Px5 at 71-76. Petitioner continued to report pain in her shoulder. Petitioner reported that she had tried physical therapy without relief. Petitioner reported difficulty with lifting with her right upper extremity. Dr. Desai diagnosed Petitioner with biceps tendinitis of the right shoulder. Dr. Desai recommended that Petitioner undergo an MRI for further evaluation of the rotator cuff.

On February 3, 2016, Petitioner presented to Dr. Jorge A. Cavero. Px6 at 112-113. Petitioner complained of right shoulder pain. Dr. Cavero recommended that Petitioner undergo an MRI of her right shoulder. He also recommended physical therapy. Dr. Cavero released Petitioner to return to work with restrictions, including no lifting over three pounds. Petitioner returned to Dr. Cavero on January 26, 2017. Px6 at 125. Dr. Cavero recommended physical therapy and referred Petitioner to an orthopedic specialist.

On February 9, 2017, Petitioner underwent an MRI of her right shoulder, which revealed a tiny high-grade bursal surface tear involving the anterior fibers of the distal supraspinatus tendon, without discrete full-thickness extension. Px3 at 25-28; Px6 at 108-110.

Petitioner presented to Dr. Erling Ho of Orthopaedic Associates of Riverside on July 3, 2017. Px8 at 753-763. Dr. Ho confirmed the presence of a high-grade bursal sided rotator cuff tear in the distal supraspinatus tendon. He did not see an obvious full-thickness tear. Dr. Ho administered a steroid injection into Petitioner's right shoulder. Dr. Ho recommended Petitioner undergo another course of formal physical therapy. Dr. Ho released Petitioner to return to work with restrictions that included no lifting, pushing, or pulling more than five pounds and no over-the-shoulder work. Dr. Ho noted that if Petitioner did not show signs of improvement by the next visit, surgery would be discussed.

Petitioner returned to Dr. Ho on August 14, 2017. Px8 at 743-748. Petitioner reported persistent discomfort and that the July injection gave her mild transient relief, but that the pain returned with persistent discomfort. Dr. Ho noted limited range of motion and a positive impingement sign. His diagnoses was high-grade partial-thickness rotator cuff tear. Dr. Ho noted that Petitioner had received extensive physical therapy without improvement and recommended

a right shoulder arthroscopic rotator cuff repair with biceps tenodesis. Petitioner's work restrictions were maintained.

On September 21, 2017, Dr. Ho performed an arthroscopic rotator cuff repair, arthroscopic biceps tenodesis, arthroscopic subacromial decompression, and arthroscopic debridement of glenoid humeral joint to subacromial space. Px2 at 14-15; Px8 at 732-734. Petitioner's postoperative diagnosis was right shoulder rotator cuff tear. Petitioner testified that after the September 21, 2017 surgery, she "ended up in very bad shape." Tr. at 21.

Petitioner followed up with Dr. Ho on October 9, 2017. Px8 at 722-730. Dr. Ho ordered physical therapy and kept Petitioner off work. Petitioner returned to Dr. Ho on November 8, 2017. Px8 at 706-718. Petitioner reported that her shoulder was very stiff. Dr. Ho kept Petitioner off work and ordered another course of physical therapy and a JAS splint. Dr. Ho noted that if Petitioner was not significantly improved in terms of range of motion in the next two months, he may need to perform a manipulation of her shoulder.

On December 20, 2017, Petitioner complained of stiffness in her right shoulder. Px8 at 697-704. Dr. Ho recommended Petitioner continue with therapy and use of the JAS splint. Dr. Ho noted that manipulation under anesthesia was discussed. Dr. Ho kept Petitioner off work. On January 22, 2018, Dr. Ho recommended that Petitioner undergo a right shoulder manipulation under anesthesia with arthroscopic resection of adhesions and possible rotator cuff revision. Px8 at 685-696. Petitioner was kept off work.

On February 8, 2018, Petitioner underwent a manipulation under anesthesia with arthroscopic extraction of adhesions, as well as an arthroscopic subacromial decompression. Px8 at 659-660, 662-663, 665-666. Petitioner's postoperative diagnoses were right shoulder arthrofibrosis status post cuff repair.

Petitioner followed up with Dr. Ho on February 21, 2018. Px8 at 647-652. Petitioner reported that her shoulder was still stiff, despite participating in physical therapy. Petitioner's external rotation was noted to be limited to 30 degrees with discomfort. Dr. Ho recommended continued therapy, use of the JAS splint, and kept Petitioner off work. Petitioner returned to Dr. Ho on April 2, 2018. Px8 at 638-645. Petitioner was noted to be doing reasonably well and still undergoing therapy at Chicago Rehabilitation with moderate progress. Dr. Ho advised Petitioner to continue with therapy, use of the JAS splint, and kept Petitioner off work.

Petitioner next saw Dr. Ho on May 14, 2018. Px8 at 633-635. Petitioner reported persistent stiffness in her right shoulder and that she was making some progress in physical therapy. Dr. Ho noted that Petitioner's external rotation was limited to about 45 degrees with discomfort. Dr. Ho advised Petitioner to continue with physical therapy and home exercises. Dr. Ho noted that if Petitioner had not improved in the following two or three months, Petitioner may require a repeat manipulation or resection of adhesions. Petitioner was kept off work.

On June 25, 2018, Dr. Ho noted that Petitioner was able to forward elevate and abduct to about 145 degrees and her external rotation was noted to be about 60 degrees, which was slightly improved from the previous visit. Px8 at 622-624. Dr. Ho administered a steroid injection into

the subacromial space of Petitioner's right shoulder to help with pain and to help loosen some of the deltoid adhesions. Petitioner was kept off work and was instructed to continue with physical therapy and home exercises.

Petitioner returned to Dr. Ho on August 6, 2018. Px8 at 613-621. Petitioner reported improvement in her range of motion with continued discomfort at terminal range of motion of her shoulder with lifting. She reported that the injection at the last visit helped alleviate her pain. Dr. Ho recommended that Petitioner continue with physical therapy and home exercises, and he also refilled her Naproxen prescription. He kept Petitioner off work.

On September 10, 2018, Petitioner followed-up with Dr. Ho. Px8 at 607-611. Dr. Ho referred Petitioner to work conditioning. Petitioner was kept off work. Petitioner underwent a Work Conditioning Evaluation ("WCE") at Chicago Rehabilitation Services on September 29, 2018, which determined that Petitioner was able to perform within the sedentary physical demand category. Px7 at 160-168. It was recommended that Petitioner participate in four weeks of a skilled work hardening/work conditioning program to allow a full duty return to work.

Petitioner followed up with Dr. Ho on October 15, 2018 and November 12, 2018. Px8 at 593-595, 602-604. On November12, 2018, Petitioner reported that she had completed work conditioning, that she was having anterior shoulder pain, and that the shoulder still felt stiff. Petitioner reported that she did not feel ready to return to work because of persistent discomfort and tightness in the shoulder. Dr. Ho placed Petitioner on work restrictions, which included no lifting, pushing, or pulling more than 10 pounds and no over-the-shoulder work.

Petitioner returned to see Dr. Ho on December 3, 2018. Px8 at 585-592. Petitioner reported that she felt the same, that she had some minor discomfort and weakness, and that she was able to perform her activities of daily living. Dr. Ho noted that Petitioner was approaching maximum medical improvement ("MMI") and he ordered a Functional Capacity Evaluation ("FCE"). Petitioner's restrictions were maintained.

On January 7, 2019, Petitioner reported to Dr. Ho that she was not able to obtain a FCE because she was told that she had previously undergone one. Px8 at 577-583. Dr. Ho did not have any record or receipt of a prior FCE, but Petitioner provided Dr. Ho with the intake form from her work conditioning which had provisional restrictions. Petitioner reported persistent discomfort, especially with reaching above shoulder level, and constant achiness on extending from her shoulder down towards her axilla. Dr. Ho placed Petitioner at MMI and placed Petitioner on permanent restrictions, which included no lifting more than 15 pounds with the right arm, no pushing or pulling more than 15 pounds, and no over-the-shoulder work.

On August 28, 2020, Petitioner underwent a WCE at Chicago Rehabilitation Services. Px8 at 563-573. Petitioner demonstrated the ability to perform within the light physical demand category. It was recommended that Petitioner would benefit from participating in four weeks of a skilled work hardening/work conditioning program to allow a full duty return to work. Petitioner testified that her hands and her legs were tested during the evaluation. Tr. at 51.

Petitioner returned to Dr. Ho on December 10, 2021 for a work status update. Px8 at 554-557; Respondent's Exhibit ("Rx") 1. Petitioner complained of tightness around the shoulder with pain mostly in the posterior inferior shoulder. Petitioner still had trouble reaching away or behind her back with the right arm. External rotation was still restricted to 60 degrees with a firm endpoint. Dr. Ho found Petitioner to be at MMI. Dr. Ho noted that the WCE showed that Petitioner was capable of returning to work with restrictions. Dr. Ho issued permanent restrictions including lifting up to 17 pounds from a squatted position occasionally, performing a bilateral shoulder lift of 22.5 pounds occasionally, performing an occasional seven-pound overhead lift, carrying up to 27.5 pounds occasionally, pushing and pulling 35 pounds occasionally, occasional forward reaching, and occasional above shoulder reaching with the right arm. Dr. Ho referred to the WCE for full details of Petitioner's permanent restrictions.

Vocational Rehabilitation

Petitioner testified that she was aware that there was a request made for her to participate in a vocational assessment with Mr. Edward Minnich in August 2021. Tr. at 29. Petitioner only knows of Mr. Minnich because her attorney told her about him. Tr. at 37. Petitioner testified that she did not participate in vocational rehabilitation with Mr. Minnich because he changed the restrictions given to her by Dr. Ho. Tr. at 29. Petitioner testified that she authorized her counsel to provide a list of vocational rehabilitation professionals to Respondent so that they could agree upon one for a reevaluation. Tr. at 30. Petitioner testified that "[w]e wanted to do it, but they didn't—I don't have the exact word for what I'm trying to say." Petitioner agreed that an agreement on a vocational professional was not reached, and that she met with Mr. Thomas Grzesik in November 2021. Tr. at 30. Petitioner was not aware that Mr. Grzesik believes that she is permanently disabled from working in the future. Tr. at 47. Petitioner would like for Mr. Grzesik's bill to be awarded. Tr. at 31.

TTD

Petitioner testified that Respondent stopped accommodating her restrictions in January 2017, prior to seeing Dr. Ho, and that she began receiving TTD benefits at that time. Tr. at 19. Petitioner agreed that she was paid TTD benefits by Respondent until September 29, 2021. Tr. at 47. The Parties' stipulated that Petitioner's benefits were terminated based upon Mr. Minnich's initial vocational assessment report. Tr. at 50.

Current Condition

Petitioner testified that she cannot work because she does not have the capacity to work because she has pain. Tr. at 39. Petitioner, however, testified that she wants to work. Tr. at 40.

Petitioner testified that she cannot fully lift her arm and still has pain in her right shoulder. Tr. at 26, 35. Petitioner did not have these problems prior to November 9, 2015. Tr. at 26-27. Petitioner testified that she dresses herself, cooks, and cleans differently than she did prior to November 9, 2015. Tr. at 27. Petitioner testified that she uses only one hand to dress herself or to pick up a heavy pot and that she cannot reach very well. Tr. at 27. Petitioner testified that she no longer lifts weights or exercises, which she did prior to November 9, 2015. Tr. at 28. Petitioner

cannot reach up to clean cabinets. Tr. at 28. Petitioner does not have problems with her hands or her legs. Tr. at 35, 41, 51. Petitioner injured only her right shoulder. Tr. at 42. Petitioner did not injure her hands or her legs. Tr. at 53. Petitioner takes Ibuprofen for pain. Tr. at 28. Petitioner testified that to her knowledge, all of her medical bills have been paid. Tr. at 31.

Section 12 Independent Medical Examination by Dr. Taizoon Baxamusa

Petitioner underwent a Section 12 Independent Medical Examination ("IME") of her right shoulder with Dr. Taizoon Baxamusa on November 20, 2018. Px11; Rx3. Dr. Baxamusa reviewed Petitioner's medical records and performed a clinical evaluation of Petitioner. Following his review of Petitioner's medical records and clinical evaluation of Petitioner, Dr. Baxamusa opined that Petitioner's diagnosis was status post right shoulder rotator cuff repair with adhesive capsulitis. Dr. Baxamusa believed that Petitioner's reported MRI findings were associated with her likely arthroscopic findings of a rotator cuff tear. He further noted that he did not have the original operative note, but by the records, Petitioner had undergone a rotator cuff repair and it was not uncommon to have stiffness post repair. He noted that he believed the subsequent adhesive capsulitis was associated with the shoulder pathology and the rotator cuff surgery. He did not identify any preexisting conditions. Dr. Baxamusa opined that Petitioner's treatment had been appropriate and necessary in relation to her work injury. Dr. Baxamusa also noted that he believed that Petitioner was at MMI at the time of his exam, and that MMI would have been reached on the last date Petitioner participated in work conditioning. He further noted that the only additional condition that may be entertained, under the direction of Petitioner's treating physician, was consideration of a possible FCE to assess validity efforts and formal restrictions with respect to Petitioner's upper right extremity, as she was on a light duty 10-pound weight restriction. Dr. Baxamusa opined that a light duty 10-pound restriction was reasonable until Petitioner discussed an FCE with her treating physician.

Section 12 Independent Medical Examination by Dr. Vijay B. Thangamani

On July 12, 2022, Petitioner underwent a Section 12 IME for her bilateral hands and bilateral legs with Dr. Vijay B. Thangamani of Duly Health and Care. Rx12. Dr. Thangamani reviewed Petitioner's medical records and performed a physical examination of Petitioner's bilateral hands and bilateral lower extremities. Dr. Thangamani noted that Petitioner reported no issues with either of her hands or lower extremities. Following his review of Petitioner's medical records and physical exam of Petitioner's bilateral hands and lower extremities, Dr. Thangamani noted that there was no diagnosis for Petitioner's bilateral hands or bilateral legs, as Petitioner did not describe any issues or injuries to those body parts. Dr. Thangamani noted that there were no limitations for Petitioner's bilateral hands or legs. He further opined that the work accident of November 9, 2015 was not in his opinion related to any limitations of the bilateral hands and knees, and that the Petitioner had no restrictions related to her bilateral knees or legs. He also opined that no treatment was necessary for Petitioner's hands or legs.

Testimony of Mr. Edward Minnich

Respondent called Mr. Edward Minnich to testify on its behalf. Tr. at 55. Mr. Minnich testified that he is a certified rehabilitation counselor and that he does medical management and

vocational rehabilitation consulting. Tr. at 55-56. Mr. Minnich testified as to his education and credentials as a certified rehabilitation counselor. Tr. at 56-58.

Mr. Minnich prepared a vocational assessment on August 12, 2021 and an addendum on July 15, 2022 at Respondent's request. Tr. at 61-62. Regarding the August 12, 2021 report, Mr. Minnich testified that he was asked to review the records of Petitioner and determine whether there would be jobs available to her within the physical restrictions of Dr. Ho at that time. Tr. at 62-63. Mr. Minnich testified that his opinions in the August 12, 2021 report were that based on Dr. Ho's restrictions of 15-pound lifting on the right and no overhead with the right arm, that Petitioner was capable of working at the light to medium functional level. Tr. at 63. Mr. Minnich testified that he wrote the July 15, 2022 addendum report after Dr. Ho's December 10, 2021 office visit note. Tr. at 70. Regarding his July 15, 2022 report, Mr. Minnich testified that his opinion at that time was that Petitioner could function at the light functional level and could work in jobs related to her background. Tr. at 71. Mr. Minnich testified that his opinion as to Petitioner's functional capabilities did not change in his July 15, 2022 report. Tr. at 71. Mr. Minnich was not asked to prepare a vocational rehabilitation plan and he did not ever meet with Petitioner. Tr. at 72.

Mr. Minnich testified that he did a labor market survey for only positions in fast food and that salaries in fast food in Illinois are $15.00 per hour, the minimum wage, and that most jobs pay minimum wage. Tr. at 72. Mr. Minnich testified that Petitioner has transferrable skills for a housekeeping position, which is a light level position. Tr. at 92.

Mr. Minnich testified that his recommendation for Petitioner was direct job placement assistance. Tr. at 75, 91. Mr. Minnich's reports were cognizant of Petitioner being able to only find Spanish-speaking jobs, and Mr. Minnich was able to find jobs that were Spanish-speaking only. Tr. at 76. Mr. Minnich testified that he was aware that Petitioner has a sixth-grade education and that it was not any kind of barrier in getting Petitioner a job within the Spanish-speaking only professions. Tr. at 76-77.

Mr. Minnich testified that he reviewed Mr. Grzesik's opinions, and that he disagreed with Mr. Grzesik's opinions. Tr. at 79, 101. Mr. Minnich testified that he found Petitioner to be capable of functioning at a higher level than Mr. Grzesik found, and that Petitioner can be trained to overcome barriers. Tr. at 80. Mr. Minnich testified that Petitioner is able to get a GED or attend free English as a Second Language ("ESL") classes at a community college. Tr. at 87-88. Mr. Minnich testified that Petitioner would not need a GED or ESL classes for placement in light duty positions. Tr. at 88, 91. Mr. Minnich did not rely on the physical capabilities found in the work conditioning evaluation of August 28, 2020. Tr. at 83.

On cross examination, Mr. Minnich agreed that he wrote "Note that I do not address the recommendations of PA-hired vocational counselors in my reports as I have found that they have only three possible outcomes: PTD, unrealistic educational recommendations, i.e., long-term training programs, and/or huge wage differential claims." Tr. at 104. Mr. Minnich does not address the opinions of the petitioner-hired vocational counselor. Tr. at 111. Mr. Minnich agreed that he wrote in his report that he did not consider the opinions of Mr. Grzesik because he was hired by Petitioner's counsel. Tr. at 111-112. Mr. Minnich agreed that he does not review the

petitioner's attorney's vocational reports, and he reviews only the doctors' notes and relies on the doctors' opinions. Tr. at 114-115. When asked if he does not review petitioner's attorneys' vocational reports because he finds that they are not reliable and not factual, Mr. Minnich responded, "Well, no. If they're reliable and credible, they would agree with me." Tr. at 115. Mr. Minnich also testified that "No. My opinion is correct, and if my – and when I give my opinion, if they agree with me, then their opinion will be the same as mine. You see? Because my opinion is correct[,]" when asked if the only people that are reliable and credible that he would review are vocational experts that agree with him. Tr. at 115. When asked if only his opinion is correct, Mr. Minnich responded, "Well, I'm a professional expert. That's exactly right. My opinion is correct." Tr. at 115. Mr. Minnich further testified, "Yes. Doesn't that make sense?" when asked if the opinions of anybody that disagrees with him is incorrect. Tr. at 116.

On redirect examination, Mr. Minnich testified that other vocational counselors can come to different opinions based on the same facts. Tr. at 119. Mr. Minnich testified that he believes his opinions to be correct on all of the facts of the cases that he sees. Tr. at 126.

Evidence Deposition Testimony of Mr. Thomas Grzesik

On February 24, 2022, Petitioner's vocational expert, Thomas Grzesik, testified by way of evidence deposition. Px9. Mr. Grzesik testified as to his education and credentials as a certified rehabilitation counselor. Px9 at 798-800. Mr. Grzesik has been a certified rehabilitation counselor for 40 years. Px9 at 800.

Mr. Grzesik evaluated Petitioner for a vocational assessment on November 3, 2021 at Petitioner's request. Px9 at 803. Petitioner's daughter accompanied Petitioner to the evaluation and provided interpretation for Petitioner. Px9 at 803. Mr. Grzesik prepared a report of his evaluation and findings, which included review of Petitioner's treatment records. Px9 at 801-803.

Petitioner reported that she completed the sixth grade in Mexico and that she attended ESL class in 2019. Px9 at 804. Petitioner reported that she had not participated in any further formal academic or vocational training. Px9 at 804. Petitioner reported that she speaks and understands very little English, and that she is able to read and write in Spanish. Px9 at 804. Petitioner also reported that she does not have basic computer or keyboard skills. Px9 at 817. Petitioner reported that she began working at Respondent eight or nine years prior to her evaluation by Mr. Grzesik. Px9 at 820. Mr. Grzesik testified that he noted that Petitioner's position as a mail sorter at Respondent was unskilled and in the medium physical demand level. Px9 at 820. Petitioner spoke in Spanish while working at Respondent. Px9 at 839-840. Petitioner worked for a few months at a cookie company, and Mr. Grzesik noted that this position as a packer was unskilled and in the light physical demand level. Px9 at 821. Petitioner also worked as a waitress at a Mexican Restaurant in Chicago for approximately one year, and Mr. Grzesik testified that this position was semi-skilled and in the light physical demand level. Px9 at 821. Petitioner also reported that she worked as a housekeeper at a hotel for approximately three years, and Mr. Grzesik testified that this position was unskilled and in the light physical demand level. Px9 at 821.

Mr. Grzesik was provided with a copy of Mr. Minnich's Labor Market Survey. Px9 at 822. Mr. Grzesik testified that he took notice of the computer program through SkillTRAN called Job Browser in order to look at the job that Mr. Minnich opined that Petitioner could perform. Px9 at 822. Mr. Grzesik testified that it revealed that the physical demands of reaching and handling exceeded the restrictions set by Dr. Ho. Px9 at 822. Mr. Grzesik testified that Mr. Minnich was providing medical opinions and/or opinions outside the area of expertise of a certified rehabilitation counselor. Px9 at 822-823. Mr. Minnich provided opinions that "we would seek from a medical source—a qualified medical source." Px9 at 823.

Mr. Grzesik testified that in his opinion and taking into consideration Petitioner's work injury and vocational profile, including Petitioner's age, sixth grade education in Mexico, work history, lack of transferrable skills, very limited ability to understand and speak in the English language, and work restrictions set by Dr. Ho, that Petitioner is not a candidate for vocational rehabilitation and that Petitioner is not employable. Px9 at 823-824, 854. Mr. Grzesik testified that Petitioner's background does not prevent Petitioner from attending ESL classes. Px9 at 839. Mr. Grzesik agreed that he saw no reason why Petitioner could not take an ESL class to learn English and testified that some ESL classes are free. Px9 at 840, 855. Mr. Grzesik testified that it was possible for Petitioner to take free ESL classes in Chicago. Px9 at 840-841. Mr. Grzesik testified that Petitioner could not learn how to keyboard because she has a restriction from using her arm. Px9 at 841. Mr. Grzesik testified that there was no reason that Petitioner could not be taught to use a computer, that there was no reason that Petitioner could not learn to take the GED, and that there was no reason that Petitioner could not learn to take the Spanish GED. Px9 at 841.

Evidence Deposition Testimony of Dr. Erling Ho

Dr. Erling Ho testified by way of an evidence deposition taken on April 20, 2022. Px10. Dr. Ho testified as to his education and credentials as an orthopedic surgeon. Px10 at 914-916. Dr. Ho reviewed Petitioner's right shoulder treatment history. Px10 at 916-937. Dr. Ho testified that the second procedure, which involved resection of adhesions, was necessary and causally related to her work injury. Px10 at 924.

Dr. Ho testified that on January 7, 2019, his opinion was that Petitioner was at MMI and that there was an issue with Petitioner obtaining the functional capacity evaluation he had ordered on December 3, 2018. Px10 at 931. Dr. Ho testified that at that time, he placed Petitioner on permanent restrictions of 15-pound restriction of the right arm and no work over shoulder level. Px10 at 932. Dr. Ho next saw Petitioner on December 10, 2021 to discuss an updated work status. Px10 at 934. Dr. Ho testified that he released Petitioner to return to work with the restrictions set forth in the WCE, and those restrictions were permanent. Px10 at 936-937, 942. Dr. Ho testified that he did not ever treat Petitioner specifically for her right or left hand, but that it was not uncommon for a person's hands to get stiff after shoulder surgery. Px10 at 938, 942-943. Dr. Ho testified that he did not ever examine Petitioner's right or left legs. Px10 at 943.

On cross examination, Dr. Ho testified that every FCE that's been ordered comes back with a full list of the patient's capabilities, including their full body, and "we tend to defer to the therapists in their assessment of what the patient can and can't do safely. Those become

permanent restrictions, from our standpoint." Px10 at 946. Dr. Ho testified that it was not unusual for him to provide restrictions for parts of the body that he did not treat because the FCE indicates what the person's capacities are. Px10 at 946.

CONCLUSIONS OF LAW

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

Decisions of an arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e). The burden of proof is on a claimant to establish the elements of her right to compensation, and unless the evidence considered in its entirety supports a finding that the injury resulted from a cause connected with the employment, there is no right to recover. *Board of Trustees v. Industrial Commission,* 44 Ill. 2d 214 (1969).

Credibility is the quality of a witness which renders her evidence worthy of belief. It is the function of the Commission to judge the credibility of the witnesses and to resolve conflicts in the medical evidence and assign weight to witness testimony. *O'Dette v. Industrial Commission*, 79 Ill. 2d 249, 253 (1980); *Hosteny v. Workers' Compensation Commission*, 397 Ill. App. 3d 665, 674 (2009). Where a claimant's testimony is inconsistent with her actual behavior and conduct, the Commission has held that an award cannot stand. *McDonald v. Industrial Commission,* 39 Ill. 2d 396 (1968); *Swift v. Industrial Commission,* 52 Ill. 2d 490 (1972).

In the case at hand, the Arbitrator observed Petitioner during the hearing and finds her to be a credible witness. The Arbitrator compared Petitioner's testimony with the totality of the evidence submitted and did not find any material contradictions that would deem the witness unreliable.

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

To obtain compensation under the Act, a claimant must prove that some act or phase of her employment was a causative factor in her ensuing injuries. A work-related injury need not be the sole or principal causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205 (2003). An employer takes its employees as it finds them. *St. Elizabeth's Hospital v. Illinois Workers' Compensation Comm'n*, 371 Ill. App. 3d 882, 888 (2007). "A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." *International Harvester v. Industrial Com.*, 93 Ill. 2d 59 (1982).

The Arbitrator finds that Petitioner established a causal connection between the accident of November 9, 2015 and her current right shoulder condition of ill-being. In so finding, the

Arbitrator relies on the following: (1) treatment records of LCM, (2) treatment records of Dr. Sujal G. Desai, (3) treatment records of Dr. Jorge A. Cavero, (4) treatment records of Chicago Rehabilitation, (5) treatment records and testimony of Dr. Erling Ho, (6) Petitioner's credible denial of any pre-accident physical issues with her right shoulder, and (7) the fact that none of the records in evidence reflect any right shoulder issues or treatment prior to November 9, 2015. The Arbitrator notes that the evidence demonstrates consistent complaints and continuous symptomology of the right shoulder following the work accident and that Petitioner was able to work full duty and without restrictions immediately prior to the work accident. The Arbitrator notes that Respondent's Section 12 examiner, Dr. Baxamusa, conceded that the Petitioner's right shoulder condition, including the necessity of the second surgical procedure, was related to the November 9, 2015 work accident.

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

Petitioner offered one unpaid bill, in the amount of $3,815.62, for the services rendered by Certified Vocational Counselor, Thomas Grzesik. Px1. The Arbitrator notes that Respondent's Certified Vocational Counselor, Mr. Edward Minnich, prepared a vocational assessment on August 12, 2021. Mr. Minnich did not meet with Petitioner in preparation of his report, and he relied on inaccurate permanent restrictions for his opinions. Accordingly, the Arbitrator finds that Mr. Minnich's vocational assessment was deficient, and that Petitioner was obligated to obtain a more thorough vocational assessment with Mr. Grzesik. The Arbitrator notes that Mr. Grzesik met with Petitioner on November 3, 2021, reviewed Petitioner's treatment records, and prepared a vocational assessment of Petitioner dated December 22. 2021. Accordingly, the Arbitrator finds that the services that were provided by Mr. Grzesik to Petitioner were reasonable and necessary, and that Respondent has not paid all appropriate charges. The Arbitrator further finds that the invoice offered as Px1 is awarded and that Respondent is liable for payment of this bill, pursuant to Section 8(a) of the Act.

Issue K, whether Petitioner is entitled to TTD, the Arbitrator finds as follows:

Petitioner claims that she is entitled to TTD benefits from January 26, 2017 through November 3, 2021. See Ax1, No. 8. The Parties stipulated that Petitioner is entitled to TTD benefits from January 26, 2017 through September 29, 2021. See Ax1, No. 8.

The Arbitrator notes that Dr. Ho initially placed Petitioner on permanent restrictions on January 7, 2019, and then again placed Petitioner on permanent restrictions pursuant to the August 28, 2020 WCE on December 10, 2021. The evidence demonstrates that Petitioner did not accommodate Petitioner's restrictions and that Petitioner was entitled to vocational assistance. The Arbitrator notes that Respondent relied on Mr. Minnich's vocational assessment and terminated Petitioner's benefits effective September 30, 2021. As the Arbitrator has found Mr. Minnich's vocational assessment of August 12, 2021 deficient, the Arbitrator further finds that Respondent improperly terminated Petitioner's benefits effective September 30, 2021.

Based on the record as a whole, the Arbitrator finds that Petitioner is entitled to TTD benefits from January 26, 2017 through November 3, 2021.

Issue L, as to the nature and extent of the injury, the Arbitrator finds as follows:

A claimant is totally and permanently disabled when she is unable to make some contribution to the work force sufficient to justify the payment of wages. *Ceco Corp. v. Industrial Comm'n*, 95 Ill. 2d 278, 286 (1983). A claimant, however, need not be reduced to total physical incapacity before a permanent total disability award may be granted. *Id*. Instead, the claimant must show that she is unable to perform services, except those that are so limited in quantity, dependability, or quality that there is no reasonable stable market for her. *A.M.T.C. of Illinois, Inc., Aero Mayflower Transit Co. v. Industrial Comm'n*, 77 Ill. 2d 482, 487 (1979).

Where a claimant's disability is of a limited nature such that she is not obviously unemployable, or where there is no medical evidence to support a claim of total disability, the claimant has the burden of establishing that she falls into the "odd-lot" category. *Ceco Corp*., 95 Ill. 2d at 287. There are two ways a claimant can ordinarily satisfy her burden of proving that she fits into the "odd-lot" category: (1) by showing a diligent but unsuccessful job search, or (2) by demonstrating that because of her age, training, education, experience, and condition, she is unable to engage in stable and continuous employment. *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 544 (2007). Once the claimant has initially established the unavailability of employment to a person in her circumstances, the burden then shifts to the employer to show that suitable work is regularly and continuously available to the claimant. *Economy Packing Company v. IWCC*, 387 Ill. App. 3d 283, 293 (2008).

On August 28, 2020, Petitioner underwent a WCE, which placed Petitioner at a light physical demand level, with weight restrictions as to lifting, carrying, pushing, and pulling. On December 10, 2021, Dr. Ho assigned Petitioner permanent restrictions pursuant to the August 28, 2020 WCE. The Arbitrator finds that the evidence shows that Petitioner's physical abilities did not meet the physical requirements of her job as a mail sorter with Respondent and that the accident caused an ongoing condition which prevented Petitioner from returning to her job as a mail sorter at Respondent.

Petitioner offered the opinions of Certified Vocational Counselor, Thomas Grzesik, who prepared a vocational assessment of Petitioner. Mr. Grzesik met with and interviewed Petitioner on November 3, 2021 in preparation of his vocational assessment. In his assessment, Mr. Grzesik noted that Petitioner had completed the sixth grade in Mexico, that she had not participated in any further academic or vocational training, that she speaks and understands very little English, and that she held prior unskilled and semi-skilled positions. This information was corroborated by Petitioner's testimony at arbitration. Mr. Grzesik opined that based on Petitioner's physical abilities, as well as her vocational profile, Petitioner is not employable in any occupation in a stable labor market, and that Petitioner is not a candidate for vocational rehabilitation services. Respondent offered the opinions of Certified Vocational Counselor, Edward Minnich, who also prepared a vocational assessment of Petitioner and a labor market survey on August 12, 2021, as well as an addendum on July 15, 2022. Mr. Minnich did not meet with nor interview Petitioner in preparation of his vocational assessment or addendum. Mr. Minnich opined that Petitioner was

functional at the light and medium physical levels and he recommended direct job placement assistance for Petitioner.

The Arbitrator has considered the opinions of Mr. Minnich and finds them less persuasive than those offered by Mr. Grzesik. In his initial vocational assessment, Mr. Minnich improperly relied on inaccurate restrictions, including that "[t]he assumptions and clearly the purview of Dr. Ho is the right arm with regard to restrictions as he did not note in his report any injury or restrictions relative to the left arm," and "[w]ith this it can be assumed that she can lift at minimum the same amount of weight on the left (uninjured side) giving her an ability to lift at minimum 30#s bilaterally. The fact is she can probably lift up to 50lbs bilaterally." Rx7. Mr. Minnich had the opportunity to review Petitioner's August 28, 2020 WCE and Dr. Ho's office visit note of December 10, 2021, wherein he assigned Petitioner permanent restrictions pursuant to the August 28, 2020 WCE. Despite Dr. Ho's assignment of permanent restrictions pursuant to the August 28, 2020 WCE, Mr. Minnich conceded that he did not rely on the physical capabilities found in the WCE of August 28, 2020 for his opinions. Tr. at 83. Instead, Mr. Minnich's opinions expressed in his August 12, 2021 assessment remained unchanged. Rx6. The Arbitrator notes that even if the Arbitrator were to solely consider the permanent restrictions related to Petitioner's right upper extremity, Mr. Minnich's opinions are still based on inaccurate restrictions. The Arbitrator notes that Dr. Ho assigned the permanent restrictions of occasional lifting of up to 17 pounds from a squatted position, occasional bilateral shoulder lifting of up to 22.5 pounds, occasional overhead lifting of up to seven pounds, occasional carrying of up to 27.5 pounds, occasional pushing and pulling of up to 35 pounds, occasional forward reaching, and occasional above-shoulder reaching with the right arm. Mr. Minnich's opinions rely on overestimated physical restrictions, including frequent bilateral lifting of 30 to 50 pounds and frequent overhead reaching. Moreover, Mr. Minnich's testimony at arbitration demonstrated clear bias, where he testified that he disregards and excludes the opinions of vocational experts hired by petitioners' counsel, that his opinion is the correct one, and that the opinions of anyone that disagrees with him is incorrect. Overall, the Arbitrator finds Mr. Minnich's opinions unreliable. Accordingly, the Arbitrator finds that the record establishes that due to Petitioner's age, training, education, experience, and condition, Petitioner is unable to engage in stable and continuous employment.

Based on the record as a whole, the Arbitrator finds that Petitioner has met her burden in satisfying an odd-lot permanent total disability award pursuant to Section 8(f) of the Act. Therefore, Respondent shall pay Petitioner permanent and total disability benefits of $517.40/week for life, commencing November 4, 2021, as provided in Section 8(f) of the Act. Commencing on the second July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the Rate Adjustment Fund, as provided in Section 8(g) of the Act.

Issue M, whether penalties/attorney's fees should be imposed upon Respondent, the Arbitrator finds as follows[1]:

The award of Section 19(l) penalties is mandatory '[i]f the payment is late, for whatever reason, and the employer or its carrier cannot show an adequate justification for the delay." *McMahan v. Industrial Commission*, 183 Ill.2d 499, 514-15 (1998). The employer bears the burden of justifying the delay and its justification is sufficient only if a reasonable person in the employer's position would have believed the delay was justified. *Board of Education of the City of Chicago v. Industrial Commission*, 93 Ill.2d 1, 9-10 (1982). In this case, it is stipulated that Respondent paid benefits to Petitioner from January 26, 2017 through September 29, 2021, at which time Respondent terminated benefits based on Mr. Minnich's August 12, 2021 vocational assessment. Section 19(l) penalties are awardable at the rate of $30.00 per day "for each day that the benefits under Section 8(a) or Section 8(b)" were "withheld or refused," up to a maximum of $10,000.00. A delay in payment of 14 days or more creates a rebuttable presumption of unreasonable delay. The Arbitrator finds that Respondent's justification for denial of payment was not adequate, where Mr. Minnich's opinions were based on assumed and inaccurate permanent restrictions. As such, the Arbitrator further finds Respondent liable for Section 19(l) penalties in the amount of $8,880.00 since benefits were denied for 296 days, from September 30, 2021 through July 22, 2022, the date of arbitration.

The Arbitrator further finds it appropriate to award Section 19(k) penalties and Section 16 attorney fees, which are discretionary rather than mandatory. They are "intended to address situations where there is not only a delay but the delay is deliberate or the result of bad faith or improper purpose." *McMahan*, 183 Ill.2d at 514-516. The employer bears the burden of proving that it acted in an objectively reasonable manner in denying a claim under all of the existing circumstances. *Consolidated Freightways, Inc. v. Industrial Commission*, 136 Ill.App.3d 630 (1985).

While the evidence demonstrates that Respondent offered professional placement services to Petitioner through Mr. Minnich, Petitioner credibly testified that she did not participate in vocational rehabilitation with Mr. Minnich because Mr. Minnich changed the restrictions given to her by Dr. Ho, that she authorized her attorney to provide a list of vocational rehabilitation professionals to Respondent so that the parties could agree upon one for reevaluation, and that "[w]e wanted to do it, but they didn't." Tr. at 29, 30; Rx5 (admitted without objection). Petitioner agreed that an agreement on a vocational professional was not reached between the parties, and that she met with Mr. Grzesik in November 2021. Tr. at 30. Petitioner's testimony is corroborated by Px12, which was admitted without objection, and reflects that Respondent was not in agreement with paying for the services of any other vocational counselor besides Mr. Minnich and also reflects that Respondent was aware of issues with Mr. Minnich's report of physician's medical reports. In this case, the Arbitrator finds that Respondent had no objectively reasonable basis to deny payment of benefits to Petitioner. The Arbitrator exercises her discretion and finds Respondent liable for Section 19(k) penalties in the amount of $715.00, representing 50% of the awarded TTD benefits, and Section 16 attorney fees in the amount of $286.00, representing 20% of the awarded benefits.

[1] Petitioner filed a petition seeking penalties and fees on December 29, 2021, about seven months before arbitration.

Ana Vazquez

ANA VAZQUEZ, ARBITRATOR

December 21, 2022

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC007628
Case Name	Jeffrey Valles on behalf of Hunter Valles v. Metal Services, LLC dba Phoenix Services. LLC
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	23IWCC0376
Number of Pages of Decision	27
Decision Issued By	Deborah Simpson, Commissioner, Deborah Baker, Commissioner

Petitioner Attorney	Matthew Gannon
Respondent Attorney	Lisa Barbieri

DATE FILED: 8/21/2023

/s/ Deborah Simpson, Commissioner

Signature

DISSENT: /s/ Deborah Baker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JEFFREY VALLES on behalf of HUNTER VALLES,

Petitioner,

vs. NO: 22 WC 7628

METAL SERVICES, LLC d/b/a/ PHOENIX SERVICES LLC,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of whether the parties were operating under the Illinois Act and whether the Commission has jurisdiction to adjudicate the claim, 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, with the following explanation.

Findings of Fact – Testimony

Mr. Michael Simms was called to testify by Petitioner pursuant to subpoena. He was Business Representative for International Union of Operating Engineers, Local 150. He was in that position on March 3, 2022, the date of the explosion that caused the injury to Hunter Valles. He acted as middleman between Respondent and the union and he would try to resolve disputes between them.

The witness was familiar with the circumstances surrounding the incident. On March 3, 2022, Hunter Valles worked as Hot Pit Loader Operator. Initially, Mr. Valles worked for Respondent in the Riverside, Illinois location. At the time of the accident he worked for Respondent in East Chicago Indiana.

Mr. Simms reviewed the contract between the union and Respondent (PX6). He had been working with the contract since Respondent was founded in 2009, was involved in the negotiations, and applied provisions of the contract on a daily basis. Mr. Simms was one of the signers of the contract. He was responsible for the parties complying with the provisions of the contract. If he were unable to resolve disputes informally, a grievance procedure would be commenced. The contract provides that all hiring must be made through Local 150. Local 150 is located in Countryside, Illinois. The local has two satellite offices in Indiana. There were numerous daily interactions between the Illinois and Indiana offices.

The contract provides that Local 150 is the sole bargaining agency for production and maintenance employees. Hunter Valles would be considered a production employee and covered under the above provision. Local 150's training facility is in Wilmington, Illinois, to which Respondent contributes. The contract also provides that employees can take time off for training. Mr. Valles had training in Wilmington under that provision.

Upon a vacancy in employment, Respondent posts the job and if someone on the job site does not fill the vacancy within five days, a work order is sent to the main dispatch office in Countryside. In the instance of numerous layoffs, transfer is based on seniority and ability to perform the particular job. If seniority is not followed that would set up a grievance procedure.

Mr. Simms was shown PX4, the "dispatch for" Mr. Hunter. It shows that Petitioner was dispatched to Riverside, Illinois. The local keeps all the dispatch forms to know where all of their members are working. Mr. Simms testified that drug testing, the interview, and medical examination are all considered pre-employment for which prospective employees are not paid. A person is not an employee until they are officially dispatched.

Mr. Simms was shown PX5, the "employment referral slip" for Mr. Hunter. It shows that Mr. Hunter was dispatched to a job in Indiana. That referral slip went to the office in Countryside, Illinois. The documents show that Mr. Hunter had his drug test, interview, and medical exam on May 8, 2018 and the dispatch from Countryside was dated May 9, 2018. Mr. Simms testified that the person is dispatched only after they had been hired.

Mr. Simms explained that up to the actual dispatch Mr. Valles could have rejected the job. He could not start working until he was formally dispatched. The applicant can go to a different job up until he was dispatched. Local 150 maintains a work list. If Mr. Valles had not called the union and "requested to be released by dispatch," he would not be considered an employee of Respondent. Mr. Valles worked at Riverside for about 11 months. There was about a 2&1/2 month gap in his employment; he did not work for any other employer during that hiatus. Mr. Simms agreed that "if Hunter Valles was called on May 8th *** [it would] be after that point where Mr. Valles would have to call to be released" on May 9th.

On cross examination, Mr. Simms agreed that they confirmed that Mr. Valles was hired before he was dispatched. He then testified pursuant to "the rules of the hiring hall, until he is dispatched, he is not formally an employee." He then answered that the employee is hired and then dispatched. When he had been dispatched, Respondent "accepted his application" and "agreed to hire him." Mr. Simms was not aware that Mr. Hunter was on the payroll as of 6:00 a.m. on May 9, 2018. Upon his hiring on May 9th, as a new hire Mr. Valles was on a mandatory 520-hour probation period. The seniority list indicated May 9, 2018 as the date Mr. Valles was hired. Respondent had the right to accept or reject his application before that date, or that of any applicant referred by the local. The contract involves several locations all of which are in Indiana. The name on the referral is an employee of the union who works in Merrillville, Indiana.

On redirect examination, Mr. Simms testified Mr. Hunter did not accept employment until he was actually dispatched. Accepting being dispatched is the "the final step" to employment. Anything before that is only an offer for employment. Respondent has to wait until an applicant is dispatched before it can hire him. Respondent had to wait until dispatch confirms the contract for hire. If these procedures were not followed, it would be taken up by the advisory board.

On re-cross examination, Mr. Simms acknowledged that the situation with Mr. Hunter was never brought up before the advisory board. The May 9, 2018 referral slip was time stamped at 7:00 a.m. The referral slip is an internal union document and nobody from Respondent signed it.

On further redirect examination, Mr. Simms testified that the Merrillville office communicates with the Countryside office daily "for dispatch purposes." They have "to go through Countryside, Illinois, the headquarters."

On further cross examination, Mr. Simms testified that Mr. Hunter was dispatched only after it was determined that both Respondent had accepted his application and Mr. Hunter accepted the offered position. He reiterated that the referral document was an internal document.

On further redirect examination, Mr. Simms agreed that he previously testified that Mr. Hunter could not accept employment before he was dispatched. He then agreed that the dispatch "is a requirement to formulate the hiring of Hunter Valles."

On further cross examination, when Mr. Simms was asked whether the dispatch was a mere formality noting that Mr. Hunter had been hired and started at Respondent on May 9, 2018, he answered "well it is an internal union document." While he actually started at 6:00 a.m., he could have been hired to work a later shift. On further redirect examination, Mr. Simms testified there were three shifts at Respondent's facility. He had no documentation that Mr. Hunter was on the day (first) shift.

Mr. David Fagan was called to testify by Petitioner pursuant to subpoena. He was financial secretary for Local 150. He was one of the five constitutional officers of the local. There are a little over 23,000 members of the union. On the date of the accident, he was financial secretary

and had been for 17 years. For 15 years prior to that he was an organizer for the union and for 10 years he worked as a field operator. In all he worked for the union for about 44 years. His job involves interaction between the main office in Countryside and the satellite offices in Indiana. He travels back and forth between Countryside and the satellite offices in Indiana. Everything comes out of the Countryside office.

Mr. Fagan testified the dispatch records are important to determine when an employee began his/her employment and no longer on the list for available work. The records show that on April 18. 2017, Hunter Valles was dispatched to Riverdale, Illinois. Thereafter, on May 9, 2018 he was classified as a new employee as of that start date. All dispatch records are maintained in Countryside. Mr. Fagan explained the hiring process, though he testified Mr. Simms had a better understanding of the specifics. "An employer would call in a work order. We would then try to match that work order in qualifications up to a member on the out of work list. That member would be dispatched and go through the employer's process. If he is hired, we are notified. At that time, he is again no longer available for a referral on the out of work list." A member cannot accept employment before they are dispatched.

An employee's failure to inform the union to be formally dispatched is a violation of their internal policies. There is a "219" area code telephone number that goes to the Countryside office. "He cannot be working and at the same time seeking employment on the out of work list." The final step a union member has to take is to notify the union that he was working.

On cross examination, Mr. Fagan testified he was not aware of all the circumstances surrounding the hiring of Mr. Valles. The dispatch is important because it is the date the union member is taken off the union referral list. He did not know whether the 219 phone number was that of Respondent's general manager in Harbor West Indiana. Nevertheless, he reiterated that everything in their satellite offices are controlled through Countryside. He agreed that as of 7:00 a.m. on May 9, 2020, Mr. Valles was "already" an employee of Respondent. In his mind, the timing meant that Mr. Valles called the union on May 9, 2020 at 7:00 a.m. to inform it that he was starting work that day. He would not have known when Mr. Valles actually began working. Mr. Fagan agreed that the union is not only the exclusive referral agent for Respondent's Harbor West in Indiana, but for the entire company. Respondent has the right to accept or reject referral from the union.

On redirect examination, Mr. Fagan testified Mr. Valles had the right to accept other employment until he requested to be dispatched. Both the union and Respondent required dispatch forms. He believed Respondent understood its obligation to give the union the opportunity to refer members for job vacancies. He agreed that "in order to confirm the employment, Hunter Valles has specific requirements. The last one being the dispatch."

On further cross examination, Mr. Fagan agreed that the dispatch was an internal union document the main purpose of which is to notify the union to take a referred applicant, in this case Mr. Valles, off the out of work list as on 7:00 on May 9, 2018. On further redirect examination,

Mr. Fagan agreed that in order for Mr. Valles to accept employment he was required to call the hall and ask to be dispatched.

On further cross examination, Mr. Fagan testified if a member sought employment outside of the referral that would be violation of their procedures and a member and employer can both be held liable for such a violation. It was possible that Mr. Valles began before the dispatch issued, but it would be outside their normal practice.

On further redirect examination, Mr. Fagan reiterated that both the member and employer would be liable if the "referral hall is not utilized." On further cross examination, Mr. Fagan testified he based his previous answer on the union being the exclusive referral agent for Respondent. He agreed that the decision on whether to hire Mr. Valles was with Respondent. There could be a violation if Respondent did not hire a referred applicant but rather a less qualified applicant. He was not aware of any violation of procedures in Mr. Valles' case.

Thereafter, the Arbitrator took judicial notice that in May 2018 Northwest Indiana was in the central time zone and that "219" is an Indiana area code. He then asked the witness whether the terms referral form and dispatch form were interchangeable. He answered that they were not with no additional explanation.

Ms. Rachel Clark was called by Respondent for which she worked for 14 years. She worked out of the Harbor West, Indiana facility. Currently, she was production manager and in 2018 she was office manager. In her job in 2018 she was involved in the hiring process. She dealt with the Local 150 union out of Merrillville, Indiana. If she needed an applicant she contacted either Monica or Tracy at the Merrillville union office. The hiring process was that if no qualified person from their job site took a posted job vacancy within five days, the boss would tell her to get applicants for the particular job opening from the Merrillville union hall. The applicants would get a phone number to call to set up an interview.

Ms. Clark was shown RX1, Hunter Valles' job application which was dated May 8, 2018. It was filled out immediately before the interview. The application was filled out and the interview took place in Indiana. If the applicant was still interested in the job after the interview, he would be sent immediately for a drug screen and physical in Gary, Indiana. Mr. Valles passed the tests. The results were time stamped May 8, 2018 at 10:16 a.m. In his application, Mr. Valles indicated that he previously worked for Respondent in Riverdale, Illinois until he was laid off on March 8, 2018. Normally, after she was informed that Mr. Valles was being hired, she would have had a time card prepared for him and given him a new hire packet. He would then be instructed to fill out paperwork and get his personal protective equipment at 6:00 a.m. the next morning. However, she did not specifically remember calling Mr. Valles at that time.

May 9, 2018 was Mr. Valles' first day working at the new job. She considered Mr. Valles a new hire even though he previously worked for Respondent in Illinois.

On cross examination, Ms. Clark testified she knew that Mr. Valles started work at 6:00 a.m. on May 9, 2018 because that was when he started getting paid. She did not have the payroll records in her possession. She had no personal knowledge of when Mr. Valles actually began working. Mr. Valles' information would have still been in Respondent's system from his working at Riverdale. She was not aware of Mr. Valles working for anybody in between his periods of employments with Respondent.

The manager at Riverdale indicated that Mr. Valles was not eligible for rehire at the Riverdale location. While he previously worked for Respondent in Illinois, he was a new hire in the Indiana location and filled out a new application. He started at the bottom of the seniority list. The seniority is not transferred, according to the union contract. She agreed that under the contract Mr. Valles had to be dispatched through the union hall. She did not know the difference between an applicant being referred or an applicant being dispatched. Ms. Clark agreed that the drug test and physical were pre-employment. He was not hired as of May 8, 2018.

On redirect examination, Ms. Clark reiterated that Mr. Valles filled out the new hire application on May 8, 2018, had an interview, and was sent for drug test and physical. He was coming in as a new hire and his seniority began as of May 9, 2018. She had not contacted any union hall for applicants other than the Merrillville hall. She was shown PX5, the union referral for Hunter Valles. She had never seen a document like that previously. It would not be a document which would be in Respondent's system. She was also shown RX6, the seniority list which indicated Mr. Valles was 45th on the list with a start date of May 9, 2018.

Mr. Joshua Bagnall was called by Respondent for which he worked for 10 years. Currently, he was general manager of Indiana Harbor West. In May of 2018 he was Blast Furnace Production Manager. He reiterated the process for hiring; posting the vacancy in the employee welfare building, and if nobody applied for the job within five days, they request a candidate from the union. The union has 48 hours to send a candidate. After an interview, a candidate that is deemed qualified will be sent for a drug screen. Mr. Valles' start date was May 9, 2018, which was the date his seniority began. Petitioner was offered and accepted employment at some time before May 9, 2018.

Generally, if the applicant was currently unemployed, they would start the applicant the day after his tests/background check. A new hire would start at 6:00 a.m. for a day-long safety training. At that time, they also fill out their paperwork including tax documents. Respondent has the right to reject an applicant which it deems unqualified or who did not pass drug testing *etc*.

On cross examination, Mr. Bagnall testified he did not have any personal knowledge of any conversation Respondent's general manager in 2018 had with Mr. Valles. Mr. Valles was not an employee until he accepted the offer of employment. He had no personal knowledge of when

Mr. Valles accepted the offer of employment. He agreed that the interview, drug test, and physical were all pre-employment. He had no role in hiring Hunter Valles. On redirect examination, Mr. Bagnall testified he knew that Mr. Valles started working on May 9, 2018.

Findings of Fact – Documentary Evidence

On March 3, 2022, Petitioner was air lifted to University of Chicago Hospital for a "higher level of care." It was noted that Mr. Valles was operating a front loader. He dumped a load into a pit, it "exploded," and he and the truck were "engulfed in flames." He had "significant burns to essentially his whole body."

Petitioner was brought into the University of Chicago ER and it was noted he had burns involving 90% or more of his body surface with 3rd degree burn of 60-69%. He was admitted to the hospital burn ICU and it appears he was discharged on June 23, 2022. Besides the extensive burns, Mr. Valles also had grade II inhalation injuries. The "family witnessed the event" and were informed about the severity of his injuries. The entire medical records were not submitted into evidence. However, it appears that he hospitalized up to June 23, 2022 and the current medical bills were purported to be $7,324,771.75.

On April 18, 2017, the International Union of Operating Engineers Local 150 in Countryside referred Hunter Valles to work at Respondent's facility in Riverside, Illinois as a steam cleaner. The salary for the position was not identified.

On May 9, 2018, the International Union of Operating Engineers Local 150 in Countryside referred Hunter Valles to work at Respondent's facility in East Chicago Indiana as a lancer. The salary for the position was not identified.

The contract between the parties in effect at the time of the accident provides that Respondent recognized the Union as exclusive bargaining agent for all production and maintenance employees at Respondent's locations at Mittal Indiana Harbor East, Mittal Indiana Harbor West, Mittal Burns Harbor, and US steel Gary Works. It also provided that all production/maintenance employees for Respondent working in Indiana must be members of the union. Despite the union exclusivity, the contract provides that Respondent retains the exclusive right to manage its business and direct its workforce, including hiring, assigning work, disciplining employees, and transferring employees. On the issue of seniority, the contract provides that seniority is broken if the employee is fired for cause or unemployment is occasioned by permanent shutdown of a facility/reduction of work force unless the employee is rehired within 12 months "or the length of service, whichever is less, the break in continuous shall be removed."

The contract also provides that "new employees and those hired after a break in continuous service will be regarded as probationary employees and will received no continuous service credit during such probationary period. Probationary employees may be laid off or discharged as exclusively determined by" the Company, but if continued in service of the Company subsequent

to the probationary period, the employee shall receive full continuous credit service from the date of original hiring.

Upon a permanent job opening, Respondent would post the vacancy at the facility for five days. If the job is not filled by a person from the facility within that time period, the Company shall offer the position to an employee who had been laid off from a facility covered by the contract. If such an employee takes the job, they shall have a seniority date based on the date of transfer to the new facility. If the vacancy is not filled through that avenue, the Company would inform the union, which would have 48 hours to send the Company a qualified applicant.

In Petitioner's employment application Mr. Valles notes that he was available to work beginning on May 9, 2018. It is noted that he previously worked for Respondent in Riverside from April of 2017 to March of 2018.

Hunter Valles passed his drug screen, hearing test, and vision test. The tests were performed in Gary, Indiana on May 8, 2018.

Hunter Valles was terminated, effective immediately (March 29, 2018), from his job with Respondent at Riverside. Illinois because his job class (lancer) was eliminated. He was not eligible for rehire.

Ms. Rachel Clark issued a written statement in which she indicated that when a job vacancy arose, it would be posted for qualified applicants on the job site. If no qualified person applied within five days, Respondent would contact Local 150 in Merrillville, Indiana to provide qualified applicants. The union would be provided specifics of the job and its requirements.

Mr. Joshua Bagwell issued a written statement in which he indicated that a job opening was posted for current personnel to apply for. If there are no applicants within five days, Local 1450 in Merrillville is contacted and a request is put in for a job position. The union is provided the specifics of the job. Applicants call, interviews are scheduled, applications are filled out at interview, applicants are sent for drug screening, background check is begun, drug test results received, background check is completed, the job is offered with start date, and on the start date the new hire would meet with the safety manager and complete all necessary paperwork.

Respondent submitted into evidence its seniority list at the plant at which Hunter Valles worked at the time of his injury. On the seniority list for operators, Hunter Valles is number 45 out of 48, with May 9, 2021 as the date of hire.

Conclusions of Law

The Arbitrator found that the parties were not operating under the Illinois Workers' Compensation Act because Petitioner did not establish that the contract for employment was

formed in Illinois rather than in Indiana. He found that the union was only the referring agent and not the hiring agent. Petitioner was not hired at the time of the referral or dispatch but rather that document simply confirmed that Respondent had offered the position and Mr. Valles accepted the offer. Those actions occurred in Indiana and not in Illinois. The Arbitrator cited the *Correct Construction Co., v. I.C.C.*, 307 Ill. App. 3d 636 (1999) as "strikingly similar" to the instant claim.

Petitioner argues the Arbitrator erred in finding Illinois had no jurisdiction to adjudicate his claim. It stresses on review, as it did at arbitration, that the last act necessary in the hiring of Mr. Valles was the dispatch from the union in Countryside, Illinois and therefore the contract was consummated in Illinois. Petitioner cites *Campbell v I.W.C.C.,* 133234WC-U, (1st Dist. WC Div. 2015) in support of its position.

In *Correct Construction Co v I.I.C.*, (1st. Dist. WC. Div. 1999), the Arbitrator found Illinois had jurisdiction and awarded permanency representing loss of the use of 20% of the right hand. The Commission affirmed the Arbitrator on the issue of jurisdiction and modified the permanency award to the loss of 12.5% of the right hand. The Circuit Court confirmed the Decision of the Commission. The Appellate Court reversed. In interpreting contract language which was "strikingly similar" to our contract language, as stated by the Arbitrator, the *Correct* Court found that language of the contract "clearly contemplates that the last act necessary for contract formation is the employer's decision to hire the referred Union member." The Appellate Court held that the contract was not formed in Illinois even though the claimant was in Illinois when he told his union representative that he would accept the job if offered. Rather, according to the Appellate Court, his employment began when he was at the job site in Indiana.

In *Campbell v I.W.C.C.,* (rule 23 order 1st Dist. WC Div. 2015), the claimant was an interstate truck driver. The Arbitrator found that Illinois did not have jurisdiction over the claim because she determined the contract was formed in Indiana rather than Illinois. The Commission affirmed the Decision of the Arbitrator and the Circuit Court confirmed the Decision of the Commission. The Appellate Court reversed the Decisions of the Circuit Court and the Commission and finding that Illinois had jurisdiction over the claim. The *Campbell* Court found that the claimant's passing a multiday safety training program in Illinois was the last necessary act for his employment in Indiana. It noted that immediately after he passed those tests he was hired while he was still in Illinois. Therefore, the *Campbell* Court determined that the last act necessary for consummation of the employment contract between the parties was the claimant's passing the training in Illinois and hence the contract was made in Illinois. In the instant claim, there was some testimony about a training facility in Illinois. However, there was no evidence that Hunter Valles was required to pass tests at that facility as a condition of his hiring and he certainly was not hired immediately after passing this type of testing in Illinois.

In another case which may be more relevant than *Campbell*, *Hunter Corp. v I.C.C.*, 268 Ill. App. 3d 1079 (1994), the union contract provided that the employer could reject a referral from the union for a job, but only if the such rejection was based on "physical incapacity or lack of qualifications." In addition, the contract provided that if the referred applicant was sent to a

worksite and the employer declined to hire them, the applicant would be paid for two hours plus travel expenses. On October 24, 1988, the claimant, while in Illinois, received a call from the union referral officer and told to report to the employer's State Line facility in Indiana. He went to the facility, filled out the paperwork, and began working. The Arbitrator found that the contract occurred in Illinois when the union official told the claimant to report for work in Indiana. The Commission affirmed the Decision of the Arbitrator finding significant the facts that the employer could only reject an applicant for physical incapacity or lack of qualifications, that upon arrival at the jobsite the applicant filled out "sign-up sheet" rather than an application, and that if the applicant was not hired he was entitled to compensation. There was no evidence in the instant claim that Respondent was limited in its authority to reject union referrals or that a rejected applicant was entitled to compensation. The *Hunter* Court found that the determination of the Commission that the contract was formed in Illinois was not against the manifest weight of the evidence.

In *Industrial Contractors Skanska v. I.W.C.C.* (rule 23 order 4th Dist. WC Div. 2021), the contract between the parties provided that the employee could not turn down a referral from the union. In addition, if the applicant was unable to work for reasons out of their control *i.e.* weather *etc.*, they would be entitled to one-hour of pay. The Arbitrator found that the contract was consummated in Illinois when the union sent him to the jobsite. The Commission affirmed the Decision of the Arbitrator and the Circuit Court confirmed the Decision of the Commission. The Appellate Court reversed the Circuit Court, the Commission, and the Arbitrator, finding that the determination of the Commission that the contract arose in Illinois was against the manifest weight of the evidence. The *Skanska* Court found that Illinois did not have jurisdiction because the employer had the right to not hire the claimant up to his arrival at the jobsite in Indiana. The Court rejected the Arbitrator's/Commission's holding that the contract arose when the phone call was placed to the union hall in Illinois and the referral was given by the union.

In its analysis, the *Skanska* Court addressed the dispute of whether *Hunter* or *Correct Construction* should control. The *Skanska* Court found *Correct Construction* controlling. The Court wrote: "Here, language in the labor agreement between respondent and the union clearly states that the union is the exclusive referral agent for respondent and the respondent retains a right to reject a referred individual. In *Correct Construction Co*., we found similar contractual language decisive: 'This language clearly contemplates that the last act necessary for contract formation is the employer's decision to have the referred Union member.' [307 Ill. App. 3d at 641] The presence of this language in the labor agreement that is operative in this case clearly brings it within the ambit of *Correct Construction*.'" Based on the language of the Appellate Court in *Skanska*, the Commission finds *Correct Construction* more relevant to the issues at bar than *Hunter*.

The Commission concludes the Arbitrator was correct in his analysis that while the union was the exclusive bargaining unit for production and maintenance employees it was not the hiring agent for such employees. That is not only evidenced from the testimony of all witnesses but the specific language of the contract. While Respondent had an obligation to get referrals from the

union, it is clear that it retained its exclusive right to hire or not hire any applicant referred by the union. Apparently, Mr. Valles had already been offered the job, accepted the job, and began working before the referral/dispatch was actually issued. In effect the document was an internal memorialization that Mr. Valles was hired and working for Respondent.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 22, 2022 is hereby affirmed and adopted, which is attached hereto and made a part hereof, with the explanation specified above.

IT IS FURTHER ORDERED BY THE COMMISSION that this claim is dismissed because the parties were not operating under the Act and the Commission does not have jurisdiction to adjudicate the claim.

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

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

August 21, 2023

O-7/12/23
DLS/dw
046

/s/*Deborah L. Simpson*
Deborah L. Simpson

/s/*Stephen J. Mathis*
Stephen J. Mathis

DISSENT

I disagree with the majority's decision to affirm the Arbitrator who denied Petitioner's claim based on incorrect facts and the absence of applicable case law. Additionally, I disagree with the majority's interpretation and reading of the facts and case law. Based on the evidence in the record and applicable case law, I would have found that Petitioner's claim is compensable as the Commission has jurisdiction to decide the instant claim under the Illinois Workers' Compensation Act as the last act of hire occurred in Illinois on May 9, 2018, when the union referred Petitioner to Respondent, removing him from the referral list.

In the instant case, Petitioner was hired through a union agreement referral system as both Simms and Clark testified. Clark, Respondent's office manager, testified that on May 8, 2018, Petitioner interviewed for the position, and it appeared that the general manager offered Petitioner

the position as Petitioner was given the opportunity to take, and passed, a drug screen and physical exams that day. Clark also testified that payroll records showed Petitioner began getting paid as of 6:00 am on May 9, 2018 and Petitioner was a new hire as of May 9, 2018. Simms testified that Petitioner was hired prior to being dispatched (referred) by the union on May 9, 2018. Simms testified that per the union contract, Petitioner, as a union member, was not allowed to formally accept employment until the union dispatched (referred) him to the employer. Simms confirmed that Petitioner could not be considered an employee until he interviewed and passed both drug and physical exams. Fagan testified that Petitioner became an employee on May 9, 2018 when the union removed Petitioner from the referral list. Fagan testified further that Local 150 is the exclusive referral agent for Phoenix in Indiana.

Ultimately, I would have found that *Hunter Corp. v. Industrial Comm'n*, 268 Ill. App. 3d 1079 (1st Dist. 1994) is analogous to the instant case and should be controlling. In *Hunter*, the employee was hired through a referral list from the union and if the employee showed up for work and the contractor did not assign work, the employee was entitled to be paid for 2 hours. The employee was only required to complete tax forms and provide a list of employers when reporting to the job site. No application was needed when the employee arrived at the job site. The *Hunter* court agreed with the Commission's conclusion that the contract was formed in Illinois. The court reasoned that union members, which included the employee, could not seek employment on their own but were required to seek employment through the union as part of the union agreement referral system. The court found it significant that the union contract stated the union was the exclusive referral agent.

The union agreement in this case has very similar provisions as the union agreement in *Hunter*. Section 1.01 of the union agreement states that the union is the "sole and exclusive bargaining agency of all production and maintenance employees at the company's installations located in Indiana." Further, Section 4.12 states that an employee who reports for work at the scheduled starting time without having previously been notified not to report for work, will be paid 4 hours at the applicable rate just for reporting to work." This is very similar to the union provision in *Hunter* and shows that once an employee reports to work, Respondent cannot turn them away without consequence, that being a requirement to compensate the employee for simply showing up at the job site.

I note that *Skanska v. Illinois Workers' Compensation Comm'n*, 2021 IL App (4th) 210003WC-U, is highly distinguishable as the employee in that case was required to show a clean drug screen, complete an I-9 form, and complete a "simple application," in addition to tax forms, when the employee arrived at the job site. In essence, the employee had to apply for the job at the job site. In our case, Petitioner had already applied, and Respondent agreed to hire Petitioner prior to arriving at the job site. The only action that needed to occur for Petitioner to actually begin working for Respondent was that the union referral needed to be sent to the Respondent, which was done on May 9, 2018. Likewise, *Correct Construction Co. v. Industrial Comm'n*, 307 Ill. App. 3d 636 (1st Dist. 1999), is also distinguishable for similar reasons. In *Correct Construction*, the employee was required to complete an actual application and provide a drug screening card on

arrival to the job site. In this case, the employer had to make the decision whether to hire the employee once the employee arrived with the proper documentation and contingent on the application being accepted. This is not the situation here. In this case, Petitioner had already been hired, as the majority concedes, however, Petitioner had not yet started working. Finally, I also find that *Campbell v. Illinois Workers' Compensation Comm'n*, 2015 IL App (1st) 133234WC-U, is highly distinguishable as there was no union agreement or union referral at issue in that case.

For the reasons set forth above, I respectfully dissent.

/s/ *Deborah J. Baker*
Commissioner Deborah J. Baker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC007628
Case Name	Jeffrey Valles on behalf of Hunter Valles v. Metal Services, LLC dba Phoenix Services, LLC
Consolidated Cases	
Proceeding Type	19(b)/8(a) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	13
Decision Issued By	Steven Fruth, Arbitrator

Petitioner Attorney	Matthew Gannon
Respondent Attorney	Daniel Swanson

DATE FILED: 11/22/2022

THE INTEREST RATE FOR THE WEEK OF NOVEMBER 22, 2022 4.52%

/s/Steven Fruth, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)/8(a)

Jeffrey Valles on behalf of Hunter Valles Case # **22 WC 007628**
Employee/Petitioner

v.

Metal Services, LLC *dba* Phoenix Services, LLC
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each a party. The matter was heard by the Honorable **Steven Fruth**, Arbitrator of the Commission, in the city of **Chicago**, on **June 14, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

O. ☒ Other **Indiana v Illinois Jurisdiction**

FINDINGS

On the date of accident, **March 3, 2022**, Respondent ***was not*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**93,548.00**; the average weekly wage was $**1,799.00**.

On the date of accident, Petitioner was **23** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of $**11,700.00** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

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

ORDER

Petitioner failed to prove that Respondent was operating under and was subject to the Illinois Workers' Compensation Act, having failed to prove that the last act necessary to confirm an employment contract between Hunter Valles and Respondent occurred in Illinois, therefore Petitioner's Application for Adjustment of Benefits is denied.

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

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

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

NOVEMBER 22, 2022

_____

Signature of Arbitrator

JEFFREY VALLES, on behalf of HUNTER VALLES
v.
METAL SERVICES, LLC dba PHOENIX SERVICES, LLC
22 WC 007628

INTRODUCTION

The sole issue in dispute in this case is whether the employment contract between Respondent Phoenix Services Harbor West and Petitioner Hunter Valles was formed in Illinois or in Indiana.

Michael Simms, Operating Engineers Union Local 150 Business Representative, and David Fagan, Local 150 Financial Secretary, testified for Petitioner. Rachel Clark, Phoenix Services Harbor West Office Manager, and Joshua Bagnall, Production Manager and current General Manager of Phoenix Services Indiana Harbor West, testified for Respondent.

STATEMENT OF FACTS

Michael Simms testified on behalf of Petitioner. He is the Business Representative for International Union of Operating Engineers, Local 150. He testified pursuant to subpoena. He was aware that Hunter Valles previously worked for Respondent Phoenix Services at its Riverdale, Illinois location. However, at the time of his accident on March 3, 2022, Mr. Valles was working at Cleveland-Cliffs, Indiana Harbor West in East Chicago, Indiana. Mr. Valles worked as a Hot Pit Loader Operator.

Mr. Simms testified that he represents operating engineers in the slag industry in role as Business Representative. He represents 20 different contractors and performs contract negotiations, administers grievance procedures for the members, and deals with various issues which may arise for members on those sites. Mr. Simms testified that he is a go-between or middle person between Phoenix and Local 150. Local 150 headquarters is located in Countryside, Illinois, District 1, with a satellite office, District 7, in Merrillville, Indiana.

Mr. Simms identified the agreement between Local 150 and Respondent Phoenix Services ["Phoenix"] (PX #6, Industrial Agreement Between Local 150 and Metal Services, LLC *dba* Phoenix Services, LLC), which he helped negotiate. It covers the employment of Hunter Valles as a production employee. Mr. Simms described the procedure for filling a vacancy at the jobsite by first posting an open position for five days.

If the vacancy is not filled, Respondent will call in a work order to the dispatch office at District 7 satellite office in Merrillville. The main dispatch office is the Countryside, Illinois union headquarters.

Mr. Simms testified about the importance of seniority with the union and that a seniority list is maintained in Countryside. He identified what he described as a "dispatch" form for Hunter Valles to his former job with Phoenix in Riverdale (PX #4). He testified that all dispatch forms go through Countryside. Further, dispatch forms are important for purposes of health, pension, and welfare benefits. The union needs to know where everybody is working.

Mr. Simms testified about the distinction between pre-employment and post-employment process with Local 150 and Phoenix. There is a pre-employment physical, drug test, and interview, which are unpaid. A member would not be an employee during the interview, physical, and the drug test. Mr. Simms identified the employment referral slip for Hunter Valles dated May 9, 2018 (PX #5). He testified that the employment referral slip was the last act that confirmed the employment, and that it was important because the union must confirm that the employee was hired by the company.

Mr. Simms testified that when the employee referral form is completed and taken to Countryside, the member is taken off the out-of-work list and classified as an employee of the company. The union member can reject the job and go to a different job before Countryside receives the employee referral form. He testified that if Hunter Valles did not call the union hall and request to be released by dispatch, he is not allowed to be an employee of Phoenix.

Mr. Simms confirmed that Hunter Valles worked for 11 months at Phoenix in Riverdale and then had a 2 ½ month break in employment before starting to work at Phoenix Services Harbor West in Indiana on May 9, 2018.

On cross-examination, Mr. Simms admitted that the union confirmed Hunter Valles was hired before a dispatch is issued. Mr. Simms testified that Mr. Valles was already hired when the union issued the dispatch. He specifically testified that "we are confirming that he has been hired and then he is dispatched. Hunter was hired by Phoenix Services before he was dispatched." Mr. Simms confirmed the order of events again, "the company hires him" and then the dispatch is issued. He was unaware that Mr. Valles was on Respondent's payroll starting May 9, 2018.

Mr. Simms agreed that Local 150 is the exclusive referral agent for Phoenix Services. Mr. Simms identified Phoenix Services Seniority List (RX #6), which reflects Hunter Valles began working at Harbor West Services on May 9, 2018. May 9 was Mr. Valles' seniority date, when his 520-hour probationary period started.

On further cross-examination Mr. Simms confirmed that Respondent Phoenix, and not Local 150, determines whether a referral is qualified for an available position. He also testified that Monica Sutton is listed as the issuer of the Union Employee Referral Form (PX #5). Ms. Sutton works out of the District 7 union office in Merrillville, where the referrals are created for Phoenix Services Harbor West. Additionally, Mr. Simms testified that the dispatch form, what he described as the employee referral form, is an internal union document. It was issued internally after Ms. Sutton in the Merrillville Local 150 satellite office received notice that Hunter Valles was accepted as an employee at Respondent Phoenix Services Harbor West in Indiana.

On redirect examination Mr. Simms testified that per the contract Hunter Valles could not accept employment until formally dispatched. Mr. Valles would not be considered an employee until dispatched. Mr. Simms testified that last act of accepting employment is the dispatch. However, he added that Phoenix had to wait until a member is formally dispatched in order to formulate a contract of employment.

On recross-examination Mr. Simms confirmed that Ms. Sutton issued the dispatch, PX #5, on May 9 in the Merrillville District 7 office. He acknowledged that nothing on the form, PX #5, has nothing listing any kind of agreement from anyone from Respondent Phoenix.

On further redirect examination Mr. Simms testified that he had not seen anything at trial that established that Hunter Valles started on May 9. Any dispatch has to go through the Countryside headquarters. Ms. Sutton must get approval from Countryside District 1 in order to send a dispatch.

On further cross-examination Mr. Simms testified that Ms. Sutton had to confirm that Mr. Valles accepted the position before issuing the dispatch. Mr. Valles confirmed his acceptance of the offered position at 7:00 am (May 9, 2018) and would then be an employee of Respondent Phoenix.

On further redirect examination Mr. Simms confirmed that Hunter Valles was not allowed to accept the position until he was dispatched by the union. The dispatch was required to formulate Mr. Valles' hiring.

On further cross-examination Mr. Simms confirmed that the dispatch was an internal union document.

David Fagan testified that he has served as the Financial Secretary of Union Local 150 for 17 years and has been with the union for 44 years. He is familiar with the Collective Bargaining Agreement (PX #6). As Financial Secretary, he participates in various meeting in Countryside, including pension fund, health and welfare fund, apprenticeship fund, retirement enhancement fund, and retiree medical savings account. Mr. Fagan

testified that Mike Simms, the Business Representative, ensures that contractual obligations are being followed by both parties.

Mr. Fagan testified that the union has a satellite office in Merrillville, Indiana with a 219-telephone number, which is first routed first through Countryside. He testified about dispatch forms, which are called employment referrals. These are important for the purpose of identifying when a member actually commenced work and is no longer available on our referral list for dispatch for a different company. Mr. Fagan explained the out-of-work list and that it is maintained so that when a work order comes in, the union can dispatch the first one on the out-of-work list.

Mr. Fagan reviewed Hunter Valles' Employee Referral form (PX #5) and testified that Mr. Valles was classified by the union as a Phoenix employee on May 9, 2018. That was the day he was removed from the referral list. He testified that the 219-area code on the dispatch form is routed to Countryside, where all dispatch records are maintained.

Mr. Fagan testified that in his mind the last step to confirm employment is when the member starts work. Hunter Valles' dispatch was May 9, 2018.

On cross-examination, Mr. Fagan confirmed that Hunter Valles becomes an employee of Phoenix when he starts work. Further, he testified that he was not aware of the facts and circumstances surrounding the hiring of Mr. Valles on May 9, 2018.

Mr. Fagan testified that he was not aware whether the 219 number on PX #5, the Hunter Valles Employment Referral form dated May 9, 2018, with a 7:00 am report time, was the phone number for Phoenix Services or the Merrillville satellite Union office. Mr. Fagan testified he believed that the 219-area code phone number would go through Countryside, because "everything in our satellite offices is controlled through Countryside, even going down to the heat and air conditioning. If we need to heat up or air conditioning, we have to call."

Mr. Fagan confirmed that as of 7:00 am Central Time, he (Hunter Valles) was already an employee of Respondent Phoenix Services, Indiana. He confirmed that process is when the union is notified of an open position the union has 48 hours in which to refer a member for a hiring interview.

Mr. Fagan testified on cross-examination that Local 150 is the exclusive referral agent for Phoenix Services Harbor West in Indiana but is not the exclusive hiring agent. He further testified that Respondent Phoenix Services has the right to accept or reject candidates for employment referred by Local 150. Respondent, and not the union, determines whether a referral is qualified for an available position. Mr. Fagan testified that the union has a separate agreement with the Phoenix Services Riverdale facility.

On redirect examination Mr. Fagan testified that Hunter Valles had the right to take another job with another company until he requests to be dispatched. Mr. Fagan

added that Mr. Valles was not an employee until dispatched on May 9, 2018. He added that under the contractual agreement Local 150 is classified as a hiring hall and a referral hall. There are specific requirements in order to confirm employment, the last being the dispatch.

On further cross-examination Mr. Fagan testified the employee referral form (PX #5) is an internal union document, the main purpose of which is to remove Hunter Valles from out-of-work list. He confirmed that Respondent Phoenix Services Indiana would make the final decision whether to hire a union referral.

The Arbitrator took judicial notice that northwest Indiana is in the Central Time Zone and that area code 219 is in northwest Indiana. Additionally, the Arbitrator asked Mr. Fagan whether Employee Referral form and dispatch form are interchangeable terms referring to the same document, to which Mr. Fagan answered "no."

Rachel Clark testified that she has worked for Phoenix Services Harbor West for 14 years. In May 2018 she was the Office Manager but is currently working as the Production Manager. In her job as the Office Manager in 2018, her main responsibilities were billing, accounts payable, human resources, and assisting in the hiring process. Ms. Clark testified that she is familiar with the hiring process and Union Local 150 procedures for hiring a referred candidate or fill an open position, like a truck driver laborer or pot carrier. She would call the Merrillville Union Hall and talk to Monica Sutton or Tracy Hadley to request a candidate when Phoenix Services needs manpower. She has been involved in hiring hundreds of people in the past 14 years.

Ms. Clark testified that she knows Hunter Valles but does not remember any of the specifics about his hire in May 2018. She would post a bid for a truck driver for 5 days and if nobody was qualified after 5 days, she would call the Merrillville Union Hall and request an applicant. Then an interview would be set up with the referred union applicant for the open truck driver position with her boss, General Manger, Paul Benson. In this case, Hunter Valles scheduled an interview with Mr. Benson on May 8, 2018. The first thing he did was fill out a new hire job application (RX #1). If the General Manager is interested and the applicant is interested after the interview, a drug screen, hearing test, and pre-employment physical would be set up immediately at Comprehensive Care in Gary, Indiana.

Ms. Clark testified that Hunter Valles passed the drug screen and pre-employment physical. The results were received by Phoenix from Comprehensive Care on May 8, 2018, at 10:16 am (RX #2). Ms. Clark testified that she would notify Mr. Benson. It was 50/50 whether she or Mr. Benson would call an employee that they could come in and start the very next day.

Ms. Clark further testified that she would have prepared a timecard for Hunter Valles and the new hire packet consisting of tax forms, W-4's & I-9's, emergency contact

information, and a checklist that says you received a hard hat and safety glasses and other personal protective equipment. New hires are instructed to come into the Phoenix Services office at 6:00 am on their first day, which was May 9, 2018 for Hunter Valles. After filling out the new hire packet, new hires start on their safety training, "SOPs", "JSA", and spill prevention. Ms. Clark testified that a 6:00 am start time on the first day was the standard operating procedure for all new hires.

On cross-examination, Ms. Clark testified that Hunter Valles started getting paid at 6:00 am on May 9, 2018, based upon payroll records. She agreed that she did not have any payroll records with her and was assuming that Mr. Valles' payroll records would reflect that he was paid beginning at 6am on May 9, 2018.

Ms. Clark testified that at Indiana Harbor West, Hunter Valles was a new hire as of May 9, 2018, despite having been employed by Phoenix Services in Riverdale previously. She testified further that filled out an entirely new packet and his seniority date started at the bottom when he began on May 9, 2018. She noted that RX# 3, Phoenix Services Personnel Action form, stated that Mr. Valles was not eligible for rehire at Riverdale. She clarified that the union contract required a Local 150 referral for any job opening.

On redirect examination Ms. Clark reviewed PX #5, the Employee Referral Form. She testified that Phoenix does not receive the Employee Referral Form. Ms. Clark noted PX #5 is on the letterhead of International Union of Operating Engineers, Local 150, Countryside. In her experience she has never seen an Employee Referral Form like PX #5.

Ms. Clark confirmed that Hunter Valles' first day of hire was May 9, 2018. That was when Mr. Valles was first paid. She identified RX #6, the Phoenix seniority list. It shows Mr. Valles' seniority date as May 9.

On recross-examination Ms. Clark testified that she is aware of Phoenix's hiring procedures. She agreed that it takes two people to form a contractual agreement. She is only aware of Phoenix's requirements for hiring.

Joshua Bagnal testified he is currently General Manager of Indian Harbor West. He is responsible for oversight of the site, the employees on site, managers, equipment, and providing for customers. He was Blast Furnace Production Manager in May 2018. He was not involved in the hire of Hunter Valles. Mr. Bagnal explained the hiring process: open positions are posted in the employee welfare building but if no one applies for the job on site, Local 150 is requested to refer a qualified candidate.

Mr. Bagnal defined a "dispatch" as somebody sent to him by someone else. He further explained that the union has 48 hours in which to refer a hiring candidate for an interview after the union is contacted. An application for employment is completed in the

interview. If the referred candidate is qualified, they are sent for a drug test and physical exam to Comprehensive Care in Gary, Indiana in 2018, like Hunter Valles was on May 8, 2018.

Mr. Bagnall assumes Paul Benson, the General Manager, made the telephone call to Hunter Valles to offer him the job. Mr. Bagnall identified the seniority list dated May 9, 2018 (PX #6), which was Mr. Valles' hire date. He testified that someone from Phoenix offered Mr. Valles a job, which he accepted, before the February 9 seniority date. Mr. Bagnal also testified that he assigns a start date for employees who qualify after interview, drug test, a physical exam.

Mr. Bagnal stated the goal is to have the employee start work the next day after completing the pre-employment process. New hires started at 6:00 am so that they can be on site and ready to do their day-long safety orientation. New hires also fill out I-9 and W-4, tax documents, at that time. The hiring procedure was the same in 2018 under General Manager Paul Benson as it is now.

Mr. Bagnal confirmed that Phoenix has the right to reject an applicant if they are unqualified. He confirmed that Phoenix and not the union hires applicants. He noted that Hunter Valles met all qualifications and was hired.

On cross-examination testified that he does not know anything about any conversation between Hunter Valles and Paul Benson during the application interview. He does not know if Mr. Valles told Mr. Benson that he had to wait to be dispatched before he could accept employment. Mr. Valles would have had the right to accept or reject an offer of employment.

CONCLUSIONS OF LAW

Was the employment contract between Respondent Phoenix Services Harbor West and Petitioner Hunter Valles formed in Illinois or in Indiana?

The Arbitrator finds that Petitioner failed to prove that an employment contract between Respondent Phoenix Services Harbor West and Hunter Valles was formed in Illinois. In so doing, the Arbitrator weighed the conflicting interpretations of the Industrial Agreement by and between International Union of Operating Engineers Local 150, AFL-CIO and Metal Services LLC dba Phoenix Services LLC, PX #6, as applied to the facts in order to determine the locale of the last act of hire. The Arbitrator finds that the last act of hire occurred Phoenix Services Harbor West, in Indiana.

The evidence demonstrated that Respondent's procedure for filling a job vacancy was an internal posting of the vacancy for five days. If no internal candidate applied then Respondent, pursuant to the collective bargaining agreement, PX #6, notified Local 150 of the operating engineers union of the job vacancy. Pursuant to the collective bargaining agreement, Local 150 had 48 hours in which to refer a qualified candidate from its out-of-work list. The Local 150 candidate would then be interviewed by Respondent's manager and complete an application form. If that interview was satisfactory, the candidate would then be referred for a physical examination and drug testing. If the candidate passed the physical examination and drug test he or she would be given a start date, at which time various tax forms and safety training were completed.

Petitioner's witnesses, Michael Simms, Operating Engineers Union Local 150 Business Representative, and David Fagan, Local 150 Financial Secretary, testified that the hiring process was controlled by a "dispatch" by the union, an Employment Referral, PX #4 and PX #5, as examples. Mr. Simms and Mr. Fagan testified that the dispatch confirmed that an applicant, in this case Hunter Valles, had been hired.

However, Mr. Simms and Mr. Fagan confirmed that the union is a referral agent in this process and not a hiring agent. They also confirmed that Respondent had a right to reject an applicant referred by the union. Both concepts were confirmed by Respondent's witnesses. Mr. Fagan also confirmed that Respondent was reposed with the final determination of whether a candidate was qualified for the vacant job. This did not take until Mr. Valles completed the application process in Indiana.

Petitioner argues that the issuance of a dispatch through its Countryside, Illinois District 1 headquarters was the confirming, last act of hire. Throughout the trial the term "dispatch" was used interchangeably with the Employment Referral, PX #5. Mr. Fagan, upon questioning by the Arbitrator, denied that the terms were interchangeable. The Arbitrator does not find this distinction to actually be a difference, particularly noting that no document was offered in evidence to demonstrate an actual difference. The two terms described the same act: a referral of a Local 150 member from the out-of-work list to Respondent in response to a notice of job vacancy from Respondent. It should be noted that Petitioner's Exhibit List notes PX #4 and PX #5 as "dispatches."

The evidence clearly established that Local 150 was a referring agent. Hunter Valles was referred to Respondent on May 9, 2018, at which time he completed an application, was interviewed by Respondent's manager, was physically examine, submitted to a drug test, and completed income tax forms, one of which was presumably related to Indiana income, the I-9. Mr Valles then was issued safety equipment and completed safety orientation. Mr. Valles was added to Respondent's seniority list that day. All of these activities took place at Phoenix Services Harbor West in East Chicago, Indiana. Mr. Valles was added to Respondent's payroll on May 9, 2018. Mr. Fagan essentially confirmed this when he testified that the last act confirming employment was

when the (union) member stated work. The evidence clearly showed that Mr. Valles started work on May 9, 2018 in Indiana.

In addition, the Employment Referral, PX #5, was issued by Monica, presumably Monica Sutton, who was located in Local 150's satellite District 7 office in Merrillville, Indiana. That form states "Wage Rate: $0.00." A contract for employment cannot be confirmed without an agreement regarding a rate of pay. PX #5 cannot confirm a contract of employment without this essential element.

The appellate case of *Correct Construction Co. vs. Industrial Comm'n,* 307 Ill. App. 3rd 636 (1999) is strikingly similar to this matter. There the union was a referring agent for the petitioner's application for employment in Indiana. As here, the job application was executed in Indiana, as was the job interview, the physical exam, and confirmation of drug-free testing. In *Correct Construction* the petitioner claimed that last act of hire was in Illinois, where he was a resident and had accepted the job offer. The Appellate Court rejected this theory, finding that the last act for hire was the successful completion of the interview, physical exam, and clearance of illicit drug use. The petitioner's argument in *Correct Construction* would fail here, given the fact that Hunter Valles was an Indiana resident.

Based upon the totality of facts and circumstances, the last act necessary to form a contract for hire between the parties occurred in Indiana after Hunter Valles reported to Respondent Phoenix Services' Indiana job site. After passing the physical and drug test in Indiana, he was offered the job, which he accepted because he appeared at the Phoenix Services Indiana jobsite for his first day of work on May 9, 2018.

Petitioner's Application for Benefits is denied for lack of Illinois jurisdiction.

_____ _____

Steven J. Fruth, Arbitrator Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC011015
Case Name	Connor Shaw v. Chicago Bears Football Club
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0377
Number of Pages of Decision	40
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Richard Gordon
Respondent Attorney	Daniel Flores

DATE FILED: 8/21/2023

/s/ Deborah Baker, Commissioner

Signature

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CONNOR SHAW,

Petitioner,

vs. NO: 19 WC 11015

CHICAGO BEARS FOOTBALL CLUB,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, whether medical treatment was reasonably necessary, Petitioner's entitlement to temporary disability benefits, and Petitioner's entitlement to permanent disability benefits, and being advised of the facts and law, provides additional clarification, but otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

I. FINDINGS OF FACT

The Commission adopts the Findings of Fact in the Decision of the Arbitrator and incorporates such facts herein.

II. CONCLUSIONS OF LAW

Although Respondent filed a Petition for Review for this case number, the above enumerated issues were not actually disputed in its brief. The Commission notes that in said brief, Respondent agreed with the Arbitrator's permanent disability award of a 25% loss of use of a leg. The Commission also agrees with this award, and thus affirms the Arbitrator's award.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 21, 2022, as clarified above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $775.18 per week for a period of 53.75 weeks, as provided in §8(e)(12) of the Act, for the reason that the injuries sustained caused the 25% loss of use of the left leg.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of 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 $41,800.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

August 21, 2023

DJB/wde

O: 7/12/23

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/s/*Deborah J. Baker*
Deborah J. Baker

/s/*Stephen Mathis*
Stephen Mathis

/s/*Deborah L. Simpson*
Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC011015
Case Name	SHAW, CONNOR v. CHICAGO BEARS FOOTBALL CLUB
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	37
Decision Issued By	Steven Fruth, Arbitrator

Petitioner Attorney	Richard Gordon
Respondent Attorney	Rich Lenkov

DATE FILED: 6/21/2022

THE INTEREST RATE FOR THE WEEK OF JUNE 14, 2022 2.16%

/s/Steven Fruth, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Connor Shaw
Employee/Petitioner

Case # **19 WC 11015**

v.

Consolidated case:

Chicago Bears Football Club
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Steven Fruth**, Arbitrator of the Commission, in the city of **Chicago**, on **6/29/2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

☐ TPD ☐ Maintenance ☐ TTD

L. ☒ What is the nature and extent of the injury?

M. ☐ Should penalties or fees be imposed upon Respondent?

N. ☐ Is Respondent due any credit?

O. ☐ Other _____

FINDINGS

On **8/27/2016** Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**510,000**; the average weekly wage was $**9,807.69**.

On the date of accident, Petitioner was **25** years of age, ***married*** with **2** dependent children.

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

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

ORDER

PERMANENT PARTIAL DISABILITY WITH 8.1B LANGUAGE

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained a permanent partial disability of 25% loss of use of the left leg, 53.75 weeks.

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.

JUNE 21, 2022

Signature of Arbitrator

CONNOR SHAW v. CHICAGO BEARS FOOTBALL CLUB
19 WC 11015, consolidated with 19 WC 11016

INTRODUCTION

These matters proceeded to hearing before Arbitrator Steven Fruth. The disputed issues were:

19 WC 11015 (DOI 8/27/2016): ***F:*** Is Petitioner's current condition of ill-being causally related to the accident?; ***L:*** What is the nature and extent of the injury?

19 WC 11016 (DOI 8/31/2017): ***F:*** Is Petitioner's current condition of ill-being causally related to the accident?; ***L:*** What is the nature and extent of the injury?

STATEMENT OF FACTS

Petitioner Connor Shaw testified he has a Bachelor of Science in Entertainment and Management from the University of South Carolina. He played quarterback in college as well.

Petitioner became employed by the NFL in 2014 as an undrafted free agent. He was employed for 4 years. Petitioner testified that one needs to be in "elite physical fitness" to perform as an NFL quarterback. This includes an off-season strength and conditioning program, practices during OTAs ["Organized Team Activities"] from April to June and training camp in August.

Petitioner further testified that to perform as an NFL quarterback, one must throw the ball with "extreme accuracy" and have mobility to escape the pocket and extend plays. This requires the ability to sprint, cut, and pivot.

Petitioner participated in the 2014 NFL Combine, an invite-only workout for scouts and NFL teams held prior to the NFL draft, which is considered the "most comprehensive physical examination" of a player's life. At the Combine, Petitioner specifically underwent baselines isokinetic testing of his right and left quadriceps and hamstrings (PX #1). Petitioner testified that he was invited to the 2014 NFL Combine. The Combine was held for 3 days and included mobility exercises, flexibility exercises, MRIs, X-rays, and on-field workouts. The strength training tested his left leg, and the on-field workouts required the use of his legs

Petitioner went undrafted during the 2014 NFL draft but was signed on May 12, 2014 (the day after the draft) to a three-year NFL Player Contract with the Cleveland Browns, which paid him $420,000 in 2014, $510,000 in 2015, and $600,000 in 2016 (PX #8). He underwent a physical examination that included his left leg.

Petitioner had suffered a left foot Lisfranc injury that required surgery while in college in November 2012. That surgery was performed during his junior year. During his senior year, he felt soreness, but the injury did not impair his ability to play quarterback. The injury did not impair his ability to play quarterback in the NFL either. Petitioner did not treat for his left foot injury after college but may have discussed soreness with the trainers. While in college, Petitioner did not undergo any other surgeries or sustain any other injuries that kept him from playing.

Petitioner testified that he suffered 2 concussions while in college: the 1st was in 2011 and the 2nd in 2012. He testified he had no after-effects from his concussions. In 2013, Petitioner suffered a right shoulder AC sprain that did not affect his ability to play quarterback.

Petitioner testified that he played for the Browns from 2014 to 2016. He was released prior to the 2016 season. While playing for the Browns, Petitioner suffered a right thumb UCL injury in which he tore a ligament that chipped off a piece of bone in August 2015. The injury occurred when he was tackled and landed onto his right hand which bent back his right thumb. Petitioner underwent surgery and missed the entire 2015 season. Petitioner testified that during 2016 his thumb was "a tad sore" but that it did not affect his ability to play quarterback.

Petitioner testified that during April 2016 OTAs, he suffered a left knee hyperextension. The injury kept Petitioner from performing as a quarterback for 2 weeks. The injury did not limit Petitioner's ability to play quarterback after he was cleared to play. Petitioner was released by the Browns in July 2016.

After being waived by the Browns, Petitioner signed with the Bears, who assumed the remainder of his 2016 Browns. Petitioner testified that when he reported to the Bears during the last week of July, he underwent a physical examination. From July 2016 to August 27, 2016, Petitioner testified that there was no condition to his left leg, left ankle, left knee, left hamstring, right thumb, or any other part of his body that limited his ability to play quarterback.

Petitioner testified that during an August 27, 2016 preseason game, he broke his left tibia and fibula while throwing a pass. He was tackled with his left foot planted after he released the ball. His left leg snapped underneath him. After the injury, his left foot was pointing at a 90° angle and extreme pain.

Petitioner was transported to Skokie Hospital. He underwent surgery by Dr. Garapati and was hospitalized for 3 to 4 nights. Dr. Birmingham, a Bears physician, also participated in the surgery. Petitioner testified they made an incision in the knee, hollowed out the bone marrow in my tibia, and placed a metal rod in place of the bone marrow. There were 2 screws at the top of his leg and 2 at the bottom.

Petitioner underwent post operative rehabilitation at the Bears training complex until January 2017. He underwent rehabilitation for 5 to 7 hours per day, as well as attending quarterback meetings. Rehabilitation included a bone stimulator and an "anti-gravity treadmill" that reduced his body weight while walking and running. Petitioner had pain and discomfort during "explosive exercise," lateral exercises, torque of twisting, and anything that required a lot of body weight. These are part of the requirements of an NFL quarterback. Petitioner testified that he did not injure his left hamstring in the 2016 accident but noticed left hamstring tightness during rehabilitation.

Petitioner testified that during rehabilitation in December and January, he did progression exercises and gradually built up to running with more speed. He had pain and discomfort with the increased speed and with explosive movements. The pain was a "sharp knife" sensation where the break occurred and towards the ankle where they made an incision. He noticed 3 areas of pain, where the screws were placed in the upper and lower leg and the left knee.

Petitioner continued his rehabilitation at Furman University in South Carolina. He remained in contact with the Bears training staff, mainly through text messages with trainer Will Rogers. He testified that he texted that every day of rehabilitation took 2 days for the soreness and swelling and pain to go down.

Petitioner testified that from August 2016 through January 2017, he performed rehabilitation 5 to 7 hours per day at Respondent's team training facility, while also attending team meetings and assisting in game preparation. He continued his rehabilitation at Furman University from January 2017 until April 2017. Petitioner communicated by text with Respondent's team trainers while rehabbing at Furman University:

> Man this [patella] tendon is still giving me fits . . . I'm a toe runner and it's impossible for me right now to run on toes . . . For every 1 day I get after it lower body like squats lunges box jumps it takes a solid 2 days for it to feel decent . . . [P]ain is definitely still there. Drops are ok I'll feel a tweak every now and then. Agility stuff though like cutting hard is impossible for me. (PX # 1).

In February 2017, Petitioner returned to Chicago for an MRI and met with Dr. Bowen. Petitioner was eventually cleared to play on April 20, 2017. He testified that prior to being cleared to play, he had not tried any organized football activities with the Bears nor undergone "any of the rigors that are unique to the NFL." He does not recall the doctor putting him through physical exercises similar to the forces his leg would feel while playing quarterback in the NFL.

Prior to Petitioner's August 2017 injury, he was performing agility drills, the strength and conditioning program and quarterback specific drills such as drops and mobility exercises. During this time, Petitioner testified that he noticed the same discomfort, knifing sensation, and sharp sensation with any bootleg action when he needed to plant, pivot, explode out of a cut, or change direction. To perform a bootleg or escape the pocket, he was required to pivot and explode off his leg and transfer weight from the back foot to the front foot as you throw.

Petitioner testified that his weight training activities included leg exercises such as a curl machine, leg presses, leg extensions, and squatting. Petitioner noticed that he could not do the "normal" weight he was doing prior to the injury. Petitioner testified that he noticed that he was not "quite as fast or quite as quick or explosive" due to pain.

After expiration of his 2016 contract, Petitioner re-signed with the Bears in April 2017 for $465,000 (PX #8).

Petitioner underwent the surgical removal of the top 2 screws in January 2017, which relieved some pain in that area.

Prior to training camp in July 2017, Petitioner testified that he participated in OTAs and minicamp. He testified that from the start of minicamp in July and prior to the injury in August 2017, he had limited mobility due to pain and discomfort in any of the exercises that required him to explode off the left foot, torque, or change directions.

Petitioner played in the last 2 of the 4 preseason games. He did not play in the first 2 games because he had the bottom 2 screws removed from his left leg in early August 2017. Removal of those screws relieved some of his pain, but Petitioner stated that he still had pain at the fracture site and in his left knee.

Petitioner testified that in the 3rd preseason game he played for one series, 4 or 5 plays. He noticed that he was not as quick or fast during game situations. Pain and discomfort in the top of his left leg and fracture site affected his ability to perform the functions of a quarterback. This limited his ability to escape the pocket.

Petitioner testified that while playing in the 4th game, on August 31, 2017, he escaped the pocket and while running for a 1st down there was a popping sound in his left hamstring. He had noticed tightness of the left hamstring from April through August and

had received treatment with the Bears training staff. Following an MRI, Petitioner testified that he had a grade 1 or grade 2 tear. Petitioner and the Bears agreed to an Injury Release Contract, which cancelled his prior contract, on September 8, 2017.

Petitioner testified that following his injury his left hamstring was extremely sore. He was unable to walk or run. He underwent rehabilitation in Greenville, South Carolina for 2 to 3 months. During his rehabilitation, he noticed knee and ankle pain and discomfort.

During the August 31 game, when he injured his left hamstring, Petitioner was also evaluated for a concussion that occurred when he escaped the pocket, ran for a 1st down, and was tackled.

After physical rehabilitation and separation from the Bears, Petitioner's agent arranged tryouts with the Houston Texans, Indianapolis Colts, and New York Jets.

Petitioner's tryout with the Texans was on October 10, 2017. After an examination by Houston's team doctors, he performed physical activities including sprinting, mobility drills, and drills requiring quick acceleration and deceleration and twisting or planting his left leg. Petitioner testified that during his tryout he had the same pain and discomfort that was not present prior to his injuries. The Texans did not offer a contract.

On December 12, 2017, Petitioner had a tryout with the Jets. He again was examined by team doctors and performed more or less the same activities as the prior tryout. Petitioner testified that he had limited mobility due to pain and discomfort in his left leg. He was not at peak his performance as he was before his injuries. He was not offered a contract.

Petitioner testified that he had a tryout with the Colts, which was similar to the others. This workout was to test his ability to perform as a quarterback. The Jets did not offer a contract and he was never invited to another NFL tryout.

In December 2019, Petitioner attended 2 independent medical evaluations, one in Chicago and one in South Carolina. In January 2020, Petitioner went to a rehabilitation center for left hamstring isokinetic testing. Petitioner testified that he tried his best in testing and the doctor's examination. This included hopping on one foot, which Petitioner testified was challenging, range of motion, and flexibility of the hamstring. He noticed less range of motion of the left hamstring. Other than screw removals, Petitioner did not have any surgery during 2017.

Petitioner testified that after retiring from the NFL, he worked as the tight ends coach at Furman University. This did not cause left leg pain or discomfort. He worked there for 7 months in 2018 and was paid "roughly" $35,000. He then worked at Colonial Life Insurance for "a little over a year" and earned $120,000. Petitioner then worked as the University of South Carolina ("USC") Director of Player Development in 2019. His

current yearly salary is $200,000. Petitioner's current job title is Director of Football Relations. Petitioner's Exhibit 9 shows his 2020 earnings of $169,277, as Petitioner was required to take a furlough due to COVID.

Petitioner's current career goal is to be a quarterback coach. He testified that "for the most part" he is able to perform the physical functions of a quarterback coach, which requires simulating quarterback drills and understanding what drills to perform.

Petitioner testified that he does not perform any sprinting explosive workouts or change of direction because he still experiences pain and soreness. He described it as a dull ache around his knee and sharp pain sensation around the fracture site. Petitioner exercises regularly on a bike. Petitioner is married with 2 children, ages 6 and 4. He has pain, discomfort, and soreness when chasing his children around the house or the park. There is left leg discomfort while using stairs or chores around the house. He has aches and pain when he squats down for too long.

Petitioner uses ice to reduce swelling around the knee. He is not currently treating with a physical therapist. Petitioner testified that he has not able to regain the physical abilities to play quarterback in the NFL after his injuries. He does not notice his hamstring unless he is working out on it. It is then tight and sore. Prior to his injuries, he did not have pain or discomfort during football workouts prior to his injuries.

Petitioner testified that he has left leg pain and discomfort after standing for a couple of hours at practice. He "soldiers on" through the pain brought on by daily living activities but still notices pain after load bearing or explosive activity. Since his retirement, Petitioner has not practiced the moves of an NFL quarterback. He hosts youth football camps in which he tries to show the kids how to perform the moves of an NFL quarterback. He does not perform these moves as explosively or as fast as he would have due to his limitations, but they were still done at 100% full speed.

On cross-examination Petitioner testified that his camps are for children ages 6 to 11. The drills are the same but the intensity level for an NFL quarterback is different. Showing children NFL moves is not similar to trying out for an NFL team.

Petitioner testified that he was not aware of any undrafted free agent quarterbacks that were currently on an NFL roster. Petitioner testified that he was fired by the Bears but admitted that he signed a document on September 8, 2017 (RX #10), entitled Agreement and Release. Petitioner acknowledged the terms of the document and was paid $136,764.70. Petitioner agreed that he reads documents before signing them. During his professional career, he signed many documents and understands the importance of a contract.

Petitioner testified he told the truth to each of his doctors throughout his course of treatment.

After his injury release from the Bears, Petitioner's agent negotiated invitations for Petitioner to try out for 3 NFL teams: Texans, Colts, and Jets. He underwent a physical exam for each. Petitioner testified that he performed all drills but with pain. He said that his leg injury prevented him from performing at an elite level needed to be an NFL quarterback. He testified that he was unable to push off, explode, torque, and other things.

On further cross-examination Petitioner testified that at his October 9, 2017 Texans tryout, he signed a Warranty of Full Disclosure and Indemnity Agreement (RX #5). In pertinent part that document stated, "Player warrants and represents that he has made full and complete disclosure to the physicians retained by Club and/or Club athletic trainers or representatives as applicable to all his present or prior physical or mental defects, illnesses, injuries, or conditions known to him, or which should be known to him, which might prevent, hinder or impair the performance of his services under an NFL standard player contract." Petitioner was cleared to play for the Texans by 2 doctors. That is a requirement to play in the NFL. Petitioner signed and initialed a document for the Jets (RX #7), stating that he warranted and represented a release of liability and stated that he was in excellent physical condition. On October 3, 2017, Petitioner signed a Medical Examination and Authorizations form for the Colts. He told the Colts that he was in excellent physical condition.

Petitioner testified that in 2017 he signed a contract with the Bears for the $465,000 league minimum salary. Not all quarterbacks are paid at the league minimum. Quarterbacks are paid based upon several factors, including skill. Prior to signing the Bears contract, Petitioner told the Bears that he was healthy and cleared to play. He asserted that he was capable of all the rigors, explosiveness, and torque required.

Petitioner was among 4 quarterbacks on the Bears depth chart, which included Mike Glennon, Mitch Trubisky, and Mark Sanchez. Petitioner denied being 4th on the depth chart as the coaching staff said that during OTAs and pre-season, quarterbacks were being evaluated to decide the depth chart ranking.

Petitioner testified a player wants as many repetitions as possible in practice to show the coaches that he is ready to play. Petitioner testified that he did not know how coaches decide reps in relation to the depth chart. The 1st string quarterback takes the 1st string reps. The 2nd string quarterback takes the 2nd string reps with the other 2nd string players. The 1st string is usually the starting group. Petitioner could not remember if he was ever 1st team. He did take 1st team reps in OTAs. He then testified that he was not on the 1st team for the Bears during training camp in 2017.

Petitioner testified that he has not treated with any doctor since 2017. His September 2017 injury settlement states that he would be doing his rehabilitation away from Halas Hall.

Petitioner testified a typical day as Furman tight end coach would include position meetings during spring practice followed by practice and running drills. He would instruct his players during position meetings and teach technique on the field, such as how to run a certain route based upon the leverage of the defender. Petitioner would not physically do the route.

Petitioner was initially the USC Director of Player Development in 2020. This year he became Director of Football Relations. This position allows more flexibility to work in administration, not just football activities. Petitioner signs an annual contract. He was never an offensive coordinator for South Carolina but was an interim quarterback coach last year. The duties of an interim quarterback coach included teaching and coaching during position meetings and on the field. Petitioner would try to simulate the drills the best that he could. This included performing reps as a quarterback would including dropping back, planting, throwing, and following through. Petitioner testified that he could not perform these activities at full speed or to the standard that he would like to perform them.

Petitioner testified that since his University of South Carolina employment, he has not missed time from work due to injuries and has not filed any other workers' compensation claims.

On redirect examination Petitioner confirmed he was employed by the Bears on August 27, 2016 and on August 31, 2017. Each team had his medical records from the Bears for his tryouts with the Texans, Colts, and Jets. The doctors that examined Petitioner at those tryouts talked to him about his 2016 fractures and the 2017 hamstring injury. He did not withhold any information to those teams and was truthful.

Petitioner testified that "cleared to play" means that he could try to play without danger to his leg. No doctor told him that his leg was better than it had been prior to his 2016 and 2017 injuries. He felt he was in excellent physical condition at the time of his tryouts. He had been invited to the tryouts and was hopeful that he could overcome the limitations in his leg and perform as he had with the Browns and the Bears. No other part of his body hindered his performance other than his left leg.

Petitioner testified that even after his fracture, surgery, and screw removals, the Bears coaches were still hopeful enough that he was given 1st string reps.

Petitioner testified that he was incorrect in his response to Respondent's counsel regarding lack of treatment since 2017 and medication. About 1 month before the hearing, Petitioner was running steps inside the South Carolina stadium and "re-tweaked" his left hamstring. He was prescribed hydrocodone, which he took for 2 & 1/2 weeks. His left hamstring generally returned to its 2017 condition.

Petitioner testified that he was faster, more agile, and stronger with his left leg prior to his August 26, 2016 injury. He continues to work as the Director of Football Relations for the University of South Carolina and continues to earn $200,000.

On recross-examination Petitioner did not know his time in the 40-yard dash because it was not tested. He has not run a 40-yard dash for years. Petitioner has sprinted but has not run a 40-yard dash. He last ran a 40-yard dash at the 2014 NFL Combine.

In addition to speed, an NFL quarterback's skills are tested through strength and reach. There are several ways to test an NFL quarterback's skill level.

On further redirect examination Petitioner testified that his IME in South Carolina included strength testing of his hamstring and that he performed the test to the best of his ability. At his tryouts, the Colts, Jets, and Texans did not ask him to perform a 40-yard dash. Prior to signing a contract with the Bears in 2017, the Bears did not ask him to perform a 40-yard dash. When he tried out for the Browns in 2014, he was not asked to perform a 40-yard dash.

When running, it is painful to change directions or cut. When running straight ahead, he does not have the endurance that he used to have from the pounding of running. Petitioner does not believe that he could perform the functions of an NFL quarterback today. He does not believe that he could make an NFL team due to limited mobility issues and pain and discomfort that would not allow him to reach peak performance.

Cliff Stein was called to testify for Respondent. Mr. Stein is the Bears Senior Vice-President and General Counsel. He oversees all legal matters including Workers' Compensation claims. He began working for the Bears in 2002. Prior to working for Respondent, Mr. Stein was in private practice as an attorney and was an NFL certified contract adviser from 1994 to 2002.

Mr. Stein acknowledged that he has no medical training and does not evaluate players' abilities to perform. He is familiar with the criteria used to evaluate players based upon 16 years spent in scouting and draft meetings. He has handled all player evaluation analysis and salary cap analysis so to be able to apply a monetary value to players by using contract data and contract information.

Mr. Stein testified Petitioner was undrafted in the 2014 NFL draft, meaning 32 teams passed on drafting Petitioner in all 7 rounds. There is a process after the draft in which undrafted players are signed to fill out the 90-man rosters. During the preseason, rosters go from 90 players to 53 players. If a player does not make the 53-man roster, he may be placed on the practice squad or will be out of football entirely. Practice players are paid less to just practice. They do not dress for games. He testified that only about 7 or 8 % of undrafted players make a 53-man roster without going to the practice squad.

Mr. Stein further testified that prior to signing a contract, a player is asked to complete forms about his health and ability to perform. They have to sign that they are fully healthy and able to play. The Bears would never sign a player that was injured or unable to pass a physical. As a contract negotiator, Mr. Stein was not permitted to sign a player until he completely cleared by the medical process. The medical staff and training staff will review all available medical records including college and records from other teams. The player then undergoes an orthopedic evaluation and will be referred to another specialist if indicated.

Mr. Stein testified contract negotiations for veteran free agents involve player evaluations, grades by scouts and coaching staff, and comparable players around the league. A drafted rookie evaluation is determined by the rookie pool so there are little negotiations. Undrafted free agents all get the minimum salary and a "split" contract. This means the value they are paid depends upon whether they are on the 53-man roster or injured reserve. There may be a signing bonus depending upon the free agent priority. A lower signing bonus for a player means that player is less in demand.

Mr. Stein also testified that when Petitioner was signed by the Browns, he was given a $5,000 signing bonus. For the Bears, that would mean a lower priority signing bonus. When the Bears signed Petitioner in 2017, it was for a low minimum wage based upon the number of credited seasons. A credited season depends upon how many games they played on a 53-man roster. As Petitioner did not play in 3 games in a season, he finished his career with 0 credited seasons.

The collective bargaining agreement prevents a team from cutting an injured player, but the parties may enter into an injury settlement. Petitioner agreed to an injury settlement with Respondent in 2017. It was for 5 weeks of his salary (RX #11). He released the team from any injury grievance and for medical benefits after a certain date. Petitioner was paid $136,000. Petitioner's injury settlement was signed on September 8, 2017. At that point, all 31 other teams had the right to claim Petitioner off waivers. When Petitioner cleared waivers, he became a free agent on September 11.

Mr. Stein testified that when a player has a tryout with any team, including the Bears, they have the same requirements of disclosing any injuries. The teams also obtain all available medical records from the electronic medical records system to determine if there are any medical red flags.

Mr. Stein identified RX #11 as a Transaction Report form the NFL Management Council website which contains a player's activity. Per the report, Petitioner was "waived injured."

After being waived, Petitioner had tryouts with the Jets, Colts, and Texans. He would have been cleared to play prior to each tryout. A tryout for the Bears would normally involve position specific drills. The position coach and scouts would be present.

The player will do everything functionally related to their position. For a quarterback, that involves taking snaps, throwing, rolling out, and all the other things a quarterback is asked to do. A tryout means doing position physical drills on the field.

Mr. Stein is familiar with the 2014 draft as he was in the draft room and handled rookie contract negotiations for Respondent. He created a summary of the drafted and undrafted quarterbacks in the 2014 draft, RX #9. 13 quarterbacks were selected in the draft and 16 were undrafted. Of the 16 undrafted quarterbacks, Dustin Vaughan is the only one that made a 53-man roster.

Mr. Stein testified the one 2014 game is the only regular season game that Petitioner played in during his career. Petitioner was in the NFL for 3 seasons and was terminated in the preseason of his 4th year. In comparison to NFL rookies, Petitioner was in the league longer than the undrafted free agents and as long as some drafted quarterbacks.

Mr. Stein testified that Petitioner was not separated from the Bears due to his injuries but because he was 4th on the depth chart. He based his opinion on his experience from attending personnel meetings and the personnel evaluation process. He admitted that he was not in the 2017 meetings.

Mr. Stein stated the Bears had signed 2 veteran quarterbacks, Mike Glennon and Mark Sanchez, in free agency and drafted Mitch Trubisky in the 1st round. Teams generally keep 2 or 3 quarterbacks. The Bears kept 3 and terminated Petitioner because he was 4th on the depth chart. Lower on the depth chart means a player is less likely to play. It is rare for an undrafted quarterback to play in the league as long as Petitioner.

On cross-examination Mr. Stein testified he was not involved in Petitioner's signing with the Bears. He is not a scout. He noted there are objective and subjective components to scouting. He acknowledged that 2 scouts can have different opinions on the same player. Combine data is important but there is no mathematical formula for evaluating players.

Mr. Stein testified that during his 20 years with the Bears, he has been involved in the decision to sign or draft players that have met or exceeded expectations and players that have failed to meet expectations. A player can be cut for performance at any time but cannot be cut while injured. Petitioner entered into an injury settlement with the Bears on September 8, 2017 (RX #10). The injury settlement was based upon the number of weeks that the doctors estimated that it would take until Petitioner was 100% healthy.

Petitioner was claimed off waivers from the Browns in 2016. The Bears and the Seattle Seahawks had both claimed Petitioner.

Petitioner underwent a Bears physical prior to signing his contract in 2017. Mr. Stein was not aware of any injury to Petitioner other than with the Bears in 2016 and 2017.

Petitioner did not exceed expectations for an undrafted quarterback by signing a 2017 contract as he had spent 2 years on injured reserve. Petitioner was on injured reserve for the 2016 season and was paid pursuant to his contract.

Mr. Stein further testified that the Bears' decision to release Petitioner in 2017 was based exclusively on skill and the deep quarterback talent already on the team. Respondent signed Petitioner to a contract on March 6, 2017 and he was cleared to play on April 20. After signing Petitioner, the team signed Glennon as free agent to be the starter, Sanchez, a former 1st round draft pick and starter, and drafted Trubisky as a top pick in the 1st round. Mr. Stein admitted that he had no role in creating the depth chart.

Mr. Stein testified that when a team doctor clears a player to play, that means "full go, they can do all football activities." He testified that he had no medical opinion but relies on a full and exhaustive evaluation by the team doctors before putting a player on the field. He did not observe Petitioner during his rehabilitation. No one reported that Petitioner did not put full effort in his rehabilitation in 2017. The decision to terminate Petitioner in 2017 was based upon the overall evaluation by the scouts, the GM, and the coach. This is based upon 15 years of being in the personnel meetings with coaches and scouts. Mr. Stein was not involved in the meetings regarding Petitioner. The GM decides whether a player is released or cut.

Mr. Stein also testified that Petitioner would have been released by the Bears regardless of the 2016 or 2017 injuries. Mr. Stein did not have any personal knowledge of Petitioner's physical condition or his ability to perform as an NFL quarterback when Petitioner was released in 2017. The team hires the best doctors to determine whether a player is able to play. Based upon his meetings with the doctors, Mr. Stein testified they are extremely conservative and leave nothing to chance. There is no incentive, especially for a minimum salary player, for a team to release a player that could have a relapse of a pre-existing injury. He said the Bears do not sign players that may not be able to play the same as they did before an injury. A player's health can impact his quickness, agility, strength, and speed.

Mr. Gregory Gabriel was called as a witness for Respondent Chicago Bears. He is retired but is doing consulting work for the Bears. Mr. Gabriel played football until age 31 but never in the NFL. He worked as a part time scout for the Buffalo Bills from 1981 to 1984. Mr. Gabriel then went to work for National Football Scouting, one of two scouting services subscribed to by the 32 teams.

With the Bills, Mr. Gabriel viewed film of prospects and wrote comprehensive reports on each player. Mr. Gabriel also traveled to college games in New York, Pennsylvania, and Ohio to evaluate players. With National Football Scouting, Mr. Gabriel worked as a college scout in the Great Lakes area. As a scout, Mr. Gabriel would contact colleges in the spring to identify prospects for the upcoming draft. In the fall, he would

look at the current senior class. In December, he would give reports to the teams. Mr. Gabriel testified that he evaluated every position including quarterback. He wrote reports on approximately 500 players while working for National Football Scouting.

In 1984, Mr. Gabriel was hired by the New York Giants as an area scout. His territory was the central area of the country. Mr. Gabriel worked for the Giants for 17 years. In 1996, he was promoted to Director of Player Development. While with the Giants, he would scout and evaluate approximately 250 players per year. While employed with the Giants, the team went to 3 Super Bowls, winning 2.

Mr. Gabriel testified he was hired as the Bears Director of College Scouting in 2001, where he oversaw the entire scouting department. He worked with General Manager Jerry Angelo to put the draft board together and give draft strategy. He also was very involved with the selection process. He was involved in 17 drafts with the Giants and 9 with the Bears.

Mr. Gabriel's Bears draft responsibilities included 3 meetings to pare down their list of players to about 500. At the NFL Combine, that list would again be pared down to 300 to 400 players. By around April, the team would develop their final draft board. While with the Bears, Mr. Gabriel testified that they drafted 12 Pro Bowl players. The team won 3 division titles, one NFC title and went to the Super Bowl once.

Mr. Gabriel testified he voluntarily left the Bears in 2010 at age 60. After leaving the Bears, he worked as a part owner and writer for National Football Post. He also wrote for Bleacher Report for 4 months. He eventually went to work for Pro Football Weekly in 2014, authoring their draft guide from 2015 to 2019. Mr. Gabriel also did media work for Radio 670 Sports and periodically did some consulting for general managers. He then went to work for the Philadelphia Eagles in a full-time consulting job.

In 2020, Mr. Gabriel became the Director of Player Personnel for the Washington, DC Extreme Football League team. His job was to put the team together from scratch. Each team had 53 players plus a practice squad, a total of about 60 players. The league folded when the pandemic hit.

Mr. Gabriel testified he was retained by the Bears to offer opinions and author a report (RX #4). He was paid $400 per hour to review documents, review tape, prepare a report, and come to court. He has also worked for the Bears on 7 or 8 other cases.

Mr. Gabriel opined that Petitioner was a good college football player but a very average NFL prospect. As a college freshman, Petitioner was a backup, completing 23 of 33 passes for 223 yards, 1 touchdown and 2 interceptions. Petitioner became the starter part way through his sophomore season. He completed 123 of 188 passes for 1,448 yards, 14 touchdowns and 6 interceptions. Petitioner was the starter during his junior and

senior years. Petitioner was one of 335 players invited to the NFL Combine prior to the 2014 draft. That year 14 quarterbacks were drafted. Petitioner went undrafted.

Mr. Gabriel noted Petitioner was a very good athlete, an exceptional competitor, and, he assumed, a very good leader. He noted Petitioner was not a strong-arm passer but because his athleticism he extended plays "with his feet." Petitioner was a very good college quarterback but was not highly thought of as an NFL quarterback because he was only 6 feet tall and did not have a strong arm. Mr. Gabriel noted that size is important in the NFL. When a player is only 6 feet tall, he has to have some special traits to be wanted by an NFL team. Petitioner went undrafted by 32 teams.

Petitioner was signed as an undrafted free agent by the Browns after the 2014 draft. He was an average rookie who was cut at the end of the preseason and signed to the practice squad after clearing waivers. In 2015, he was listed as the 4th of 4 quarterbacks. In the opening pre-season game, Petitioner tore ligaments in his thumb that required surgery. He was placed on injured reserve for the remainder of the 2015 season.

Petitioner was waived by the Browns at the end of the 2016 off-season program and was claimed by the Bears (as well as the Seattle Seahawks). He was the 4th of 4 Bears quarterback.

Mr. Gabriel noted Petitioner was injured during the Bears 3rd preseason game against the Chiefs. Petitioner was playing well prior to the injury, completing 5 of 6 passes for 65 yards and 1 touchdown. He was placed on injured reserve for the remainder of the season.

Mr. Gabriel opined that it was unlikely that Petitioner would have made the 53-man roster in 2016 had he not been injured. The coach, John Fox, had a history of only keeping 3 quarterbacks between the roster and practice squad. If a quarterback was injured, the practice squad quarterback would be brought up. The number 3 quarterback, David Fales, and Petitioner were not good enough. Fales was eventually cut, and Matt Barkley became the practice squad quarterback for that season.

Mr. Gabriel further opined, based upon the tapes of the 3 preseason games, that Petitioner did not have the talent to make the 53-man roster or be a viable practice squad player. Petitioner was a good athlete and could move around very well and extend plays, but his arm strength was very poor and average, and he could not "drive the ball." His best throws were "between the numbers and checkdown," but his throws would struggle when he had to throw outside the numbers.

Mr. Gabriel testified typically, an NFL team will keep 2 quarterbacks on the roster and 1 on the practice squad. Depending on who the 3rd quarterback is, he may be on the roster to avoid the risk of exposing the player to waivers.

Mr. Gabriel confirmed that Petitioner was re-signed by the Bears and was the 4th quarterback during the 2017 offseason. Petitioner was eventually let go by the Bears at the end of the 2017 preseason when he agreed to an injury settlement after injuring his hamstring in the final preseason game.

Mr. Gabriel testified, based upon the NFL teams that he worked for, that teams rely on a player's veracity in describing their medical history prior to offering the player a contract.

Mr. Gabriel has been involved in NFL contract negotiations, mostly with college free agents after the draft. He has also been involved in the process with veteran players by contacting the agents and players, although not the "high-priced" free agents. Most undrafted free agents are usually signed within a 2-hour span after the draft ends. The scouting director does the actual negotiations and agreement on a contract.

Mr. Gabriel has been involved in the signing of non-college veteran players by establishing the "parameters" for a player. The parameters included medical, and the grade given by based upon the team's system. The system is based upon a player's draft position and grade number. He noted it is very difficult for a free agent quarterback to carve out a career in the NFL because he comes into camp as the low man, and he has to beat out the veterans and drafted quarterbacks. Most teams will only keep 2 quarterbacks on the 53-man roster and a 3rd if the team does not want to risk waivers.

Mr. Gabriel testified that injuries did not play a role in Petitioner not having a career in the NFL. Each player has a medical record that starts with college and follows him to the NFL. Those records go with him to every team and are an important part of the evaluation process. Mr. Gabriel testified that he relies on the doctors and "…if a doctor says a guy can play, he's good to go, then we are free to sign him."

On cross-examination Mr. Gabriel confirmed Petitioner sustained an injury to his left leg on August 27, 2016 while playing for the Bears. Petitioner also injured his left hamstring while with the Bears on August 31, 2017. He opined that even if had Petitioner not been injured in 2016, he would have been released at the final cut in September, which was based on watching every preseason play.

After the 2016 contact expired, the Bears re-signed Petitioner in 2017 because they needed a "camp quarterback." Mr. Gabriel testified he would not have re-signed Petitioner prior to the 2017 season. He testified that on September 11, 2017, Petitioner was unemployable by any NFL team but that had nothing to do with the condition of his left leg.

Mr. Gabriel testified he reviewed a medical chronology prepared by Respondent's counsel. Petitioner had to pass a physical in order to sign a new contract with the Bears. Mr. Gabriel acknowledged that he had no information regarding Petitioner's physical

activities, what Petitioner noticed about his leg, how fast he could sprint without pain, what weights he was able to lift without pain, or if Petitioner was able to cut, pivot, spin, or run backward.

On further cross-examination Mr. Gabriel testified he became aware of Petitioner's ability to perform in April and during OTAs in May. He viewed video of Petitioner performing the functions of an NFL quarterback from May 2017 to August 30, 2017, including some practice tapes provided by the Bears, specifically, game tape from 2016, practice tape from 2017, and game tape from the 2017 preseason. He has not seen Petitioner perform any activity unique to an NFL quarterback since his injury in 2017. Mr. Gabriel noted Petitioner did not move around like he had pain and that he looked like the athlete he has always been. There were no visible deficits in his leg strength or speed when comparing the 2017 film with the prior film. If Petitioner had significant strength deficits between his left leg and right leg, that would not change his opinion. Petitioner played 2 preseason games in 2017.

Mr. Gabriel did not speak with Bears training staff about the condition of Petitioner's left ankle, knee, or hamstring, and he has not seen any report or video of Petitioner's attempts to perform as an NFL quarterback after August 31, 2017. He was unaware of what weights Petitioner was lifting with his left leg before the 2017 injury.

Mr. Gabriel acknowledged that while he was with the Giants and Bears some of his draft recommendations were not successful and did not work out. There is no mathematical or scientific formula to finding a successful player in the draft. Every NFL scout weighs intangibles differently. Mr. Gabriel responded "wrong" when asked whether scouts rely on intuition to make their recommendations.

Mr. Gabriel was then questioned regarding his testimony in an evidence deposition he gave in *Justin Perillo v. Bears Football Club* (PX #10). He was asked whether in that deposition he was asked, "And do you recall that you were asked in that testimony, question, every scout relies on, in some part, on intuition to make their recommendations, isn't that fair to say? And you answered, fair. Do you remember that testimony?" Mr. Gabriel responded, "Intuition and experience." He further testified every scout relies on intuition to some degree but that it is a very small percentage. Scouts rely on experience and experience is not "your gut."

In the *Perillo* deposition, Mr. Gabriel was asked "Scouts rely kind of on what their gut tells them as a component of their decision-making process, right? And you answered, yes. Did I accurately read that testimony?" He testified that his testimony in the present case was just explaining gut as he had been "through these a few times now, using the proper words."

Mr. Gabriel testified a scout's job is to get it right as often as possible because he is held accountable. There is subjectivity in that one scout could have a different opinion

than another after watching the same player on tape. Each scout has his own way of doing things as he watches tape. Scouts try to come up with as close to the same answer as possible, but it is often done in different ways. There is no written treatise, book, or publication that is widely accepted as a "how-to" for scouting an NFL player. He added, NFL clubs do an excellent job scouting players and mistakes are minimal. There isn't an exact percentage but in every draft there are players that bust and don't reach their potential.

In his *Perillo* testimony, Mr. Gabriel was asked "Fair to say that less than 50 percent of the NFL first round picks in the last 10 years have reached their potential?" He responded that it was probably fair. He testified that "probably" is the key word. He added "it's fair but there is no exact number."

Mr. Gabriel testified it is not fair to say that if a scout hit 50% of his recommendations that he is doing a good job. He agreed that he previously was asked "And you would agree with me that if you hit 50 percent of your scouting recommendations as successful, you are probably doing pretty well in the NFL, is that fair to say? And you answered, yes, sir."

Scouting is a tool used by NFL teams to predict future productivity. There are certain traits that a player has to have to play a certain position. For example, a 210-pound player will not be able to play as an offensive lineman.

Mr. Gabriel has no idea how a tibia/fibula fracture or a patella tendon tear affects the speed of an NFL player, sprinting ability, or physical abilities. He was not aware of how the 2016 injury affected Petitioner's left leg strength. He has no idea of how a hamstring tear could affect the performance of an NFL quarterback.

Mr. Gabriel said his report stated that he was one of the most respected draft analysts as his book was a best seller on Amazon for 2 years and he was the only person in that business that has actually run a draft. He agrees with the statement that from a scout's perspective they must know exactly what to look for at each position and that comes from guidance from each position coach. Mr. Gabriel did not speak with any position coaches with the Bears or in the NFL in preparation of his report. He had no idea of what the Bears quarterback coaches were looking for in a quarterback in 2017.

Mr. Gabriel has been hired by the Bears in 7 cases. He has never reached an opinion that a player's release was related to an injury, but he has not written reports on all of the cases. In each of those cases, he charges $400 per hour and earns roughly $5,000 to $10,000 for his total time, including report, preparation, travel, and testimony.

Mr. Gabriel testified that whether a player is injured or hurt can impact his quickness, agility, balance, strength, or explosiveness. Being drafted is not a prerequisite

for playing in the NFL and an undrafted player can still be successful, noting Hall of Fame players Kurt Warner, Tony Romo, and Warren Moon.

Mr. Gabriel testified Petitioner outlasted almost all the quarterbacks in the 2014 draft but only played in 1 regular season game. He is not a medical expert and does not know how long a tibia/fibula fracture takes to heal and only has personal experience regarding hamstring tears. Mr. Gabriel did not speak with any doctors and did not review deposition transcripts. He did not rely on a medical chronology to come to his opinion

Mr. Gabriel testified that his opinion was based on one thing only, the talent level of the player. Whether an orthopedic surgeon said that Petitioner's 2016 leg injury affected his ability to perform as an NFL quarterback, would not change his opinion as to Petitioner's talent level. He testified that before the injury, Petitioner did not show anything on the field that said that he could play.

On redirect examination Mr. Gabriel testified that none of the questions or opinions brought up by opposing counsel are inconsistent with his opinions. Had Petitioner not suffered the 2016 tibia/fibula injury, he would have been released at the final cut down date a week later. The 2016 injury actually sustained his career where he earned more money because of his injury.

Mr. Gabriel's redirect examination was interrupted and resumed on a later date.

Mr. Gabriel reviewed Respondent's Exhibit #5 in preparation of his report and testimony. RX #5 contained Dr. Sherman's report and Dr. McCain's deposition. Item 14 of RX #5 is a document he received form Cliff Stein which is a study done by the Bears and NFL Management Council on the average length of careers of draft choices and undrafted free agents. There were 14 quarterbacks drafted in 2014. All 32 NFL teams passed on drafting Petitioner.

Mr. Gabriel testified that he does not care about getting drafted, only about talent. He stated Petitioner was a marginal draft choice with minimal talent and was not going to make it in the league.

Mr. Gabriel testified most of undrafted free agent contracts in the NFL are basically the same. Contracts are for rookie minimum salaries and are 2 to 3 years in length, which are paid if the player makes the team. Item 15 shows the number of free agents that made it in the NFL. He noted it is very difficult for an undrafted free agent to make an NFL team. They have to be special in training camp to show that they have the wherewithal to compete in the NFL.

Mr. Gabriel reviewed a Wikipedia printout (which indicated the New Orleans Saints was interested in claiming Petitioner on waivers in 2016), a scouting report from 2014, and a DVD of game tape with the Browns. The most important thing to study is the tape. He does not listen to what the coaches say or what the trainers say, but "the eye in

the sky doesn't lie." This is especially important for a quarterback. Petitioner's injury came up after the fact. He opined Petitioner already showed that he could not play with the Browns and again later in his career with the Bears.

Mr. Gabriel testified "cleared to play" is a term used in player evaluations. If a doctor says that a player can or cannot do something, the doctor's opinion is followed. A player has to be cleared to play in order to play in the NFL. Before a player signs his original contract he must pass a physical and be cleared by the team's medical staff.

Mr. Gabriel's highest level of employment in the NFL was as the Bears' Director of College Scouting. He was also Director of Player personnel for the XFL. He spent his entire adult life evaluating whether football players can play in the NFL. His job was to understand whether players can play or not play at the NFL level. He acknowledged it is "not a science." Instinct and experience are involved. One looks at traits by watching whether a player has the wherewithal to be a productive player. He testified 2 scouts can come up with different evaluations. He said instinct and intuition are one and the same when it comes to evaluation players. A scout instinctively knows from watching tape and watching thousands of other players over the years.

Mr. Gabriel testified there are certain things looked for in a player, depending upon position. These include height, weight, speed, arm length, and hand size. Gut feeling and experience are used in evaluating a player as well as speed, strength, agility, cognitive tests, mental tests, and several other factors. Scouts are judged on their reports. Mr. Gabriel testified that after thinking about it, 50% success for a scout is only average. The goal is above 50%.

Mr. Gabriel could not explain why he testified in the *Perillo* case that a 50% scouting success was good and why he testified at trial that a 50% scouting success was not doing a good job. A scout wants a high percentage because scouts are evaluated by management based upon every report they write.

On recross-examination Mr. Gabriel admitted he reviewed a medical chronology, reviewed tape, and other research on Petitioner. He did read the depositions of Drs. Sherman and McCain and medical reports. He acknowledged he was mistaken in his earlier testimony denying that he had reviewed those documents because he had a number of other cases going on. He also admitted that he was mistaken in his prior testimony denying that he had knowledge of what Petitioner noticed about his left leg and ankle during the 2016 off season. He said what Petitioner told the doctors was irrelevant to his opinion because Petitioner had been cleared to play.

Mr. Gabriel considers what the medical staff tells him regarding a player's pain issues. If not, he goes by what he sees. He did not speak with the Bears medical staff in this case.

On further recross-examination Mr. Gabriel testified that Dr. McCain's opinion that Petitioner was no longer capable of playing in the NFL did not enter into his evaluation because Petitioner did not have the talent to play in the NFL regardless of injury. Dr. McCain's opinion that there was an 80% deficit of Petitioner's left hamstring that was related to the 2017 injury also did not enter into the evaluation as it was "after the fact."

Mr. Gabriel said "cleared to play" means that the medical staff said that it is safe for Petitioner to participate in football activities. If a player is going to be at risk, he will not be cleared.

Mr. Gabriel testified if it is in his report, then he was aware of Dr. McCain said that Petitioner had pain in his left leg when transferring weight and was no longer able to cut, pivot or sprint as before the injury. He testified if Dr. Sherman said that Petitioner's 2016 left leg injury was limb-threatening and career-threatening in his deposition, then he read it. He also read where Dr. Sherman testified that "cleared to play" means that it was safe, not that "fractured and healed" is the same as never injured in the first place. Mr. Gabriel's opinion of what cleared to play is different than Dr. Sherman's opinion. He also read Dr. Sherman's testimony regarding left leg weakness and function.

Mr. Gabriel addressed Petitioner's ability to play football only in his report. He said any discussion about strength, agility, and speed 2 or 3 year after the fact did not matter. He noted Petitioner was a sub- average football player while playing for the Browns and the Bears. Mr. Gabriel testified that if he were making the decisions, he would not have signed Petitioner to a contract in 2016 or 2017. He was not aware of the specifics of Petitioner's contract with the Bears.

Mr. Gabriel reviewed Petitioner's Exhibit #8, the February 28, 2017 contract between Petitioner and the Bears. He testified Petitioner could not have signed the contract unless he had passed a physical. The Bears had no obligation to sign Petitioner. Their decision was based partially upon input from the coaching staff. Input of the scouts may have led to the 2016 signing.

Mr. Gabriel reviewed 2016 and 2017 game tapes. In the 2016 tape, prior to the injury, Petitioner rolling out of the pocket and attempting to sprint up field. Mr. Gabriel disagreed that Petitioner was running, cutting, and pivoting as expected of an NFL quarterback.

Mr. Gabriel's 2014 scouting report, Part 17 of Respondent's Exhibit #5, on Petitioner stated that in college "He can move around in the pocket and make/extend plays with his feet." Mr. Gabriel noted the doctors' opinions were after the fact. Mr. Gabriel testified that before Petitioner was injured in the 2016 4th preseason game, "He stunk. There's no other way of putting it, okay? He wasn't very good." Petitioner was a member of the Bears on the day he was injured, as were 89 other players.

Dr. Richard Sherman examined Petitioner at Respondent's request on December 17, 2019, in accord with §12 of the Act. His report was marked as Deposition Exhibit #2. Dr. Sherman gave his evidence deposition on June 30, 2020 (PX #5). Dr. Sherman received his medical degree from the University of Chicago Medical School. He completed a 5-year orthopedic residency at Loyola University Medical Center and a 1-year fellowship in sports medicine at Harvard Medical School, Brigham and Women's Hospital, and Massachusetts General Hospital. He is board-certified in orthopedic surgery.

Dr. Sherman performs 10 to 12 surgeries per week, 70% are for the knee and 30% for the shoulder. Less than 1% of the doctor's practice is devoted to medical/legal work such as expert reviews and testimony.

In addition to the examination on December 17, Dr. Sherman reviewed Petitioner's medical records. He refreshed his memory from his narrative report dated December 17, 2019 (DepX #2).

Dr. Sherman noted Petitioner suffered left tibia and fibula fractures in the 3rd preseason game while playing quarterback for the Bears on August 27, 2016. The injury occurred when a defender rolled into Petitioner's left leg while it was planted. Petitioner suffered a mid-shaft fracture of the left tibia and fibula. Surgery on August 29, 2016 included the insertion of an intramedullary nail to stabilize the fracture and transverse screws that are used to keep the rod from telescoping. This injury can be "limb-threatening but certainly career-threatening" because the bone and the muscle around the bone get injured. Petitioner underwent rehabilitation to restore both mobility and strength.

Dr. Sherman noted that in his rehabilitation, Petitioner complained of pain around the patella tendon, hamstrings, and upper tibia where the transverse screws were placed. In January 2017, the proximal transverse screws were removed due to irritation of the bursa sac as they were no longer required to keep the bone from telescoping. This was related to the original injury. A February 15, 2017 left leg MRI (PX #5) showed edema in the soft tissue around the upper tibia where the rod entered the bone. Petitioner's complaints were common after an intramedullary nail is placed.

The records indicated Petitioner was cleared to participate in training camp in late Spring 2017. With increased running, Petitioner experienced lower leg pain in the area of the distal locking screws. The doctor noted Petitioner was deemed able to play football but was having some limitation in his ability to run with quickness and was having trouble planting and accelerating.

Dr. Sherman testified when a player is medically cleared to play, he can safely play football from a medical standpoint and is not at risk to undo the healing that has occurred. He said fractured and healed is not the same as never injured. The medical records showed that Petitioner participated in training camp in August 2017 but experienced

lower leg pain due to the distal locking screws. The distal screws were surgically removed on August 4, 2017. Dr. Corcoran's medical records stated that despite the screw removal, Petitioner may have chronic pain due to nerve irritation.

Dr. Sherman testified that at his December 17 examination, Petitioner complained of left lower leg pain. The doctor testified that Petitioner reported that his leg was significantly weaker and that he did not feel that he had regained the strength he had before the injury.

Petitioner injured his left hamstring during an August 31, 2017 preseason game while he was accelerating to get out of the pocket. He felt a pop which is often indicates a muscle tear. A September 1, 2017 MRI (PX #9) showed some degenerative changes to the patellofemoral joint not directly related the hamstring injury and a less than 50% tear of the hamstring. Petitioner's earlier complaints of hamstring tightness could make him more prone to tearing his hamstring with sudden acceleration. The findings were consistent with a hamstring tear from the August 31injury. Treatment for a hamstring tear is to just wait and let it heal.

Dr. Sherman noted that following his Bears release, Petitioner continued to work out with stretching, running, and squatting. He reported that he had tryouts with the Texans, Colts, and Jets but did not have the ability to accelerate quickly and plant and twist due to weakness and pain. Petitioner then retired from football.

On examination Petitioner complained of pain on palpitation of the fracture site and weakness. X-rays showed good healing. Physical measurements of Petitioner's calf circumference showed a ½ inch deficit on the left. Measurement of Petitioner's thighs showed a ½ inch deficit on the left. Hopping was reduced by 2 inches on the left. Straight leg-raising on the left was limited to 45° and 70° on the right. Long sitting testing was reduced on the left due to hamstring tightness. Petitioner complained of pain when running, squatting, planting, and twisting maneuvers.

Petitioner's left leg tenderness, pain, and weakness are consistent with a tibia fracture with an intramedullary nail. Petitioner stated that he could no longer plant, cut or accelerate in the manner that he needed to play NFL quarterback. Dr. Sherman opined this has definitely affected Petitioner's ability to continue his career. He further opined that the condition of Petitioner's left leg at the time of the examination is permanent, also noting Dr. Corcoran's opinion.

Dr. Sherman found no evidence of symptom magnification or malingering. Possible future treatment could include physical therapy to get more flexibility and strength, anti-inflammatory medication to relieve discomfort, or cortisone or viscosupplementation injections if he is having pain close to the knee. However. Dr. Sherman did not foresee that Petitioner would require surgery in the future.

On cross-examination Dr. Sherman acknowledged he did not review any of petitioner's medical records from before August 8, 2016 and that he was unaware of prior injuries. Petitioner did not report prior treatment or surgical history that is not in his report. He was unaware of a prior Lisfranc injury to the left foot that required surgery. He testified that those records were not needed even though he opined about Petitioner's ability to plant, cut, and run quickly as it relates to Petitioner's ability to play for an NFL team. The records showed that Petitioner was medically cleared to play prior to the 2016 season and on April 20, 2017. The records show that on 4-17-17, Petitioner acknowledged that he was physically able to play football (PX #7). The doctor was unaware of a May 30, 2017 document.

Dr. Sherman does not regularly evaluate NFL players. Any such evaluation was sporadic. The doctor was unaware of the criteria used by the Bears to evaluate Petitioner's ability to play quarterback. The criteria could be different from team to team or physician to physician. The doctor was aware that on June 12, 2017, Petitioner was cleared to participate in the 2017 training camp without restrictions.

Dr. Sherman was not provided with any medical information after a September 7, 2017 Dr. Guy second opinion evaluation stating that Petitioner should not return to play until he has gained full strength. Petitioner reported to Dr. Sherman that he had tryouts with the Texans, Colts, and Jets. The doctor further testified that he did not review any of the evaluations by those teams but understood that the teams had cleared Petitioner to play otherwise they would not let him try out.

Dr. Sherman did not opine that Petitioner's injuries prevented him from playing football but did clarify that the injuries prevented him from playing football while he was injured. Dr. Sherman did not disagree with the doctors that cleared Petitioner to play football. He did not state in his report or in his testimony that Petitioner had any restrictions pertaining to his left leg. Dr. Sherman does not know why the Texans, Colts, or Jets did not sign Petitioner. He had no opinion regarding Petitioner's capabilities to work other than the context of playing professional football.

On redirect examination Dr. Sherman clarified that that being cleared to play means it is medically safe to play in the NFL. Medical clearance to play does not equate to returning to the same physical condition one had before the injury. He added that Petitioner's quality of play was affected by his left leg injuries.

Dr/ Sherman testified Petitioner signed a document stating that he was physically able to play football. In his practice, the doctor has had patients sign documents indicating that they are physically able to do their job but that he does not rely on their medical expertise to answer that question. It means that they are safe to do their job, but it does not mean that they will be the same as prior to the injury. Medical clearance to play does not equate to returning to preinjury condition.

Sherman DepX #3 noted Petitioner had a left Lisfranc injury in 2012. The doctor is unaware of any left leg injury from 2012 to 2016. As Petitioner played college and professional football after the injury the doctor opined that the injury did not prevent him from playing football. The doctor is not aware of any treatment that would have allowed Petitioner to continue playing in the NFL.

On recross-examination Dr. Sherman testified he did not have any objective baseline measurements prior to August 27, 2016 to compare his measurements with.

Dr. Richard McCain testified at his evidence deposition on July 6, 2020 and on September 28, 2020. He received his undergraduate degree from Washington and Lee University and his medical degree from the University of South Carolina Medical School in1978. He completed an orthopedic residency at the University of South Carolina in 1983 and has been in private practice in Colombia, South Carolina since. Dr. McCain is board-certified in orthopedic surgery with subspecialties in trauma and sports medicine.

Approximately 4% of the doctor's practice is devoted to IMEs, for both petitioners and respondents. The doctor testified that his practice includes all long bone and joint injuries and the full scope of orthopedic trauma excluding spine surgery.

Dr. McCain conducted an IME of Petitioner in Columbia South Carolina on December 2, 2019. In addition to the clinical examination, Dr. McCain reviewed Petitioner's medical records. He refreshed his memory by referring to his report of December 6, 2019 (DepX #2) and his addendum report based on additional records review of March 2, 2020 (DepX #4). Petitioner provided a history of numerous injuries and surgeries while playing collegiate and professional football. Petitioner complained of pain in the mid and proximal tibia when running, twisting, and squatting. His left knee swells with running.

Dr. McCain testified his examination showed relatively normal range of motion of the left knee from 0° to 130°. Collateral ligaments were stable. No tenderness over the medial collateral ligament femoral origin but slight tenderness over the medial collateral ligament tibial insertion. No tenderness of the lateral collateral ligament and all 4 joint lines were non-tender. Testing was negative for ACL and PCL injury, or medial or lateral meniscus tears. There was a 5° deficit of left knee extension, probably due to the hamstring injury. Ankle examination showed no swelling or obvious deformity.

Dr. McCain reviewed Petitioner's physical therapy records from Spartanburg Medical Center from January 13, 2020 (DepX #3). Petitioner had residual left quad and hamstring weakness.

Weight-bearing X-rays showed bilateral 1-to-2mm depression of both knees at the tibial plateau. Left leg X-rays showed a well-healed mid-shaft tibia/fibula fracture with a retained intramedullary rod.

Dr. McCain diagnosed a mid-shaft left tibia fracture on August 27, 2016 and a left hamstring injury on or about August 27, 2017. He testified treatment was excellent, reasonable, necessary, and causally related to the accidents. The mid-shaft tibia fracture was healed but opined that hamstring injuries can be problematic over the long-term. The doctor recommended isokinetic muscle testing to clarify muscle weakness or impairment.

Dr. McCain testified that Petitioner did not have any restrictions and was capable of normal full-time work except as a professional athlete or football player. He has most likely reached MMI pending isokinetic testing.

Dr. McCain noted January 13, 2020 isokinetic testing (RX #3) showed residual left hamstring weakness, also addressed in the doctor's March 2, 2020 report (RX #4). Dr. McCain testified that the residual deficits were due to the August 28, 2017 injury and recommended therapy for the left lower extremity twice per week for 6 weeks. Petitioner was at MMI pending rehabilitation. Dr. McCain noted Petitioner was employable and working in the insurance industry and was not currently a football player.

Dr. McCain performed an AMA Impairment Rating and found Petitioner had a 10% impairment of a lower extremity due to his hamstring injury.

Dr. McCain opined that Petitioner was capable of full duty work but not as a professional football player. He was unaware Petitioner had been medically cleared to play football by 3 NFL teams after his release by the Bears, which he noted as "surprising." The doctor did not know why Petitioner was released by the Bears and did not know why he was not signed by the Texans, Colts, or Jets. He did not have personal knowledge of the decision-making process of those teams and cannot say that the injuries were the reason that he was not hired. Petitioner's injuries were significant, particularly the left hamstring deficit. He acknowledged there are other factors taken into account beyond the physical component that the doctor was not aware of.

Dr. McCain further testified that without isokinetic testing when Petitioner was trying out for the 3 teams in late 2017, he could not say with certainty what Petitioner could or could not do.

On cross-examination Dr. McCain testified "cleared to play" means that there is no deficit or potential for re-injury. That it is not dangerous to play. If there was a hamstring deficit, there is a potential for re-injury. In hindsight, Dr. McCain would not have cleared Petitioner to play, noting hindsight is always 20/20. It is possible that a player that is cleared to play may not be as fast as before an injury. With regard to agility, he would hope the player was very close.

Dr. McCain testified he treats college athletes and has treated injuries similar to Petitioner's injuries. He did not feel that Petitioner was a malingerer or exacerbated his

symptoms. He opined Petitioner's complaints in December of 2019 of proximal tibia pain when running, twisting, or squatting are likely related to the August 2016 injury.

Dr. McCain noted Petitioner diligently performed rehabilitation of his tibia and hamstring injury. The surgery for the tibia/fibula fractures were necessary and appropriate and came with a risk of diminished ability to cut, pivot, or sprint. He is not aware that Petitioner complained of a diminished ability, but it would not surprise him.

Dr. McCain noted X-rays showed a well-healed fracture. The doctor testified that he would expect Petitioner's pain complaints to be mild. He does not recall asking Petitioner what his symptoms were during his tryouts as he focused on his recent symptoms.

At the resumed deposition Dr. McCain opined that Petitioner's injuries could impact his ability to run, plant, twist, and cut in the short-term. Petitioner's tibia/fibula fracture had completely healed. Regarding the hamstring injury, Dr. McCain noted no prior physician requested isokinetic testing which is a laboratory evaluation that would vary greatly from an on-field evaluation. Petitioner had no evidence of osteolysis or osteoporosis or infection or loosening of the tibia rod. There is no permanent deficit with Petitioner's left leg.

Dr. McCain opined that Petitioner's complaints of pain with squatting, explosive movements, and prolonged running would in part, but not in whole, be related to the accidents of August 2016 and August 2017. Petitioner's isokinetic testing showed an 81% deficit of left hamstring strength when compared to the right. It is more probable than not that this finding is related to the August 2017 left hamstring injury although the doctor did not have access to the on-field tests.

In the isokinetic report, RX #3, Petitioner complained of decreased strength and movement, increased pain and swelling, decreased soft tissue and joint mobility, gait deficits, and decreased ability with ADLs that are in part related to the August 2016 and August 2017 injuries as Petitioner also had a 2mm depression from a left tibial plateau fracture. Those deficits are not permanent as they can be addressed with therapy.

Dr. McCain testified that he not qualified to say whether Petitioner could play quarterback in the NFL after 6 weeks of physical therapy, as there are other factors involved.

Dr. McCain found Petitioner lacked 5° of extension but that could be related to the tibial plateau fracture. The doctor is not qualified to say whether Petitioner cold play in the NFL as there are other factors such as age, conditioning, unaddressed hamstring deficit, loss of perception, agility, speed, and any number of factors since Petitioner last played professional football.

On redirect examination Dr. McCain testified that there is no baseline isokinetic data for either of Petitioner's injuries. As noted in the addendum he found no restrictions of Petitioner's ability to work pending isokinetic testing to the left leg. He opined the deficits shown in Petitioner's isokinetic testing are not permanent and can be restored with proper physical therapy.

On recross-examination Dr. McCain acknowledged he does not know if any NFL teams perform baseline isokinetic testing. He was not aware of any professional athlete in any sport that went back to play after an 80% isokinetic deficit. His evaluation focused on the tibia fracture and hamstring injury, but the doctor was aware of the other injuries. Dr. McCain did not recall testifying in the earlier session that Petitioner could work full duty except as a football player.

As noted, following his accident on August 31, 2017 Petitioner had tryouts with the Houston Texans on October 10, 2017, the Indianapolis Colts on October 30, 2017, and the New York Jets on December 12, 2017. Records relating to those tryouts were admitted in evidence without objection. The records note at each tryout Petitioner's affirmation that he was in "excellent physical condition", which Petitioner affirmed in his testimony. It was also noted that at each tryout Petitioner had been cleared to play.

The notes from the medical examination at the Texans' tryout documented Petitioner's history of injury with the Bears. His hamstrings were noted as "pliable" and showed no palpable defect. The notes from the medical examination at the Jets tryout noted "Restrictions 0, limitations 0; In the Hamstring / Quadriceps section, a handwritten note states "L= right…0 defect."

CONCLUSIONS OF LAW

19 WC 11015 (DOI 8/27/2016)

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

The Arbitrator finds that Petitioner proved his current condition of ill-being was causally related to his work-related injury on August 27, 2016.

This issue was not genuinely disputed. Petitioner was admittedly an employee of Respondent Chicago Bears when he was injured while playing in a televised preseason football game. Petitioner received emergent medical care for a left tibia/fibula fracture which eventually required open surgical reduction with internal fixation. Respondent offered no credible rebuttal to this issue.

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

It is undisputed that Petitioner sustained fractures of his left tibia and fibula. The injury was severe enough to require an open reduction with internal fixation, including an intramedullary nail.

The Arbitrator evaluated Petitioner's Permanent Partial Disability in accord with §8.1b of the Act:

i) No AMA Impairment Rating of the August 27, 2016 injury was admitted in evidence. The Arbitrator cannot give any weight to this factor.
ii) Petitioner was a professional NFL football player. This is an occupation which requires extraordinary strength and agility. The Arbitrator gives great weight to this factor.
iii) Petitioner was 25 years old at the time of his injury. He has a statistical life expectancy of approximately 53 years. The nature of Petitioner's injury is likely to adversely affect him for the remainder of his life. The Arbitrator gives great weight to this factor, which enhances the nature of the disability.
iv) Petitioner was re-signed to another professional football contract with Respondent in 2017, the year following his injury, for a rate higher than his salary at the time of his injury. The Arbitrator gives great weight to this factor, which diminishes the nature of the disability.
v) Petitioner sustained a severe facture to his lower left leg. The injury required an open surgical reduction with internal fixation, including an intramedullary nail and fixation screws. Petitioner had two separate subsequent procedures for removal of fixation screws. However, Petitioner recovered sufficiently to be cleared to play professional NFL football for the following season in 2017. In fact, Petitioner returned to play football in time to be injured during the 2017 preseason. The Arbitrator gives great weight to this factor, which diminishes the nature of the disability.

After reviewing all of the evidence, including the above five factors, the Arbitrator finds that Petitioner proved he sustained a permanent partial disability of his left leg because the injury caused a 25% loss of use of the left leg, 53.75 weeks.

19 WC 11016 (DOI 8/31/2017)

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

The Arbitrator finds that Petitioner proved his current condition of ill-being was causally related to his work-related injury on August 31, 2017.

The issue of Petitioner's initial injury on August 31 was not genuinely disputed. Petitioner sustained fractures of his left tibia and fibula in a preseason NFL game while playing for Respondent Chicago Bears on August 27, 2016. Petitioner recovered from that injury such that he was re-signed by Respondent for the 2017 season. It is also undisputed that Petitioner sustained a torn hamstring muscle in a preseason NFL game while playing for Respondent on August 31, 2017.

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

Petitioner argues that the culmination of his two injuries resulted in a disability which caused a loss of earning capacity and therefore he is entitled to a wage differential award. It is undisputed that after his injury release by the Bears in September 2017 Petitioner had 3 unsuccessful tryouts with other NFL teams. He is now employed with the football program at the University of South Carolina at a wage less than his last NFL contract.

Respondent argues that Petitioner was unable to continue playing professional football after these injuries due to lack of skill and ability rather than due to his injuries. In principal support of this argument Respondent presented the opinions of Gregory Gabriel, a professional football scout with some 30 years of experience in evaluating the skill and ability of football players. Mr. Gabriel opined that Petitioner never possessed the necessary skill or ability to successfully play football at the professional level. Respondent's argument was also supported by the testimony of Respondent's General Counsel Cliff Stein.

In order to prove whether they are entitled to a wage differential award pursuant to §8(d)(1) of the Act, a claimant must prove they sustained a partial incapacity which prevents them from pursuing their usual and customary line of employment and an impairment of earnings. In order to prove an impairment of earnings, a claimant must prove their actual earnings for a substantial period before the accident and after they returned to work, or in the event that they not returned to work, they must prove what they were able to earn in some suitable employment. The plain language of §8(d)(1) requires awarding a wage differential if these elements are proved.

The Arbitrator finds that Petitioner proved that he is entitled to a wage differential award.

Petitioner presented compelling evidence of injuries to his left leg. He was examined by Drs. Richard Sherman and Richard McCain, both being board-certified in orthopedic surgery. Both physicians found deficits in Petitioner's left leg function. Both opined these deficits were permanent. Both opined that Petitioner's quality of play was affected by his injuries. Dr. McCain specifically opined that Petitioner could engage in any type of employment except as a professional football player.

The Arbitrator finds that the evidence demonstrated that Petitioner could no longer meet the physical demands of his usual and customary line of employment as a professional football player and quarterback in the National Football League due to the combined effects of these two left leg injuries. The testimony was credible and not refuted by competent medical evidence. The record conclusively establishes the first requirement

for a wage differential award – that Petitioner sustained a partial incapacity which prevented him from pursuing his usual and customary line of employment. The evidence also clearly showed an impairment to his earnings.

Petitioner objected to the admission of Mr. Gabriel's opinions, arguing that he was not qualified to offer those opinions. Petitioner did not object to Mr. Stein's qualifications in offering his opinions.

Illinois Rule of Evidence 702 is applicable here:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Illinois Rule of Evidence 703 is further applicable:

> The facts or data in the case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Handbook of Illinois Evidence, §702.1 provides helpful analysis:

> The admissibility of expert testimony requires that three preliminary determinations be made by the court. First, can expert testimony applying scientific, technical, or other specialized knowledge be of assistance to the trier of fact in understanding the evidence or determining a fact in issue? Second, the court must also determine whether the witness called is properly qualified to give the testimony sought. The witness may be qualified as an expert on the basis of knowledge, skill, experience, training, or education or any combination thereof. Finally, a sufficient foundation must be introduced that proper procedure was actually followed by the expert in applying the scientific, technical, or other specialized knowledge in the matter at hand. Expert testimony is not limited to scientific or technical areas, but rather it includes all areas of specialized knowledge.

After applying the above analysis, the Arbitrator finds that based on his knowledge, skill, and experience Mr. Gabriel was qualified to testify to the opinions offered by Respondent in evidence. Mr. Gabriel's decades of experience in scouting and management of professional football players satisfies the knowledge, skill, and experience elements to qualify as an expert in his field.

However, despite the admissibility of Mr. Gabriel's opinions, the Arbitrator did not find those opinions persuasive. To quote Mr. Gabriel, Petitioner "stunk" as an NFL quarterback. He testified that he would have never signed Petitioner to an NFL contract because Petitioner lacked the skills and ability necessary to compete and achieve in

professional football. He testified that Petitioner never possessed the skills and ability necessary to compete and achieve in professional football.

Mr. Gabriel's opinions conflict with common sense in light of the evidence presented. Petitioner was signed as an undrafted free agent by the Cleveland Browns in 2014. When Petitioner was released by the Browns, he was claimed on waivers by Respondent Chicago Bears, as well as the Seattle Seahawks (PX #4) and perhaps the New Orleans Saints, despite having been injured with the Browns. Further, despite having been injured in the 2016 preseason Respondent Bears re-signed Petitioner for the 2017 football season, when he was again injured. Even though he had been injured three times while playing professional football, Petitioner had tryouts with three other NFL teams after his separation from the Bears.

Clearly, six, perhaps seven, NFL teams believed Petitioner had some likelihood of success as an NFL quarterback, otherwise he would not have been signed or given tryouts. Mr. Gabriel was believable in one sense, that NFL teams have access to a player's medical and injury history. Four of those teams, particularly including Respondent Chicago Bears, had full knowledge of his history of left leg injury. Mr. Gabriel's opinions cannot stand in the light of this evidence. The Arbitrator is not obligated to believe that which is not believable.

Further, Mr. Gabriel's credibility was undermined by his testimony at trial in which he contradicted his own testimony on whether he had relied on medical records or opinions regarding Petitioner's ability to play football at the professional level. At one point he testified that he had not relied on Petitioner's medical records or doctor opinions and then testified later to the contrary. In addition, Mr. Gabriel was impeached with prior sworn testimony regarding the process and art of scouting professional football prospects. The Arbitrator also noted Mr. Gabriel was frequently coy and evasive on cross-examination. Mr. Gabriel's credibility was clearly compromised.

The Arbitrator also finds the opinions of Respondent's General Counsel Cliff Stein unpersuasive. The analysis applied to Mr. Gabriel's qualifications as an expert also applies to Mr. Stein. Mr. Stein is an attorney at law. He has been General Counsel to the Chicago Bears since 2002. He acknowledged that he has had no medical training or that he has ever worked as a football scout. He testified that his job responsibilities do not include evaluating any player's abilities. There was no evidence that he played or participated in American football at any level. His opinions were based on his attending scouting and draft meetings with general managers, coaches, and scouts, so as to apply a monetary value to a player's contract. This does not satisfy the elements of Illinois Rule of Evidence 702 in order to qualify him to opine about any player's ability to perform as an NFL quarterback. Hence, Mr. Stein's opinions regarding Petitioner's capabilities as an NFL quarterback are disregarded.

The Arbitrator assumes that NFL teams have a vested interest in having players who are physically able to meet the incredible demands of professional football. It is illogical that Respondent Chicago Bears, as well as any other NFL team, would be interested in signing a quarterback who, as Respondent argues, never had the skills or ability to succeed in the NFL. It is equally illogical that so many NFL teams showed interest in a player that "stunk."

Respondent also argues that Petitioner is entitled only to an award for some degree of permanent partial disability rather than a wage differential as claimed by Petitioner. Respondent relies on the various occasions when Petitioner was "cleared to play" by various physicians, as well as Petitioner's various statements that he was healthy and fit to play professional football. However, it is clear from the evidence that the term "fit to play" refers to a player's ability to engage in football activities without risk of injury, whether they can effectively and competitively compete at a level of activity required of a professional football player.

Albrecht v. Industrial Comm'n, 271 Ill.App.3d 756 (1st Dist. 1995) presented similar issues as here. The Court found that professional football players are skilled workers. The Court stated ("[w]e conclude that professional football players are skilled workers contemplated under the statute and that any shortened work expectancy in claimant's career would not preclude him from a wage-loss differential award under section 8(d)(1). … A wage differential is to be calculated on the presumption that, but for the injury, the employee would be in the full performance of his duties." *Id*. at 759, citing *Old Ben Coal* Co. v. *Industrial Comm'n*, 198 Ill. App. 3d 485 (5th Dist. 1990).

The evidence here established that but for Petitioner's tib/fib fracture August 27, 2016 and hamstring tear August 31, 2017, Petitioner would have been in the full performance of his duties as a Bears' quarterback.

The Arbitrator further concludes that Petitioner entered a suitable employment or business necessary for a wage-loss differential award when he began working as the Director of Football Operations at the University of South Carolina.

The parties stipulated that in the 52-weeks prior to the August 2017 injury, Petitioner had earned $600,000, which equates to an average wage of $11,538.46 per week. There is further no dispute that Petitioner is currently employed and earning a salary of $200,000, which equates to an average wage of $3,846.15 per week. The wage differential exceeds the maximum Average Weekly Wage of $1,071.58.

Based on the findings above, Respondent shall pay Petitioner permanent partial disability benefits, commencing upon Petitioner's September 11, 2017 release by Respondent, of $1,071.58 per week until Petitioner reaches age 67, because the injuries

sustained caused a loss of earnings, as provided in section 8(d)(1) of the Act. Respondent currently owes $222,888.64 in accrued wage differential benefits from September 11, 2017 through September 11, 2021, and shall pay Petitioner $1,071.58 per week thereafter until Petitioner's 67th birthday, September 19, 2058.

Steven J. Fruth, Arbitrator

Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC011016
Case Name	Connor Shaw v. Chicago Bears Football Club
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0378
Number of Pages of Decision	42
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Richard Gordon
Respondent Attorney	Daniel Flores

DATE FILED: 8/21/2023

/s/ Deborah Baker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CONNOR SHAW,

Petitioner,

vs. NO: 19 WC 11016

CHICAGO BEARS FOOTBALL CLUB,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, whether medical treatment was reasonably necessary, Petitioner's entitlement to temporary disability benefits, and Petitioner's entitlement to permanent disability benefits, and being advised of the facts and law, changes the Decision of the Arbitrator and provides additional analysis as stated below, but otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

I. FINDINGS OF FACT

The Commission adopts the Findings of Fact in the Decision of the Arbitrator and incorporates such facts herein but expands the ensuing analysis with respect to causal connection.

II. CONCLUSIONS OF LAW

A. Causal Connection

With respect to causal connection, while the Commission agrees with the Arbitrator's ultimate conclusion finding causal connection between the August 31, 2017 work injury and Petitioner's current condition of ill-being, the Commission writes separately to clarify its reasoning.

Determinative of this issue is whether Petitioner's stipulated August 31, 2017 work accident aggravated his pre-existing hamstring condition. It is well established that an accident need not be the sole or primary cause—as long as employment is a cause—of a claimant's condition. *Sisbro, Inc. v. Industrial Commission*, 207 Ill. 2d 193, 205 (2003). Furthermore, an employer takes its employees as

it finds them (*St. Elizabeth's Hospital v. Illinois Workers' Compensation Commission*, 371 Ill. App. 3d 882, 888 (5th Dist. 2007)), and a claimant with a pre-existing condition may recover where employment aggravates or accelerates that condition. *Caterpillar Tractor Co. v. Industrial Commission*, 92 Ill. 2d 30, 36 (1982). As the Appellate Court held in *Schroeder v. Illinois Workers' Compensation Commission*, 2017 IL App (4th) 160192WC, the inquiry focuses on whether there has been a deterioration in the claimant's condition:

> That is, if a claimant is in a certain condition, an accident occurs, and following the accident, the claimant's condition has deteriorated, it is plainly inferable that the intervening accident caused the deterioration. The salient factor is not the precise previous condition; it is the resulting deterioration from whatever the previous condition had been. *Schroeder* at ¶ 26.

Here, Petitioner had a preexisting hamstring condition prior to the August 31, 2017 stipulated accident. In consolidated case 19 WC 11015, Petitioner broke his left tibia and fibula on August 27, 2016. He subsequently underwent surgery to repair his leg, which included a metal rod being placed in his tibia, two screws at the top of his leg and two screws towards his ankle. Petitioner's Exhibit #1. While rehabilitating from this surgery, he developed left hamstring tightness. Petitioner continued rehabilitating, and on April 20, 2017, passed his physical and was cleared to play by Chicago Bear physicians, although he still complained of left hamstring tightness. Petitioner returned to mini-camp with Respondent in July 2017. He eventually played in the team's final two pre-season games. During the final pre-season game on August 31, 2017, he heard a pop in his left hamstring in the middle of a play. He testified he was unable to walk or run afterwards. A September 1, 2017 MRI revealed a less than 50% hamstring tear. Dr. Sherman Deposition, Exhibit #9. A second opinion was sought from Dr. Jeffrey Guy at Palmetto Health Orthopedic Center in South Carolina on September 7, 2017, who diagnosed either a Grade 1 or Grade 2 hamstring tear. Petitioner's Exhibit #1. Petitioner testified he then rehabilitated for two to three months. After rehabilitating his left hamstring, Petitioner was again cleared to play football.

In October 2017, Petitioner had tryouts with the Houston Texans and Indianapolis Colts. He also had a December 2017 tryout with the New York Jets. While performing drills and workouts, Petitioner testified he lacked his prior level of mobility and still experienced pain and discomfort in his leg. He completed the drills, but could not complete them to the level required of an NFL quarterback. His left leg was his only body part that hindered his performance. None of the three teams offered Petitioner a contract. Petitioner has not received a tryout invitation since.

On December 6, 2019, Petitioner underwent a section 12 examination at Respondent's request with Dr. Richard McCain, who testified via deposition. Dr. McCain noted Petitioner's tibia fracture was healed, but that hamstring injuries can be problematic over the long term. He noted Petitioner's hamstring injury was significant. He recommended isokinetic muscle testing to clarify Petitioner's muscle weakness or impairment. Dr. McCain testified Petitioner did not have any restrictions and could perform full time work, except as a professional athlete or football player. He opined Petitioner had most likely reached maximum medical improvement, pending isokinetic testing. The Commission notes that Petitioner underwent isokinetic testing for his hamstring in January of 2020 at Spartanburg Medical Center. The results revealed decreased strength and range of motion, increased pain and swelling, decreased mobility, and gait deficits. Petitioner's Exhibit #7. Dr. McCain also testified Petitioner suffered from a residual 81% left hamstring deficit, which was related to his hamstring injury. He recommended therapy, and validated isokinetic testing, offering that it clarifies

muscle impairment and is a more objective, more refined way of evaluating muscle strength and motion. Dr. McCain also added context to the clearance Petitioner received to return to playing football, stating that being cleared to play meant there was no deficit or potential for re-injury. However, he noted that with a hamstring deficit, there is a potential for re-injury. Dr. McCain did not believe Petitioner was a malingerer.

On December 17, 2019, Petitioner underwent another section 12 examination at Respondent's request with Dr. Richard S. Sherman, who also testified via deposition. During his examination with Dr. Sherman, Petitioner was asked to hop on each leg and had his left hamstring strength tested. He was able to hop 3 inches with his right leg, but only 1 inch with his left leg. Dr. Sherman Deposition, Exhibit #2. He testified it was a lot more challenging to hop on his left leg. He also had more mobility in his right hamstring than in his left. Dr. Sherman noted Petitioner had a reduced long sitting test due to hamstring tightness and pain with running, squatting, planting, and twisting. Dr. Sherman testified at his deposition that Petitioner's complaints were consistent with his injury. He also opined the injury had definitely affected Petitioner's ability to continue his career, and that the condition was permanent. Dr. Sherman found no symptom magnification or malingering. Dr. Sherman offered more context to a player being cleared to play football. He noted that medical clearance means it is safe to play in the NFL, but it does not mean the player has returned to the same physical condition he had prior to his injury. He reiterated that Petitioner's quality of play was affected by his injuries.

After retiring from football, Petitioner became an assistant coach at Furman University in 2018, earning $35,000.00. He instructed players on techniques, but did not mimic the techniques himself. Later that year he was hired in risk management with Colonial Life Insurance, earning $120,000.00. Petitioner also served as interim quarterbacks coach for University of South Carolina, and did mimic some drills, but not at full speed. In 2019, Petitioner was hired by University of South Carolina as Director of Player Development earning $200,000.00.[1] His role has been updated to Director of Football Relations.

The Commission finds Petitioner's credible testimony, medical records, and the opinions of Respondent's own section 12 examining physicians support a finding that his left hamstring condition never returned to baseline after the accident. The Commission finds several factors which make it more likely than not that Petitioner suffered a significant deterioration in his condition following the August 31, 2017 work accident. As a result of the accident Petitioner suffered a hamstring tear which was surgically repaired and required rehabilitation. Subsequently, Petitioner had continued complaints of pain, decreased range of motion, and tightness. Further, the Commission finds persuasive the opinions of Respondent's section 12 examining physicians, neither of whom found evidence of malingering, but did opine the injury was significant, permanently affected Petitioner's ability to continue his career, and carried with it the possibility of re-injury. Accordingly, we find that the work accident aggravated and accelerated Petitioner's left hamstring condition, and his condition has deteriorated so much since the date of accident that he has sustained permanent disability. Petitioner's unresolved post-accident complaints are causally related to the stipulated August 31, 2017 work accident and the instant accident is a factor in Petitioner's current left hamstring condition.

All else is affirmed.

[1] Petitioner's W-2 does not reflect this salary since he took a mandatory furlough due to the COVID-19 pandemic. PX 9.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 21, 2022, as changed above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $1,071.58 per week commencing on September 11, 2017 and continuing until Petitioner reaches the age of 67 or five (5) years from the date the award becomes final, whichever is later, as provided in §8(d)(1) of the Act. Respondent shall pay $222,888.64 in accrued wage differential benefits from September 11, 2017 through September 11, 2021, pursuant to §8(d)(1) of the Act.

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

August 21, 2023

DJB/wde

O: 7/12/23

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/s/*Deborah J. Baker*
Deborah J. Baker

/s/*Stephen Mathis*
Stephen Mathis

/s/*Deborah L. Simpson*
Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC011016
Case Name	SHAW, CONNOR v. CHICAGO BEARS FOOTBALL CLUB
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	37
Decision Issued By	Steven Fruth, Arbitrator

Petitioner Attorney	Richard Gordon
Respondent Attorney	Rich Lenkov

DATE FILED: 6/21/2022

THE INTEREST RATE FOR THE WEEK OF JUNE 14, 2022 2.16%

/s/Steven Fruth, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Connor Shaw
Employee/Petitioner

Case # **19 WC 11016**

v.

Consolidated case:

Chicago Bears Football Club
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Steven Fruth**, Arbitrator of the Commission, in the city of **Chicago**, on **5/27/2021 & 6/29/2021**. 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

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

L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **8/31/2017** Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**600,000**; the average weekly wage was $**11,538.46**.

On the date of accident, Petitioner was **26** years of age, ***married*** with **2** dependent children.

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

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

ORDER

Petitioner proved that he is entitled to a wage differential award as provided in §8(d)(1) of the Act.

Respondent shall pay Petitioner $1,071.58 per week until he reaches age 67, because the injuries sustained caused a loss of earnings. Respondent shall further pay $222,888.64 in accrued wage differential benefits from September 11, 2017 through September 11, 2021.

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.

_____ **JUNE 21, 2022**

Signature of Arbitrator

CONNOR SHAW v. CHICAGO BEARS FOOTBALL CLUB
19 WC 11015, consolidated with 19 WC 11016

INTRODUCTION

These matters proceeded to hearing before Arbitrator Steven Fruth. The disputed issues were:

19 WC 11015 (DOI 8/27/2016): ***F:*** Is Petitioner's current condition of ill-being causally related to the accident?; ***L:*** What is the nature and extent of the injury?

19 WC 11016 (DOI 8/31/2017): ***F:*** Is Petitioner's current condition of ill-being causally related to the accident?; ***L:*** What is the nature and extent of the injury?

STATEMENT OF FACTS

Petitioner Connor Shaw testified he has a Bachelor of Science in Entertainment and Management from the University of South Carolina. He played quarterback in college as well.

Petitioner became employed by the NFL in 2014 as an undrafted free agent. He was employed for 4 years. Petitioner testified that one needs to be in "elite physical fitness" to perform as an NFL quarterback. This includes an off-season strength and conditioning program, practices during OTAs ["Organized Team Activities"] from April to June and training camp in August.

Petitioner further testified that to perform as an NFL quarterback, one must throw the ball with "extreme accuracy" and have mobility to escape the pocket and extend plays. This requires the ability to sprint, cut, and pivot.

Petitioner participated in the 2014 NFL Combine, an invite-only workout for scouts and NFL teams held prior to the NFL draft, which is considered the "most comprehensive physical examination" of a player's life. At the Combine, Petitioner specifically underwent baselines isokinetic testing of his right and left quadriceps and hamstrings (PX #1). Petitioner testified that he was invited to the 2014 NFL Combine. The Combine was held for 3 days and included mobility exercises, flexibility exercises, MRIs, X-rays, and on-field workouts. The strength training tested his left leg, and the on-field workouts required the use of his legs

Petitioner went undrafted during the 2014 NFL draft but was signed on May 12, 2014 (the day after the draft) to a three-year NFL Player Contract with the Cleveland Browns, which paid him $420,000 in 2014, $510,000 in 2015, and $600,000 in 2016 (PX #8). He underwent a physical examination that included his left leg.

Petitioner had suffered a left foot Lisfranc injury that required surgery while in college in November 2012. That surgery was performed during his junior year. During his senior year, he felt soreness, but the injury did not impair his ability to play quarterback. The injury did not impair his ability to play quarterback in the NFL either. Petitioner did not treat for his left foot injury after college but may have discussed soreness with the trainers. While in college, Petitioner did not undergo any other surgeries or sustain any other injuries that kept him from playing.

Petitioner testified that he suffered 2 concussions while in college: the 1st was in 2011 and the 2nd in 2012. He testified he had no after-effects from his concussions. In 2013, Petitioner suffered a right shoulder AC sprain that did not affect his ability to play quarterback.

Petitioner testified that he played for the Browns from 2014 to 2016. He was released prior to the 2016 season. While playing for the Browns, Petitioner suffered a right thumb UCL injury in which he tore a ligament that chipped off a piece of bone in August 2015. The injury occurred when he was tackled and landed onto his right hand which bent back his right thumb. Petitioner underwent surgery and missed the entire 2015 season. Petitioner testified that during 2016 his thumb was "a tad sore" but that it did not affect his ability to play quarterback.

Petitioner testified that during April 2016 OTAs, he suffered a left knee hyperextension. The injury kept Petitioner from performing as a quarterback for 2 weeks. The injury did not limit Petitioner's ability to play quarterback after he was cleared to play. Petitioner was released by the Browns in July 2016.

After being waived by the Browns, Petitioner signed with the Bears, who assumed the remainder of his 2016 Browns. Petitioner testified that when he reported to the Bears during the last week of July, he underwent a physical examination. From July 2016 to August 27, 2016, Petitioner testified that there was no condition to his left leg, left ankle, left knee, left hamstring, right thumb, or any other part of his body that limited his ability to play quarterback.

Petitioner testified that during an August 27, 2016 preseason game, he broke his left tibia and fibula while throwing a pass. He was tackled with his left foot planted after he released the ball. His left leg snapped underneath him. After the injury, his left foot was pointing at a 90° angle and extreme pain.

Petitioner was transported to Skokie Hospital. He underwent surgery by Dr. Garapati and was hospitalized for 3 to 4 nights. Dr. Birmingham, a Bears physician, also participated in the surgery. Petitioner testified they made an incision in the knee, hollowed out the bone marrow in my tibia, and placed a metal rod in place of the bone marrow. There were 2 screws at the top of his leg and 2 at the bottom.

Petitioner underwent post operative rehabilitation at the Bears training complex until January 2017. He underwent rehabilitation for 5 to 7 hours per day, as well as attending quarterback meetings. Rehabilitation included a bone stimulator and an "anti-gravity treadmill" that reduced his body weight while walking and running. Petitioner had pain and discomfort during "explosive exercise," lateral exercises, torque of twisting, and anything that required a lot of body weight. These are part of the requirements of an NFL quarterback. Petitioner testified that he did not injure his left hamstring in the 2016 accident but noticed left hamstring tightness during rehabilitation.

Petitioner testified that during rehabilitation in December and January, he did progression exercises and gradually built up to running with more speed. He had pain and discomfort with the increased speed and with explosive movements. The pain was a "sharp knife" sensation where the break occurred and towards the ankle where they made an incision. He noticed 3 areas of pain, where the screws were placed in the upper and lower leg and the left knee.

Petitioner continued his rehabilitation at Furman University in South Carolina. He remained in contact with the Bears training staff, mainly through text messages with trainer Will Rogers. He testified that he texted that every day of rehabilitation took 2 days for the soreness and swelling and pain to go down.

Petitioner testified that from August 2016 through January 2017, he performed rehabilitation 5 to 7 hours per day at Respondent's team training facility, while also attending team meetings and assisting in game preparation. He continued his rehabilitation at Furman University from January 2017 until April 2017. Petitioner communicated by text with Respondent's team trainers while rehabbing at Furman University:

> Man this [patella] tendon is still giving me fits . . . I'm a toe runner and it's impossible for me right now to run on toes . . . For every 1 day I get after it lower body like squats lunges box jumps it takes a solid 2 days for it to feel decent . . . [P]ain is definitely still there. Drops are ok I'll feel a tweak every now and then. Agility stuff though like cutting hard is impossible for me. (PX # 1).

In February 2017, Petitioner returned to Chicago for an MRI and met with Dr. Bowen. Petitioner was eventually cleared to play on April 20, 2017. He testified that prior to being cleared to play, he had not tried any organized football activities with the Bears nor undergone "any of the rigors that are unique to the NFL." He does not recall the doctor putting him through physical exercises similar to the forces his leg would feel while playing quarterback in the NFL.

Prior to Petitioner's August 2017 injury, he was performing agility drills, the strength and conditioning program and quarterback specific drills such as drops and mobility exercises. During this time, Petitioner testified that he noticed the same discomfort, knifing sensation, and sharp sensation with any bootleg action when he needed to plant, pivot, explode out of a cut, or change direction. To perform a bootleg or escape the pocket, he was required to pivot and explode off his leg and transfer weight from the back foot to the front foot as you throw.

Petitioner testified that his weight training activities included leg exercises such as a curl machine, leg presses, leg extensions, and squatting. Petitioner noticed that he could not do the "normal" weight he was doing prior to the injury. Petitioner testified that he noticed that he was not "quite as fast or quite as quick or explosive" due to pain.

After expiration of his 2016 contract, Petitioner re-signed with the Bears in April 2017 for $465,000 (PX #8).

Petitioner underwent the surgical removal of the top 2 screws in January 2017, which relieved some pain in that area.

Prior to training camp in July 2017, Petitioner testified that he participated in OTAs and minicamp. He testified that from the start of minicamp in July and prior to the injury in August 2017, he had limited mobility due to pain and discomfort in any of the exercises that required him to explode off the left foot, torque, or change directions.

Petitioner played in the last 2 of the 4 preseason games. He did not play in the first 2 games because he had the bottom 2 screws removed from his left leg in early August 2017. Removal of those screws relieved some of his pain, but Petitioner stated that he still had pain at the fracture site and in his left knee.

Petitioner testified that in the 3rd preseason game he played for one series, 4 or 5 plays. He noticed that he was not as quick or fast during game situations. Pain and discomfort in the top of his left leg and fracture site affected his ability to perform the functions of a quarterback. This limited his ability to escape the pocket.

Petitioner testified that while playing in the 4th game, on August 31, 2017, he escaped the pocket and while running for a 1st down there was a popping sound in his left hamstring. He had noticed tightness of the left hamstring from April through August and

had received treatment with the Bears training staff. Following an MRI, Petitioner testified that he had a grade 1 or grade 2 tear. Petitioner and the Bears agreed to an Injury Release Contract, which cancelled his prior contract, on September 8, 2017.

Petitioner testified that following his injury his left hamstring was extremely sore. He was unable to walk or run. He underwent rehabilitation in Greenville, South Carolina for 2 to 3 months. During his rehabilitation, he noticed knee and ankle pain and discomfort.

During the August 31 game, when he injured his left hamstring, Petitioner was also evaluated for a concussion that occurred when he escaped the pocket, ran for a 1st down, and was tackled.

After physical rehabilitation and separation from the Bears, Petitioner's agent arranged tryouts with the Houston Texans, Indianapolis Colts, and New York Jets.

Petitioner's tryout with the Texans was on October 10, 2017. After an examination by Houston's team doctors, he performed physical activities including sprinting, mobility drills, and drills requiring quick acceleration and deceleration and twisting or planting his left leg. Petitioner testified that during his tryout he had the same pain and discomfort that was not present prior to his injuries. The Texans did not offer a contract.

On December 12, 2017, Petitioner had a tryout with the Jets. He again was examined by team doctors and performed more or less the same activities as the prior tryout. Petitioner testified that he had limited mobility due to pain and discomfort in his left leg. He was not at peak his performance as he was before his injuries. He was not offered a contract.

Petitioner testified that he had a tryout with the Colts, which was similar to the others. This workout was to test his ability to perform as a quarterback. The Jets did not offer a contract and he was never invited to another NFL tryout.

In December 2019, Petitioner attended 2 independent medical evaluations, one in Chicago and one in South Carolina. In January 2020, Petitioner went to a rehabilitation center for left hamstring isokinetic testing. Petitioner testified that he tried his best in testing and the doctor's examination. This included hopping on one foot, which Petitioner testified was challenging, range of motion, and flexibility of the hamstring. He noticed less range of motion of the left hamstring. Other than screw removals, Petitioner did not have any surgery during 2017.

Petitioner testified that after retiring from the NFL, he worked as the tight ends coach at Furman University. This did not cause left leg pain or discomfort. He worked there for 7 months in 2018 and was paid "roughly" $35,000. He then worked at Colonial Life Insurance for "a little over a year" and earned $120,000. Petitioner then worked as the University of South Carolina ("USC") Director of Player Development in 2019. His

current yearly salary is $200,000. Petitioner's current job title is Director of Football Relations. Petitioner's Exhibit 9 shows his 2020 earnings of $169,277, as Petitioner was required to take a furlough due to COVID.

Petitioner's current career goal is to be a quarterback coach. He testified that "for the most part" he is able to perform the physical functions of a quarterback coach, which requires simulating quarterback drills and understanding what drills to perform.

Petitioner testified that he does not perform any sprinting explosive workouts or change of direction because he still experiences pain and soreness. He described it as a dull ache around his knee and sharp pain sensation around the fracture site. Petitioner exercises regularly on a bike. Petitioner is married with 2 children, ages 6 and 4. He has pain, discomfort, and soreness when chasing his children around the house or the park. There is left leg discomfort while using stairs or chores around the house. He has aches and pain when he squats down for too long.

Petitioner uses ice to reduce swelling around the knee. He is not currently treating with a physical therapist. Petitioner testified that he has not able to regain the physical abilities to play quarterback in the NFL after his injuries. He does not notice his hamstring unless he is working out on it. It is then tight and sore. Prior to his injuries, he did not have pain or discomfort during football workouts prior to his injuries.

Petitioner testified that he has left leg pain and discomfort after standing for a couple of hours at practice. He "soldiers on" through the pain brought on by daily living activities but still notices pain after load bearing or explosive activity. Since his retirement, Petitioner has not practiced the moves of an NFL quarterback. He hosts youth football camps in which he tries to show the kids how to perform the moves of an NFL quarterback. He does not perform these moves as explosively or as fast as he would have due to his limitations, but they were still done at 100% full speed.

On cross-examination Petitioner testified that his camps are for children ages 6 to 11. The drills are the same but the intensity level for an NFL quarterback is different. Showing children NFL moves is not similar to trying out for an NFL team.

Petitioner testified that he was not aware of any undrafted free agent quarterbacks that were currently on an NFL roster. Petitioner testified that he was fired by the Bears but admitted that he signed a document on September 8, 2017 (RX #10), entitled Agreement and Release. Petitioner acknowledged the terms of the document and was paid $136,764.70. Petitioner agreed that he reads documents before signing them. During his professional career, he signed many documents and understands the importance of a contract.

Petitioner testified he told the truth to each of his doctors throughout his course of treatment.

After his injury release from the Bears, Petitioner's agent negotiated invitations for Petitioner to try out for 3 NFL teams: Texans, Colts, and Jets. He underwent a physical exam for each. Petitioner testified that he performed all drills but with pain. He said that his leg injury prevented him from performing at an elite level needed to be an NFL quarterback. He testified that he was unable to push off, explode, torque, and other things.

On further cross-examination Petitioner testified that at his October 9, 2017 Texans tryout, he signed a Warranty of Full Disclosure and Indemnity Agreement (RX #5). In pertinent part that document stated, "Player warrants and represents that he has made full and complete disclosure to the physicians retained by Club and/or Club athletic trainers or representatives as applicable to all his present or prior physical or mental defects, illnesses, injuries, or conditions known to him, or which should be known to him, which might prevent, hinder or impair the performance of his services under an NFL standard player contract." Petitioner was cleared to play for the Texans by 2 doctors. That is a requirement to play in the NFL. Petitioner signed and initialed a document for the Jets (RX #7), stating that he warranted and represented a release of liability and stated that he was in excellent physical condition. On October 3, 2017, Petitioner signed a Medical Examination and Authorizations form for the Colts. He told the Colts that he was in excellent physical condition.

Petitioner testified that in 2017 he signed a contract with the Bears for the $465,000 league minimum salary. Not all quarterbacks are paid at the league minimum. Quarterbacks are paid based upon several factors, including skill. Prior to signing the Bears contract, Petitioner told the Bears that he was healthy and cleared to play. He asserted that he was capable of all the rigors, explosiveness, and torque required.

Petitioner was among 4 quarterbacks on the Bears depth chart, which included Mike Glennon, Mitch Trubisky, and Mark Sanchez. Petitioner denied being 4th on the depth chart as the coaching staff said that during OTAs and pre-season, quarterbacks were being evaluated to decide the depth chart ranking.

Petitioner testified a player wants as many repetitions as possible in practice to show the coaches that he is ready to play. Petitioner testified that he did not know how coaches decide reps in relation to the depth chart. The 1st string quarterback takes the 1st string reps. The 2nd string quarterback takes the 2nd string reps with the other 2nd string players. The 1st string is usually the starting group. Petitioner could not remember if he was ever 1st team. He did take 1st team reps in OTAs. He then testified that he was not on the 1st team for the Bears during training camp in 2017.

Petitioner testified that he has not treated with any doctor since 2017. His September 2017 injury settlement states that he would be doing his rehabilitation away from Halas Hall.

Petitioner testified a typical day as Furman tight end coach would include position meetings during spring practice followed by practice and running drills. He would instruct his players during position meetings and teach technique on the field, such as how to run a certain route based upon the leverage of the defender. Petitioner would not physically do the route.

Petitioner was initially the USC Director of Player Development in 2020. This year he became Director of Football Relations. This position allows more flexibility to work in administration, not just football activities. Petitioner signs an annual contract. He was never an offensive coordinator for South Carolina but was an interim quarterback coach last year. The duties of an interim quarterback coach included teaching and coaching during position meetings and on the field. Petitioner would try to simulate the drills the best that he could. This included performing reps as a quarterback would including dropping back, planting, throwing, and following through. Petitioner testified that he could not perform these activities at full speed or to the standard that he would like to perform them.

Petitioner testified that since his University of South Carolina employment, he has not missed time from work due to injuries and has not filed any other workers' compensation claims.

On redirect examination Petitioner confirmed he was employed by the Bears on August 27, 2016 and on August 31, 2017. Each team had his medical records from the Bears for his tryouts with the Texans, Colts, and Jets. The doctors that examined Petitioner at those tryouts talked to him about his 2016 fractures and the 2017 hamstring injury. He did not withhold any information to those teams and was truthful.

Petitioner testified that "cleared to play" means that he could try to play without danger to his leg. No doctor told him that his leg was better than it had been prior to his 2016 and 2017 injuries. He felt he was in excellent physical condition at the time of his tryouts. He had been invited to the tryouts and was hopeful that he could overcome the limitations in his leg and perform as he had with the Browns and the Bears. No other part of his body hindered his performance other than his left leg.

Petitioner testified that even after his fracture, surgery, and screw removals, the Bears coaches were still hopeful enough that he was given 1st string reps.

Petitioner testified that he was incorrect in his response to Respondent's counsel regarding lack of treatment since 2017 and medication. About 1 month before the hearing, Petitioner was running steps inside the South Carolina stadium and "re-tweaked" his left hamstring. He was prescribed hydrocodone, which he took for 2 & 1/2 weeks. His left hamstring generally returned to its 2017 condition.

Petitioner testified that he was faster, more agile, and stronger with his left leg prior to his August 26, 2016 injury. He continues to work as the Director of Football Relations for the University of South Carolina and continues to earn $200,000.

On recross-examination Petitioner did not know his time in the 40-yard dash because it was not tested. He has not run a 40-yard dash for years. Petitioner has sprinted but has not run a 40-yard dash. He last ran a 40-yard dash at the 2014 NFL Combine.

In addition to speed, an NFL quarterback's skills are tested through strength and reach. There are several ways to test an NFL quarterback's skill level.

On further redirect examination Petitioner testified that his IME in South Carolina included strength testing of his hamstring and that he performed the test to the best of his ability. At his tryouts, the Colts, Jets, and Texans did not ask him to perform a 40-yard dash. Prior to signing a contract with the Bears in 2017, the Bears did not ask him to perform a 40-yard dash. When he tried out for the Browns in 2014, he was not asked to perform a 40-yard dash.

When running, it is painful to change directions or cut. When running straight ahead, he does not have the endurance that he used to have from the pounding of running. Petitioner does not believe that he could perform the functions of an NFL quarterback today. He does not believe that he could make an NFL team due to limited mobility issues and pain and discomfort that would not allow him to reach peak performance.

Cliff Stein was called to testify for Respondent. Mr. Stein is the Bears Senior Vice-President and General Counsel. He oversees all legal matters including Workers' Compensation claims. He began working for the Bears in 2002. Prior to working for Respondent, Mr. Stein was in private practice as an attorney and was an NFL certified contract adviser from 1994 to 2002.

Mr. Stein acknowledged that he has no medical training and does not evaluate players' abilities to perform. He is familiar with the criteria used to evaluate players based upon 16 years spent in scouting and draft meetings. He has handled all player evaluation analysis and salary cap analysis so to be able to apply a monetary value to players by using contract data and contract information.

Mr. Stein testified Petitioner was undrafted in the 2014 NFL draft, meaning 32 teams passed on drafting Petitioner in all 7 rounds. There is a process after the draft in which undrafted players are signed to fill out the 90-man rosters. During the preseason, rosters go from 90 players to 53 players. If a player does not make the 53-man roster, he may be placed on the practice squad or will be out of football entirely. Practice players are paid less to just practice. They do not dress for games. He testified that only about 7 or 8 % of undrafted players make a 53-man roster without going to the practice squad.

Mr. Stein further testified that prior to signing a contract, a player is asked to complete forms about his health and ability to perform. They have to sign that they are fully healthy and able to play. The Bears would never sign a player that was injured or unable to pass a physical. As a contract negotiator, Mr. Stein was not permitted to sign a player until he completely cleared by the medical process. The medical staff and training staff will review all available medical records including college and records from other teams. The player then undergoes an orthopedic evaluation and will be referred to another specialist if indicated.

Mr. Stein testified contract negotiations for veteran free agents involve player evaluations, grades by scouts and coaching staff, and comparable players around the league. A drafted rookie evaluation is determined by the rookie pool so there are little negotiations. Undrafted free agents all get the minimum salary and a "split" contract. This means the value they are paid depends upon whether they are on the 53-man roster or injured reserve. There may be a signing bonus depending upon the free agent priority. A lower signing bonus for a player means that player is less in demand.

Mr. Stein also testified that when Petitioner was signed by the Browns, he was given a $5,000 signing bonus. For the Bears, that would mean a lower priority signing bonus. When the Bears signed Petitioner in 2017, it was for a low minimum wage based upon the number of credited seasons. A credited season depends upon how many games they played on a 53-man roster. As Petitioner did not play in 3 games in a season, he finished his career with 0 credited seasons.

The collective bargaining agreement prevents a team from cutting an injured player, but the parties may enter into an injury settlement. Petitioner agreed to an injury settlement with Respondent in 2017. It was for 5 weeks of his salary (RX #11). He released the team from any injury grievance and for medical benefits after a certain date. Petitioner was paid $136,000. Petitioner's injury settlement was signed on September 8, 2017. At that point, all 31 other teams had the right to claim Petitioner off waivers. When Petitioner cleared waivers, he became a free agent on September 11.

Mr. Stein testified that when a player has a tryout with any team, including the Bears, they have the same requirements of disclosing any injuries. The teams also obtain all available medical records from the electronic medical records system to determine if there are any medical red flags.

Mr. Stein identified RX #11 as a Transaction Report form the NFL Management Council website which contains a player's activity. Per the report, Petitioner was "waived injured."

After being waived, Petitioner had tryouts with the Jets, Colts, and Texans. He would have been cleared to play prior to each tryout. A tryout for the Bears would normally involve position specific drills. The position coach and scouts would be present.

The player will do everything functionally related to their position. For a quarterback, that involves taking snaps, throwing, rolling out, and all the other things a quarterback is asked to do. A tryout means doing position physical drills on the field.

Mr. Stein is familiar with the 2014 draft as he was in the draft room and handled rookie contract negotiations for Respondent. He created a summary of the drafted and undrafted quarterbacks in the 2014 draft, RX #9. 13 quarterbacks were selected in the draft and 16 were undrafted. Of the 16 undrafted quarterbacks, Dustin Vaughan is the only one that made a 53-man roster.

Mr. Stein testified the one 2014 game is the only regular season game that Petitioner played in during his career. Petitioner was in the NFL for 3 seasons and was terminated in the preseason of his 4th year. In comparison to NFL rookies, Petitioner was in the league longer than the undrafted free agents and as long as some drafted quarterbacks.

Mr. Stein testified that Petitioner was not separated from the Bears due to his injuries but because he was 4th on the depth chart. He based his opinion on his experience from attending personnel meetings and the personnel evaluation process. He admitted that he was not in the 2017 meetings.

Mr. Stein stated the Bears had signed 2 veteran quarterbacks, Mike Glennon and Mark Sanchez, in free agency and drafted Mitch Trubisky in the 1st round. Teams generally keep 2 or 3 quarterbacks. The Bears kept 3 and terminated Petitioner because he was 4th on the depth chart. Lower on the depth chart means a player is less likely to play. It is rare for an undrafted quarterback to play in the league as long as Petitioner.

On cross-examination Mr. Stein testified he was not involved in Petitioner's signing with the Bears. He is not a scout. He noted there are objective and subjective components to scouting. He acknowledged that 2 scouts can have different opinions on the same player. Combine data is important but there is no mathematical formula for evaluating players.

Mr. Stein testified that during his 20 years with the Bears, he has been involved in the decision to sign or draft players that have met or exceeded expectations and players that have failed to meet expectations. A player can be cut for performance at any time but cannot be cut while injured. Petitioner entered into an injury settlement with the Bears on September 8, 2017 (RX #10). The injury settlement was based upon the number of weeks that the doctors estimated that it would take until Petitioner was 100% healthy.

Petitioner was claimed off waivers from the Browns in 2016. The Bears and the Seattle Seahawks had both claimed Petitioner.

Petitioner underwent a Bears physical prior to signing his contract in 2017. Mr. Stein was not aware of any injury to Petitioner other than with the Bears in 2016 and 2017.

Petitioner did not exceed expectations for an undrafted quarterback by signing a 2017 contract as he had spent 2 years on injured reserve. Petitioner was on injured reserve for the 2016 season and was paid pursuant to his contract.

Mr. Stein further testified that the Bears' decision to release Petitioner in 2017 was based exclusively on skill and the deep quarterback talent already on the team. Respondent signed Petitioner to a contract on March 6, 2017 and he was cleared to play on April 20. After signing Petitioner, the team signed Glennon as free agent to be the starter, Sanchez, a former 1st round draft pick and starter, and drafted Trubisky as a top pick in the 1st round. Mr. Stein admitted that he had no role in creating the depth chart.

Mr. Stein testified that when a team doctor clears a player to play, that means "full go, they can do all football activities." He testified that he had no medical opinion but relies on a full and exhaustive evaluation by the team doctors before putting a player on the field. He did not observe Petitioner during his rehabilitation. No one reported that Petitioner did not put full effort in his rehabilitation in 2017. The decision to terminate Petitioner in 2017 was based upon the overall evaluation by the scouts, the GM, and the coach. This is based upon 15 years of being in the personnel meetings with coaches and scouts. Mr. Stein was not involved in the meetings regarding Petitioner. The GM decides whether a player is released or cut.

Mr. Stein also testified that Petitioner would have been released by the Bears regardless of the 2016 or 2017 injuries. Mr. Stein did not have any personal knowledge of Petitioner's physical condition or his ability to perform as an NFL quarterback when Petitioner was released in 2017. The team hires the best doctors to determine whether a player is able to play. Based upon his meetings with the doctors, Mr. Stein testified they are extremely conservative and leave nothing to chance. There is no incentive, especially for a minimum salary player, for a team to release a player that could have a relapse of a pre-existing injury. He said the Bears do not sign players that may not be able to play the same as they did before an injury. A player's health can impact his quickness, agility, strength, and speed.

Mr. Gregory Gabriel was called as a witness for Respondent Chicago Bears. He is retired but is doing consulting work for the Bears. Mr. Gabriel played football until age 31 but never in the NFL. He worked as a part time scout for the Buffalo Bills from 1981 to 1984. Mr. Gabriel then went to work for National Football Scouting, one of two scouting services subscribed to by the 32 teams.

With the Bills, Mr. Gabriel viewed film of prospects and wrote comprehensive reports on each player. Mr. Gabriel also traveled to college games in New York, Pennsylvania, and Ohio to evaluate players. With National Football Scouting, Mr. Gabriel worked as a college scout in the Great Lakes area. As a scout, Mr. Gabriel would contact colleges in the spring to identify prospects for the upcoming draft. In the fall, he would

look at the current senior class. In December, he would give reports to the teams. Mr. Gabriel testified that he evaluated every position including quarterback. He wrote reports on approximately 500 players while working for National Football Scouting.

In 1984, Mr. Gabriel was hired by the New York Giants as an area scout. His territory was the central area of the country. Mr. Gabriel worked for the Giants for 17 years. In 1996, he was promoted to Director of Player Development. While with the Giants, he would scout and evaluate approximately 250 players per year. While employed with the Giants, the team went to 3 Super Bowls, winning 2.

Mr. Gabriel testified he was hired as the Bears Director of College Scouting in 2001, where he oversaw the entire scouting department. He worked with General Manager Jerry Angelo to put the draft board together and give draft strategy. He also was very involved with the selection process. He was involved in 17 drafts with the Giants and 9 with the Bears.

Mr. Gabriel's Bears draft responsibilities included 3 meetings to pare down their list of players to about 500. At the NFL Combine, that list would again be pared down to 300 to 400 players. By around April, the team would develop their final draft board. While with the Bears, Mr. Gabriel testified that they drafted 12 Pro Bowl players. The team won 3 division titles, one NFC title and went to the Super Bowl once.

Mr. Gabriel testified he voluntarily left the Bears in 2010 at age 60. After leaving the Bears, he worked as a part owner and writer for National Football Post. He also wrote for Bleacher Report for 4 months. He eventually went to work for Pro Football Weekly in 2014, authoring their draft guide from 2015 to 2019. Mr. Gabriel also did media work for Radio 670 Sports and periodically did some consulting for general managers. He then went to work for the Philadelphia Eagles in a full-time consulting job.

In 2020, Mr. Gabriel became the Director of Player Personnel for the Washington, DC Extreme Football League team. His job was to put the team together from scratch. Each team had 53 players plus a practice squad, a total of about 60 players. The league folded when the pandemic hit.

Mr. Gabriel testified he was retained by the Bears to offer opinions and author a report (RX #4). He was paid $400 per hour to review documents, review tape, prepare a report, and come to court. He has also worked for the Bears on 7 or 8 other cases.

Mr. Gabriel opined that Petitioner was a good college football player but a very average NFL prospect. As a college freshman, Petitioner was a backup, completing 23 of 33 passes for 223 yards, 1 touchdown and 2 interceptions. Petitioner became the starter part way through his sophomore season. He completed 123 of 188 passes for 1,448 yards, 14 touchdowns and 6 interceptions. Petitioner was the starter during his junior and

senior years. Petitioner was one of 335 players invited to the NFL Combine prior to the 2014 draft. That year 14 quarterbacks were drafted. Petitioner went undrafted.

Mr. Gabriel noted Petitioner was a very good athlete, an exceptional competitor, and, he assumed, a very good leader. He noted Petitioner was not a strong-arm passer but because his athleticism he extended plays "with his feet." Petitioner was a very good college quarterback but was not highly thought of as an NFL quarterback because he was only 6 feet tall and did not have a strong arm. Mr. Gabriel noted that size is important in the NFL. When a player is only 6 feet tall, he has to have some special traits to be wanted by an NFL team. Petitioner went undrafted by 32 teams.

Petitioner was signed as an undrafted free agent by the Browns after the 2014 draft. He was an average rookie who was cut at the end of the preseason and signed to the practice squad after clearing waivers. In 2015, he was listed as the 4th of 4 quarterbacks. In the opening pre-season game, Petitioner tore ligaments in his thumb that required surgery. He was placed on injured reserve for the remainder of the 2015 season.

Petitioner was waived by the Browns at the end of the 2016 off-season program and was claimed by the Bears (as well as the Seattle Seahawks). He was the 4th of 4 Bears quarterback.

Mr. Gabriel noted Petitioner was injured during the Bears 3rd preseason game against the Chiefs. Petitioner was playing well prior to the injury, completing 5 of 6 passes for 65 yards and 1 touchdown. He was placed on injured reserve for the remainder of the season.

Mr. Gabriel opined that it was unlikely that Petitioner would have made the 53-man roster in 2016 had he not been injured. The coach, John Fox, had a history of only keeping 3 quarterbacks between the roster and practice squad. If a quarterback was injured, the practice squad quarterback would be brought up. The number 3 quarterback, David Fales, and Petitioner were not good enough. Fales was eventually cut, and Matt Barkley became the practice squad quarterback for that season.

Mr. Gabriel further opined, based upon the tapes of the 3 preseason games, that Petitioner did not have the talent to make the 53-man roster or be a viable practice squad player. Petitioner was a good athlete and could move around very well and extend plays, but his arm strength was very poor and average, and he could not "drive the ball." His best throws were "between the numbers and checkdown," but his throws would struggle when he had to throw outside the numbers.

Mr. Gabriel testified typically, an NFL team will keep 2 quarterbacks on the roster and 1 on the practice squad. Depending on who the 3rd quarterback is, he may be on the roster to avoid the risk of exposing the player to waivers.

Mr. Gabriel confirmed that Petitioner was re-signed by the Bears and was the 4th quarterback during the 2017 offseason. Petitioner was eventually let go by the Bears at the end of the 2017 preseason when he agreed to an injury settlement after injuring his hamstring in the final preseason game.

Mr. Gabriel testified, based upon the NFL teams that he worked for, that teams rely on a player's veracity in describing their medical history prior to offering the player a contract.

Mr. Gabriel has been involved in NFL contract negotiations, mostly with college free agents after the draft. He has also been involved in the process with veteran players by contacting the agents and players, although not the "high-priced" free agents. Most undrafted free agents are usually signed within a 2-hour span after the draft ends. The scouting director does the actual negotiations and agreement on a contract.

Mr. Gabriel has been involved in the signing of non-college veteran players by establishing the "parameters" for a player. The parameters included medical, and the grade given by based upon the team's system. The system is based upon a player's draft position and grade number. He noted it is very difficult for a free agent quarterback to carve out a career in the NFL because he comes into camp as the low man, and he has to beat out the veterans and drafted quarterbacks. Most teams will only keep 2 quarterbacks on the 53-man roster and a 3rd if the team does not want to risk waivers.

Mr. Gabriel testified that injuries did not play a role in Petitioner not having a career in the NFL. Each player has a medical record that starts with college and follows him to the NFL. Those records go with him to every team and are an important part of the evaluation process. Mr. Gabriel testified that he relies on the doctors and "…if a doctor says a guy can play, he's good to go, then we are free to sign him."

On cross-examination Mr. Gabriel confirmed Petitioner sustained an injury to his left leg on August 27, 2016 while playing for the Bears. Petitioner also injured his left hamstring while with the Bears on August 31, 2017. He opined that even if had Petitioner not been injured in 2016, he would have been released at the final cut in September, which was based on watching every preseason play.

After the 2016 contact expired, the Bears re-signed Petitioner in 2017 because they needed a "camp quarterback." Mr. Gabriel testified he would not have re-signed Petitioner prior to the 2017 season. He testified that on September 11, 2017, Petitioner was unemployable by any NFL team but that had nothing to do with the condition of his left leg.

Mr. Gabriel testified he reviewed a medical chronology prepared by Respondent's counsel. Petitioner had to pass a physical in order to sign a new contract with the Bears. Mr. Gabriel acknowledged that he had no information regarding Petitioner's physical

activities, what Petitioner noticed about his leg, how fast he could sprint without pain, what weights he was able to lift without pain, or if Petitioner was able to cut, pivot, spin, or run backward.

On further cross-examination Mr. Gabriel testified he became aware of Petitioner's ability to perform in April and during OTAs in May. He viewed video of Petitioner performing the functions of an NFL quarterback from May 2017 to August 30, 2017, including some practice tapes provided by the Bears, specifically, game tape from 2016, practice tape from 2017, and game tape from the 2017 preseason. He has not seen Petitioner perform any activity unique to an NFL quarterback since his injury in 2017. Mr. Gabriel noted Petitioner did not move around like he had pain and that he looked like the athlete he has always been. There were no visible deficits in his leg strength or speed when comparing the 2017 film with the prior film. If Petitioner had significant strength deficits between his left leg and right leg, that would not change his opinion. Petitioner played 2 preseason games in 2017.

Mr. Gabriel did not speak with Bears training staff about the condition of Petitioner's left ankle, knee, or hamstring, and he has not seen any report or video of Petitioner's attempts to perform as an NFL quarterback after August 31, 2017. He was unaware of what weights Petitioner was lifting with his left leg before the 2017 injury.

Mr. Gabriel acknowledged that while he was with the Giants and Bears some of his draft recommendations were not successful and did not work out. There is no mathematical or scientific formula to finding a successful player in the draft. Every NFL scout weighs intangibles differently. Mr. Gabriel responded "wrong" when asked whether scouts rely on intuition to make their recommendations.

Mr. Gabriel was then questioned regarding his testimony in an evidence deposition he gave in *Justin Perillo v. Bears Football Club* (PX #10). He was asked whether in that deposition he was asked, "And do you recall that you were asked in that testimony, question, every scout relies on, in some part, on intuition to make their recommendations, isn't that fair to say? And you answered, fair. Do you remember that testimony?" Mr. Gabriel responded, "Intuition and experience." He further testified every scout relies on intuition to some degree but that it is a very small percentage. Scouts rely on experience and experience is not "your gut."

In the *Perillo* deposition, Mr. Gabriel was asked "Scouts rely kind of on what their gut tells them as a component of their decision-making process, right? And you answered, yes. Did I accurately read that testimony?" He testified that his testimony in the present case was just explaining gut as he had been "through these a few times now, using the proper words."

Mr. Gabriel testified a scout's job is to get it right as often as possible because he is held accountable. There is subjectivity in that one scout could have a different opinion

than another after watching the same player on tape. Each scout has his own way of doing things as he watches tape. Scouts try to come up with as close to the same answer as possible, but it is often done in different ways. There is no written treatise, book, or publication that is widely accepted as a "how-to" for scouting an NFL player. He added, NFL clubs do an excellent job scouting players and mistakes are minimal. There isn't an exact percentage but in every draft there are players that bust and don't reach their potential.

In his *Perillo* testimony, Mr. Gabriel was asked "Fair to say that less than 50 percent of the NFL first round picks in the last 10 years have reached their potential?" He responded that it was probably fair. He testified that "probably" is the key word. He added "it's fair but there is no exact number."

Mr. Gabriel testified it is not fair to say that if a scout hit 50% of his recommendations that he is doing a good job. He agreed that he previously was asked "And you would agree with me that if you hit 50 percent of your scouting recommendations as successful, you are probably doing pretty well in the NFL, is that fair to say? And you answered, yes, sir."

Scouting is a tool used by NFL teams to predict future productivity. There are certain traits that a player has to have to play a certain position. For example, a 210-pound player will not be able to play as an offensive lineman.

Mr. Gabriel has no idea how a tibia/fibula fracture or a patella tendon tear affects the speed of an NFL player, sprinting ability, or physical abilities. He was not aware of how the 2016 injury affected Petitioner's left leg strength. He has no idea of how a hamstring tear could affect the performance of an NFL quarterback.

Mr. Gabriel said his report stated that he was one of the most respected draft analysts as his book was a best seller on Amazon for 2 years and he was the only person in that business that has actually run a draft. He agrees with the statement that from a scout's perspective they must know exactly what to look for at each position and that comes from guidance from each position coach. Mr. Gabriel did not speak with any position coaches with the Bears or in the NFL in preparation of his report. He had no idea of what the Bears quarterback coaches were looking for in a quarterback in 2017.

Mr. Gabriel has been hired by the Bears in 7 cases. He has never reached an opinion that a player's release was related to an injury, but he has not written reports on all of the cases. In each of those cases, he charges $400 per hour and earns roughly $5,000 to $10,000 for his total time, including report, preparation, travel, and testimony.

Mr. Gabriel testified that whether a player is injured or hurt can impact his quickness, agility, balance, strength, or explosiveness. Being drafted is not a prerequisite

for playing in the NFL and an undrafted player can still be successful, noting Hall of Fame players Kurt Warner, Tony Romo, and Warren Moon.

Mr. Gabriel testified Petitioner outlasted almost all the quarterbacks in the 2014 draft but only played in 1 regular season game. He is not a medical expert and does not know how long a tibia/fibula fracture takes to heal and only has personal experience regarding hamstring tears. Mr. Gabriel did not speak with any doctors and did not review deposition transcripts. He did not rely on a medical chronology to come to his opinion

Mr. Gabriel testified that his opinion was based on one thing only, the talent level of the player. Whether an orthopedic surgeon said that Petitioner's 2016 leg injury affected his ability to perform as an NFL quarterback, would not change his opinion as to Petitioner's talent level. He testified that before the injury, Petitioner did not show anything on the field that said that he could play.

On redirect examination Mr. Gabriel testified that none of the questions or opinions brought up by opposing counsel are inconsistent with his opinions. Had Petitioner not suffered the 2016 tibia/fibula injury, he would have been released at the final cut down date a week later. The 2016 injury actually sustained his career where he earned more money because of his injury.

Mr. Gabriel's redirect examination was interrupted and resumed on a later date.

Mr. Gabriel reviewed Respondent's Exhibit #5 in preparation of his report and testimony. RX #5 contained Dr. Sherman's report and Dr. McCain's deposition. Item 14 of RX #5 is a document he received form Cliff Stein which is a study done by the Bears and NFL Management Council on the average length of careers of draft choices and undrafted free agents. There were 14 quarterbacks drafted in 2014. All 32 NFL teams passed on drafting Petitioner.

Mr. Gabriel testified that he does not care about getting drafted, only about talent. He stated Petitioner was a marginal draft choice with minimal talent and was not going to make it in the league.

Mr. Gabriel testified most of undrafted free agent contracts in the NFL are basically the same. Contracts are for rookie minimum salaries and are 2 to 3 years in length, which are paid if the player makes the team. Item 15 shows the number of free agents that made it in the NFL. He noted it is very difficult for an undrafted free agent to make an NFL team. They have to be special in training camp to show that they have the wherewithal to compete in the NFL.

Mr. Gabriel reviewed a Wikipedia printout (which indicated the New Orleans Saints was interested in claiming Petitioner on waivers in 2016), a scouting report from 2014, and a DVD of game tape with the Browns. The most important thing to study is the tape. He does not listen to what the coaches say or what the trainers say, but "the eye in

the sky doesn't lie." This is especially important for a quarterback. Petitioner's injury came up after the fact. He opined Petitioner already showed that he could not play with the Browns and again later in his career with the Bears.

Mr. Gabriel testified "cleared to play" is a term used in player evaluations. If a doctor says that a player can or cannot do something, the doctor's opinion is followed. A player has to be cleared to play in order to play in the NFL. Before a player signs his original contract he must pass a physical and be cleared by the team's medical staff.

Mr. Gabriel's highest level of employment in the NFL was as the Bears' Director of College Scouting. He was also Director of Player personnel for the XFL. He spent his entire adult life evaluating whether football players can play in the NFL. His job was to understand whether players can play or not play at the NFL level. He acknowledged it is "not a science." Instinct and experience are involved. One looks at traits by watching whether a player has the wherewithal to be a productive player. He testified 2 scouts can come up with different evaluations. He said instinct and intuition are one and the same when it comes to evaluation players. A scout instinctively knows from watching tape and watching thousands of other players over the years.

Mr. Gabriel testified there are certain things looked for in a player, depending upon position. These include height, weight, speed, arm length, and hand size. Gut feeling and experience are used in evaluating a player as well as speed, strength, agility, cognitive tests, mental tests, and several other factors. Scouts are judged on their reports. Mr. Gabriel testified that after thinking about it, 50% success for a scout is only average. The goal is above 50%.

Mr. Gabriel could not explain why he testified in the *Perillo* case that a 50% scouting success was good and why he testified at trial that a 50% scouting success was not doing a good job. A scout wants a high percentage because scouts are evaluated by management based upon every report they write.

On recross-examination Mr. Gabriel admitted he reviewed a medical chronology, reviewed tape, and other research on Petitioner. He did read the depositions of Drs. Sherman and McCain and medical reports. He acknowledged he was mistaken in his earlier testimony denying that he had reviewed those documents because he had a number of other cases going on. He also admitted that he was mistaken in his prior testimony denying that he had knowledge of what Petitioner noticed about his left leg and ankle during the 2016 off season. He said what Petitioner told the doctors was irrelevant to his opinion because Petitioner had been cleared to play.

Mr. Gabriel considers what the medical staff tells him regarding a player's pain issues. If not, he goes by what he sees. He did not speak with the Bears medical staff in this case.

On further recross-examination Mr. Gabriel testified that Dr. McCain's opinion that Petitioner was no longer capable of playing in the NFL did not enter into his evaluation because Petitioner did not have the talent to play in the NFL regardless of injury. Dr. McCain's opinion that there was an 80% deficit of Petitioner's left hamstring that was related to the 2017 injury also did not enter into the evaluation as it was "after the fact."

Mr. Gabriel said "cleared to play" means that the medical staff said that it is safe for Petitioner to participate in football activities. If a player is going to be at risk, he will not be cleared.

Mr. Gabriel testified if it is in his report, then he was aware of Dr. McCain said that Petitioner had pain in his left leg when transferring weight and was no longer able to cut, pivot or sprint as before the injury. He testified if Dr. Sherman said that Petitioner's 2016 left leg injury was limb-threatening and career-threatening in his deposition, then he read it. He also read where Dr. Sherman testified that "cleared to play" means that it was safe, not that "fractured and healed" is the same as never injured in the first place. Mr. Gabriel's opinion of what cleared to play is different than Dr. Sherman's opinion. He also read Dr. Sherman's testimony regarding left leg weakness and function.

Mr. Gabriel addressed Petitioner's ability to play football only in his report. He said any discussion about strength, agility, and speed 2 or 3 year after the fact did not matter. He noted Petitioner was a sub- average football player while playing for the Browns and the Bears. Mr. Gabriel testified that if he were making the decisions, he would not have signed Petitioner to a contract in 2016 or 2017. He was not aware of the specifics of Petitioner's contract with the Bears.

Mr. Gabriel reviewed Petitioner's Exhibit #8, the February 28, 2017 contract between Petitioner and the Bears. He testified Petitioner could not have signed the contract unless he had passed a physical. The Bears had no obligation to sign Petitioner. Their decision was based partially upon input from the coaching staff. Input of the scouts may have led to the 2016 signing.

Mr. Gabriel reviewed 2016 and 2017 game tapes. In the 2016 tape, prior to the injury, Petitioner rolling out of the pocket and attempting to sprint up field. Mr. Gabriel disagreed that Petitioner was running, cutting, and pivoting as expected of an NFL quarterback.

Mr. Gabriel's 2014 scouting report, Part 17 of Respondent's Exhibit #5, on Petitioner stated that in college "He can move around in the pocket and make/extend plays with his feet." Mr. Gabriel noted the doctors' opinions were after the fact. Mr. Gabriel testified that before Petitioner was injured in the 2016 4th preseason game, "He stunk. There's no other way of putting it, okay? He wasn't very good." Petitioner was a member of the Bears on the day he was injured, as were 89 other players.

Dr. Richard Sherman examined Petitioner at Respondent's request on December 17, 2019, in accord with §12 of the Act. His report was marked as Deposition Exhibit #2. Dr. Sherman gave his evidence deposition on June 30, 2020 (PX #5). Dr. Sherman received his medical degree from the University of Chicago Medical School. He completed a 5-year orthopedic residency at Loyola University Medical Center and a 1-year fellowship in sports medicine at Harvard Medical School, Brigham and Women's Hospital, and Massachusetts General Hospital. He is board-certified in orthopedic surgery.

Dr. Sherman performs 10 to 12 surgeries per week, 70% are for the knee and 30% for the shoulder. Less than 1% of the doctor's practice is devoted to medical/legal work such as expert reviews and testimony.

In addition to the examination on December 17, Dr. Sherman reviewed Petitioner's medical records. He refreshed his memory from his narrative report dated December 17, 2019 (DepX #2).

Dr. Sherman noted Petitioner suffered left tibia and fibula fractures in the 3rd preseason game while playing quarterback for the Bears on August 27, 2016. The injury occurred when a defender rolled into Petitioner's left leg while it was planted. Petitioner suffered a mid-shaft fracture of the left tibia and fibula. Surgery on August 29, 2016 included the insertion of an intramedullary nail to stabilize the fracture and transverse screws that are used to keep the rod from telescoping. This injury can be "limb-threatening but certainly career-threatening" because the bone and the muscle around the bone get injured. Petitioner underwent rehabilitation to restore both mobility and strength.

Dr. Sherman noted that in his rehabilitation, Petitioner complained of pain around the patella tendon, hamstrings, and upper tibia where the transverse screws were placed. In January 2017, the proximal transverse screws were removed due to irritation of the bursa sac as they were no longer required to keep the bone from telescoping. This was related to the original injury. A February 15, 2017 left leg MRI (PX #5) showed edema in the soft tissue around the upper tibia where the rod entered the bone. Petitioner's complaints were common after an intramedullary nail is placed.

The records indicated Petitioner was cleared to participate in training camp in late Spring 2017. With increased running, Petitioner experienced lower leg pain in the area of the distal locking screws. The doctor noted Petitioner was deemed able to play football but was having some limitation in his ability to run with quickness and was having trouble planting and accelerating.

Dr. Sherman testified when a player is medically cleared to play, he can safely play football from a medical standpoint and is not at risk to undo the healing that has occurred. He said fractured and healed is not the same as never injured. The medical records showed that Petitioner participated in training camp in August 2017 but experienced

lower leg pain due to the distal locking screws. The distal screws were surgically removed on August 4, 2017. Dr. Corcoran's medical records stated that despite the screw removal, Petitioner may have chronic pain due to nerve irritation.

Dr. Sherman testified that at his December 17 examination, Petitioner complained of left lower leg pain. The doctor testified that Petitioner reported that his leg was significantly weaker and that he did not feel that he had regained the strength he had before the injury.

Petitioner injured his left hamstring during an August 31, 2017 preseason game while he was accelerating to get out of the pocket. He felt a pop which is often indicates a muscle tear. A September 1, 2017 MRI (PX #9) showed some degenerative changes to the patellofemoral joint not directly related the hamstring injury and a less than 50% tear of the hamstring. Petitioner's earlier complaints of hamstring tightness could make him more prone to tearing his hamstring with sudden acceleration. The findings were consistent with a hamstring tear from the August 31injury. Treatment for a hamstring tear is to just wait and let it heal.

Dr. Sherman noted that following his Bears release, Petitioner continued to work out with stretching, running, and squatting. He reported that he had tryouts with the Texans, Colts, and Jets but did not have the ability to accelerate quickly and plant and twist due to weakness and pain. Petitioner then retired from football.

On examination Petitioner complained of pain on palpitation of the fracture site and weakness. X-rays showed good healing. Physical measurements of Petitioner's calf circumference showed a ½ inch deficit on the left. Measurement of Petitioner's thighs showed a ½ inch deficit on the left. Hopping was reduced by 2 inches on the left. Straight leg-raising on the left was limited to 45° and 70° on the right. Long sitting testing was reduced on the left due to hamstring tightness. Petitioner complained of pain when running, squatting, planting, and twisting maneuvers.

Petitioner's left leg tenderness, pain, and weakness are consistent with a tibia fracture with an intramedullary nail. Petitioner stated that he could no longer plant, cut or accelerate in the manner that he needed to play NFL quarterback. Dr. Sherman opined this has definitely affected Petitioner's ability to continue his career. He further opined that the condition of Petitioner's left leg at the time of the examination is permanent, also noting Dr. Corcoran's opinion.

Dr. Sherman found no evidence of symptom magnification or malingering. Possible future treatment could include physical therapy to get more flexibility and strength, anti-inflammatory medication to relieve discomfort, or cortisone or viscosupplementation injections if he is having pain close to the knee. However. Dr. Sherman did not foresee that Petitioner would require surgery in the future.

On cross-examination Dr. Sherman acknowledged he did not review any of petitioner's medical records from before August 8, 2016 and that he was unaware of prior injuries. Petitioner did not report prior treatment or surgical history that is not in his report. He was unaware of a prior Lisfranc injury to the left foot that required surgery. He testified that those records were not needed even though he opined about Petitioner's ability to plant, cut, and run quickly as it relates to Petitioner's ability to play for an NFL team. The records showed that Petitioner was medically cleared to play prior to the 2016 season and on April 20, 2017. The records show that on 4-17-17, Petitioner acknowledged that he was physically able to play football (PX #7). The doctor was unaware of a May 30, 2017 document.

Dr. Sherman does not regularly evaluate NFL players. Any such evaluation was sporadic. The doctor was unaware of the criteria used by the Bears to evaluate Petitioner's ability to play quarterback. The criteria could be different from team to team or physician to physician. The doctor was aware that on June 12, 2017, Petitioner was cleared to participate in the 2017 training camp without restrictions.

Dr. Sherman was not provided with any medical information after a September 7, 2017 Dr. Guy second opinion evaluation stating that Petitioner should not return to play until he has gained full strength. Petitioner reported to Dr. Sherman that he had tryouts with the Texans, Colts, and Jets. The doctor further testified that he did not review any of the evaluations by those teams but understood that the teams had cleared Petitioner to play otherwise they would not let him try out.

Dr. Sherman did not opine that Petitioner's injuries prevented him from playing football but did clarify that the injuries prevented him from playing football while he was injured. Dr. Sherman did not disagree with the doctors that cleared Petitioner to play football. He did not state in his report or in his testimony that Petitioner had any restrictions pertaining to his left leg. Dr. Sherman does not know why the Texans, Colts, or Jets did not sign Petitioner. He had no opinion regarding Petitioner's capabilities to work other than the context of playing professional football.

On redirect examination Dr. Sherman clarified that that being cleared to play means it is medically safe to play in the NFL. Medical clearance to play does not equate to returning to the same physical condition one had before the injury. He added that Petitioner's quality of play was affected by his left leg injuries.

Dr/ Sherman testified Petitioner signed a document stating that he was physically able to play football. In his practice, the doctor has had patients sign documents indicating that they are physically able to do their job but that he does not rely on their medical expertise to answer that question. It means that they are safe to do their job, but it does not mean that they will be the same as prior to the injury. Medical clearance to play does not equate to returning to preinjury condition.

Sherman DepX #3 noted Petitioner had a left Lisfranc injury in 2012. The doctor is unaware of any left leg injury from 2012 to 2016. As Petitioner played college and professional football after the injury the doctor opined that the injury did not prevent him from playing football. The doctor is not aware of any treatment that would have allowed Petitioner to continue playing in the NFL.

On recross-examination Dr. Sherman testified he did not have any objective baseline measurements prior to August 27, 2016 to compare his measurements with.

Dr. Richard McCain testified at his evidence deposition on July 6, 2020 and on September 28, 2020. He received his undergraduate degree from Washington and Lee University and his medical degree from the University of South Carolina Medical School in1978. He completed an orthopedic residency at the University of South Carolina in 1983 and has been in private practice in Colombia, South Carolina since. Dr. McCain is board-certified in orthopedic surgery with subspecialties in trauma and sports medicine.

Approximately 4% of the doctor's practice is devoted to IMEs, for both petitioners and respondents. The doctor testified that his practice includes all long bone and joint injuries and the full scope of orthopedic trauma excluding spine surgery.

Dr. McCain conducted an IME of Petitioner in Columbia South Carolina on December 2, 2019. In addition to the clinical examination, Dr. McCain reviewed Petitioner's medical records. He refreshed his memory by referring to his report of December 6, 2019 (DepX #2) and his addendum report based on additional records review of March 2, 2020 (DepX #4). Petitioner provided a history of numerous injuries and surgeries while playing collegiate and professional football. Petitioner complained of pain in the mid and proximal tibia when running, twisting, and squatting. His left knee swells with running.

Dr. McCain testified his examination showed relatively normal range of motion of the left knee from 0° to 130°. Collateral ligaments were stable. No tenderness over the medial collateral ligament femoral origin but slight tenderness over the medial collateral ligament tibial insertion. No tenderness of the lateral collateral ligament and all 4 joint lines were non-tender. Testing was negative for ACL and PCL injury, or medial or lateral meniscus tears. There was a 5° deficit of left knee extension, probably due to the hamstring injury. Ankle examination showed no swelling or obvious deformity.

Dr. McCain reviewed Petitioner's physical therapy records from Spartanburg Medical Center from January 13, 2020 (DepX #3). Petitioner had residual left quad and hamstring weakness.

Weight-bearing X-rays showed bilateral 1-to-2mm depression of both knees at the tibial plateau. Left leg X-rays showed a well-healed mid-shaft tibia/fibula fracture with a retained intramedullary rod.

Dr. McCain diagnosed a mid-shaft left tibia fracture on August 27, 2016 and a left hamstring injury on or about August 27, 2017. He testified treatment was excellent, reasonable, necessary, and causally related to the accidents. The mid-shaft tibia fracture was healed but opined that hamstring injuries can be problematic over the long-term. The doctor recommended isokinetic muscle testing to clarify muscle weakness or impairment.

Dr. McCain testified that Petitioner did not have any restrictions and was capable of normal full-time work except as a professional athlete or football player. He has most likely reached MMI pending isokinetic testing.

Dr. McCain noted January 13, 2020 isokinetic testing (RX #3) showed residual left hamstring weakness, also addressed in the doctor's March 2, 2020 report (RX #4). Dr. McCain testified that the residual deficits were due to the August 28, 2017 injury and recommended therapy for the left lower extremity twice per week for 6 weeks. Petitioner was at MMI pending rehabilitation. Dr. McCain noted Petitioner was employable and working in the insurance industry and was not currently a football player.

Dr. McCain performed an AMA Impairment Rating and found Petitioner had a 10% impairment of a lower extremity due to his hamstring injury.

Dr. McCain opined that Petitioner was capable of full duty work but not as a professional football player. He was unaware Petitioner had been medically cleared to play football by 3 NFL teams after his release by the Bears, which he noted as "surprising." The doctor did not know why Petitioner was released by the Bears and did not know why he was not signed by the Texans, Colts, or Jets. He did not have personal knowledge of the decision-making process of those teams and cannot say that the injuries were the reason that he was not hired. Petitioner's injuries were significant, particularly the left hamstring deficit. He acknowledged there are other factors taken into account beyond the physical component that the doctor was not aware of.

Dr. McCain further testified that without isokinetic testing when Petitioner was trying out for the 3 teams in late 2017, he could not say with certainty what Petitioner could or could not do.

On cross-examination Dr. McCain testified "cleared to play" means that there is no deficit or potential for re-injury. That it is not dangerous to play. If there was a hamstring deficit, there is a potential for re-injury. In hindsight, Dr. McCain would not have cleared Petitioner to play, noting hindsight is always 20/20. It is possible that a player that is cleared to play may not be as fast as before an injury. With regard to agility, he would hope the player was very close.

Dr. McCain testified he treats college athletes and has treated injuries similar to Petitioner's injuries. He did not feel that Petitioner was a malingerer or exacerbated his

symptoms. He opined Petitioner's complaints in December of 2019 of proximal tibia pain when running, twisting, or squatting are likely related to the August 2016 injury.

Dr. McCain noted Petitioner diligently performed rehabilitation of his tibia and hamstring injury. The surgery for the tibia/fibula fractures were necessary and appropriate and came with a risk of diminished ability to cut, pivot, or sprint. He is not aware that Petitioner complained of a diminished ability, but it would not surprise him.

Dr. McCain noted X-rays showed a well-healed fracture. The doctor testified that he would expect Petitioner's pain complaints to be mild. He does not recall asking Petitioner what his symptoms were during his tryouts as he focused on his recent symptoms.

At the resumed deposition Dr. McCain opined that Petitioner's injuries could impact his ability to run, plant, twist, and cut in the short-term. Petitioner's tibia/fibula fracture had completely healed. Regarding the hamstring injury, Dr. McCain noted no prior physician requested isokinetic testing which is a laboratory evaluation that would vary greatly from an on-field evaluation. Petitioner had no evidence of osteolysis or osteoporosis or infection or loosening of the tibia rod. There is no permanent deficit with Petitioner's left leg.

Dr. McCain opined that Petitioner's complaints of pain with squatting, explosive movements, and prolonged running would in part, but not in whole, be related to the accidents of August 2016 and August 2017. Petitioner's isokinetic testing showed an 81% deficit of left hamstring strength when compared to the right. It is more probable than not that this finding is related to the August 2017 left hamstring injury although the doctor did not have access to the on-field tests.

In the isokinetic report, RX #3, Petitioner complained of decreased strength and movement, increased pain and swelling, decreased soft tissue and joint mobility, gait deficits, and decreased ability with ADLs that are in part related to the August 2016 and August 2017 injuries as Petitioner also had a 2mm depression from a left tibial plateau fracture. Those deficits are not permanent as they can be addressed with therapy.

Dr. McCain testified that he not qualified to say whether Petitioner could play quarterback in the NFL after 6 weeks of physical therapy, as there are other factors involved.

Dr. McCain found Petitioner lacked 5° of extension but that could be related to the tibial plateau fracture. The doctor is not qualified to say whether Petitioner cold play in the NFL as there are other factors such as age, conditioning, unaddressed hamstring deficit, loss of perception, agility, speed, and any number of factors since Petitioner last played professional football.

On redirect examination Dr. McCain testified that there is no baseline isokinetic data for either of Petitioner's injuries. As noted in the addendum he found no restrictions of Petitioner's ability to work pending isokinetic testing to the left leg. He opined the deficits shown in Petitioner's isokinetic testing are not permanent and can be restored with proper physical therapy.

On recross-examination Dr. McCain acknowledged he does not know if any NFL teams perform baseline isokinetic testing. He was not aware of any professional athlete in any sport that went back to play after an 80% isokinetic deficit. His evaluation focused on the tibia fracture and hamstring injury, but the doctor was aware of the other injuries. Dr. McCain did not recall testifying in the earlier session that Petitioner could work full duty except as a football player.

As noted, following his accident on August 31, 2017 Petitioner had tryouts with the Houston Texans on October 10, 2017, the Indianapolis Colts on October 30, 2017, and the New York Jets on December 12, 2017. Records relating to those tryouts were admitted in evidence without objection. The records note at each tryout Petitioner's affirmation that he was in "excellent physical condition", which Petitioner affirmed in his testimony. It was also noted that at each tryout Petitioner had been cleared to play.

The notes from the medical examination at the Texans' tryout documented Petitioner's history of injury with the Bears. His hamstrings were noted as "pliable" and showed no palpable defect. The notes from the medical examination at the Jets tryout noted "Restrictions 0, limitations 0; In the Hamstring / Quadriceps section, a handwritten note states "L= right…0 defect."

CONCLUSIONS OF LAW

19 WC 11015 (DOI 8/27/2016)

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

The Arbitrator finds that Petitioner proved his current condition of ill-being was causally related to his work-related injury on August 27, 2016.

This issue was not genuinely disputed. Petitioner was admittedly an employee of Respondent Chicago Bears when he was injured while playing in a televised preseason football game. Petitioner received emergent medical care for a left tibia/fibula fracture which eventually required open surgical reduction with internal fixation. Respondent offered no credible rebuttal to this issue.

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

It is undisputed that Petitioner sustained fractures of his left tibia and fibula. The injury was severe enough to require an open reduction with internal fixation, including an intramedullary nail.

The Arbitrator evaluated Petitioner's Permanent Partial Disability in accord with §8.1b of the Act:

i) No AMA Impairment Rating of the August 27, 2016 injury was admitted in evidence. The Arbitrator cannot give any weight to this factor.
ii) Petitioner was a professional NFL football player. This is an occupation which requires extraordinary strength and agility. The Arbitrator gives great weight to this factor.
iii) Petitioner was 25 years old at the time of his injury. He has a statistical life expectancy of approximately 53 years. The nature of Petitioner's injury is likely to adversely affect him for the remainder of his life. The Arbitrator gives great weight to this factor, which enhances the nature of the disability.
iv) Petitioner was re-signed to another professional football contract with Respondent in 2017, the year following his injury, for a rate higher than his salary at the time of his injury. The Arbitrator gives great weight to this factor, which diminishes the nature of the disability.
v) Petitioner sustained a severe facture to his lower left leg. The injury required an open surgical reduction with internal fixation, including an intramedullary nail and fixation screws. Petitioner had two separate subsequent procedures for removal of fixation screws. However, Petitioner recovered sufficiently to be cleared to play professional NFL football for the following season in 2017. In fact, Petitioner returned to play football in time to be injured during the 2017 preseason. The Arbitrator gives great weight to this factor, which diminishes the nature of the disability.

After reviewing all of the evidence, including the above five factors, the Arbitrator finds that Petitioner proved he sustained a permanent partial disability of his left leg because the injury caused a 25% loss of use of the left leg, 53.75 weeks.

19 WC 11016 (DOI 8/31/2017)

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

The Arbitrator finds that Petitioner proved his current condition of ill-being was causally related to his work-related injury on August 31, 2017.

The issue of Petitioner's initial injury on August 31 was not genuinely disputed. Petitioner sustained fractures of his left tibia and fibula in a preseason NFL game while playing for Respondent Chicago Bears on August 27, 2016. Petitioner recovered from that injury such that he was re-signed by Respondent for the 2017 season. It is also undisputed that Petitioner sustained a torn hamstring muscle in a preseason NFL game while playing for Respondent on August 31, 2017.

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

Petitioner argues that the culmination of his two injuries resulted in a disability which caused a loss of earning capacity and therefore he is entitled to a wage differential award. It is undisputed that after his injury release by the Bears in September 2017 Petitioner had 3 unsuccessful tryouts with other NFL teams. He is now employed with the football program at the University of South Carolina at a wage less than his last NFL contract.

Respondent argues that Petitioner was unable to continue playing professional football after these injuries due to lack of skill and ability rather than due to his injuries. In principal support of this argument Respondent presented the opinions of Gregory Gabriel, a professional football scout with some 30 years of experience in evaluating the skill and ability of football players. Mr. Gabriel opined that Petitioner never possessed the necessary skill or ability to successfully play football at the professional level. Respondent's argument was also supported by the testimony of Respondent's General Counsel Cliff Stein.

In order to prove whether they are entitled to a wage differential award pursuant to §8(d)(1) of the Act, a claimant must prove they sustained a partial incapacity which prevents them from pursuing their usual and customary line of employment and an impairment of earnings. In order to prove an impairment of earnings, a claimant must prove their actual earnings for a substantial period before the accident and after they returned to work, or in the event that they not returned to work, they must prove what they were able to earn in some suitable employment. The plain language of §8(d)(1) requires awarding a wage differential if these elements are proved.

The Arbitrator finds that Petitioner proved that he is entitled to a wage differential award.

Petitioner presented compelling evidence of injuries to his left leg. He was examined by Drs. Richard Sherman and Richard McCain, both being board-certified in orthopedic surgery. Both physicians found deficits in Petitioner's left leg function. Both opined these deficits were permanent. Both opined that Petitioner's quality of play was affected by his injuries. Dr. McCain specifically opined that Petitioner could engage in any type of employment except as a professional football player.

The Arbitrator finds that the evidence demonstrated that Petitioner could no longer meet the physical demands of his usual and customary line of employment as a professional football player and quarterback in the National Football League due to the combined effects of these two left leg injuries. The testimony was credible and not refuted by competent medical evidence. The record conclusively establishes the first requirement

for a wage differential award – that Petitioner sustained a partial incapacity which prevented him from pursuing his usual and customary line of employment. The evidence also clearly showed an impairment to his earnings.

Petitioner objected to the admission of Mr. Gabriel's opinions, arguing that he was not qualified to offer those opinions. Petitioner did not object to Mr. Stein's qualifications in offering his opinions.

Illinois Rule of Evidence 702 is applicable here:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Illinois Rule of Evidence 703 is further applicable:

> The facts or data in the case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Handbook of Illinois Evidence, §702.1 provides helpful analysis:

> The admissibility of expert testimony requires that three preliminary determinations be made by the court. First, can expert testimony applying scientific, technical, or other specialized knowledge be of assistance to the trier of fact in understanding the evidence or determining a fact in issue? Second, the court must also determine whether the witness called is properly qualified to give the testimony sought. The witness may be qualified as an expert on the basis of knowledge, skill, experience, training, or education or any combination thereof. Finally, a sufficient foundation must be introduced that proper procedure was actually followed by the expert in applying the scientific, technical, or other specialized knowledge in the matter at hand. Expert testimony is not limited to scientific or technical areas, but rather it includes all areas of specialized knowledge.

After applying the above analysis, the Arbitrator finds that based on his knowledge, skill, and experience Mr. Gabriel was qualified to testify to the opinions offered by Respondent in evidence. Mr. Gabriel's decades of experience in scouting and management of professional football players satisfies the knowledge, skill, and experience elements to qualify as an expert in his field.

However, despite the admissibility of Mr. Gabriel's opinions, the Arbitrator did not find those opinions persuasive. To quote Mr. Gabriel, Petitioner "stunk" as an NFL quarterback. He testified that he would have never signed Petitioner to an NFL contract because Petitioner lacked the skills and ability necessary to compete and achieve in

professional football. He testified that Petitioner never possessed the skills and ability necessary to compete and achieve in professional football.

Mr. Gabriel's opinions conflict with common sense in light of the evidence presented. Petitioner was signed as an undrafted free agent by the Cleveland Browns in 2014. When Petitioner was released by the Browns, he was claimed on waivers by Respondent Chicago Bears, as well as the Seattle Seahawks (PX #4) and perhaps the New Orleans Saints, despite having been injured with the Browns. Further, despite having been injured in the 2016 preseason Respondent Bears re-signed Petitioner for the 2017 football season, when he was again injured. Even though he had been injured three times while playing professional football, Petitioner had tryouts with three other NFL teams after his separation from the Bears.

Clearly, six, perhaps seven, NFL teams believed Petitioner had some likelihood of success as an NFL quarterback, otherwise he would not have been signed or given tryouts. Mr. Gabriel was believable in one sense, that NFL teams have access to a player's medical and injury history. Four of those teams, particularly including Respondent Chicago Bears, had full knowledge of his history of left leg injury. Mr. Gabriel's opinions cannot stand in the light of this evidence. The Arbitrator is not obligated to believe that which is not believable.

Further, Mr. Gabriel's credibility was undermined by his testimony at trial in which he contradicted his own testimony on whether he had relied on medical records or opinions regarding Petitioner's ability to play football at the professional level. At one point he testified that he had not relied on Petitioner's medical records or doctor opinions and then testified later to the contrary. In addition, Mr. Gabriel was impeached with prior sworn testimony regarding the process and art of scouting professional football prospects. The Arbitrator also noted Mr. Gabriel was frequently coy and evasive on cross-examination. Mr. Gabriel's credibility was clearly compromised.

The Arbitrator also finds the opinions of Respondent's General Counsel Cliff Stein unpersuasive. The analysis applied to Mr. Gabriel's qualifications as an expert also applies to Mr. Stein. Mr. Stein is an attorney at law. He has been General Counsel to the Chicago Bears since 2002. He acknowledged that he has had no medical training or that he has ever worked as a football scout. He testified that his job responsibilities do not include evaluating any player's abilities. There was no evidence that he played or participated in American football at any level. His opinions were based on his attending scouting and draft meetings with general managers, coaches, and scouts, so as to apply a monetary value to a player's contract. This does not satisfy the elements of Illinois Rule of Evidence 702 in order to qualify him to opine about any player's ability to perform as an NFL quarterback. Hence, Mr. Stein's opinions regarding Petitioner's capabilities as an NFL quarterback are disregarded.

The Arbitrator assumes that NFL teams have a vested interest in having players who are physically able to meet the incredible demands of professional football. It is illogical that Respondent Chicago Bears, as well as any other NFL team, would be interested in signing a quarterback who, as Respondent argues, never had the skills or ability to succeed in the NFL. It is equally illogical that so many NFL teams showed interest in a player that "stunk."

Respondent also argues that Petitioner is entitled only to an award for some degree of permanent partial disability rather than a wage differential as claimed by Petitioner. Respondent relies on the various occasions when Petitioner was "cleared to play" by various physicians, as well as Petitioner's various statements that he was healthy and fit to play professional football. However, it is clear from the evidence that the term "fit to play" refers to a player's ability to engage in football activities without risk of injury, whether they can effectively and competitively compete at a level of activity required of a professional football player.

Albrecht v. Industrial Comm'n, 271 Ill.App.3d 756 (1st Dist. 1995) presented similar issues as here. The Court found that professional football players are skilled workers. The Court stated ("[w]e conclude that professional football players are skilled workers contemplated under the statute and that any shortened work expectancy in claimant's career would not preclude him from a wage-loss differential award under section 8(d)(1). … A wage differential is to be calculated on the presumption that, but for the injury, the employee would be in the full performance of his duties." *Id*. at 759, citing *Old Ben Coal* Co. v. *Industrial Comm'n*, 198 Ill. App. 3d 485 (5th Dist. 1990).

The evidence here established that but for Petitioner's tib/fib fracture August 27, 2016 and hamstring tear August 31, 2017, Petitioner would have been in the full performance of his duties as a Bears' quarterback.

The Arbitrator further concludes that Petitioner entered a suitable employment or business necessary for a wage-loss differential award when he began working as the Director of Football Operations at the University of South Carolina.

The parties stipulated that in the 52-weeks prior to the August 2017 injury, Petitioner had earned $600,000, which equates to an average wage of $11,538.46 per week. There is further no dispute that Petitioner is currently employed and earning a salary of $200,000, which equates to an average wage of $3,846.15 per week. The wage differential exceeds the maximum Average Weekly Wage of $1,071.58.

Based on the findings above, Respondent shall pay Petitioner permanent partial disability benefits, commencing upon Petitioner's September 11, 2017 release by Respondent, of $1,071.58 per week until Petitioner reaches age 67, because the injuries

sustained caused a loss of earnings, as provided in section 8(d)(1) of the Act. Respondent currently owes $222,888.64 in accrued wage differential benefits from September 11, 2017 through September 11, 2021, and shall pay Petitioner $1,071.58 per week thereafter until Petitioner's 67th birthday, September 19, 2058.

Steven J. Fruth, Arbitrator

Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC018561
Case Name	Kena VanMeter v. Masterbrand
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0379
Number of Pages of Decision	19
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	John Bays
Respondent Attorney	Nathan Bernard

DATE FILED: 8/22/2023

/s/Maria Portela, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF CHAMPAIGN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KENA VAN METER,

Petitioner,

vs. NO: 21 WC 18561

MASTERBRAND CABINETS,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission affirms the decision of the Arbitrator, however corrects the following scrivener's errors:

In the fourth line of page 8, the Commission changes "teas" to "test."

In the second to last paragraph on page 10, the Commission changes the date of Dr. Stiehl's deposition from "July 7, 2021" to "July 19, 2021." In the same line, the Commission changes "Section 16" to "Section 12."

In the 5th line of the 2nd full paragraph on page 11, the Commission changes "w" to the word "was."

Finally, in the last paragraph of page 11, the Commission changes the word "seem" to the word "seen."

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 21, 2022 is hereby affirmed and adopted.

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

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

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

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

August 22, 2023

/s/ *Maria E. Portela*

/s/ *Amylee H. Simonovich*

/s/ *Kathryn A. Doerries*

MEP/dmm
O: 71123
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ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC018561
Case Name	Kena Van Meter v. Masterbrand Cabinets
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	16
Decision Issued By	Dennis OBrien, Arbitrator

Petitioner Attorney	Fred Johnson
Respondent Attorney	Nathan Bernard

DATE FILED: 7/21/2022

THE INTEREST RATE FOR THE WEEK OF JULY 19, 2022 2.91%

/s/ Dennis OBrien, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF **SANGAMON**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

KENA VAN METER
Employee/Petitioner

v.

MASTERBRAND CABINETS
Employer/Respondent

Case # **21** WC **018561**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Dennis O'Brien**, Arbitrator of the Commission, in the city of **Champaign**, on **May 19, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **November 16, 2020**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $; the average weekly wage was $**588.96**.

On the date of accident, Petitioner was **31** years of age, ***married*** with **2** dependent children.

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

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

Respondent is entitled to a credit of $**7,062.92** under Section 8(j) of the Act.

ORDER

Petitioner suffered an accident on November 16, 2020, which arose out of and in the course of his employment by Respondent.

Petitioner's medical condition, medial epicondylitis with inflammation causing pressure on the ulnar nerve, is causally related to the accident of November 16, 2020.

The $185.00 bill of Dr. Brustein contained in Petitioner's Exhibit 6 is related to Petitioner's medial epicondylitis with inflammation causing pressure on the ulnar nerve injury, is reasonable and was necessitated to treat or cure Petitioner's injuries suffered in this accident and is to be paid pursuant to the Medical Fee Schedule.

Respondent is to get credit for any amounts paid by its group health insurance carrier pursuant to Section 8(j) of the Act.

Petitioner is entitled to prospective medical treatment as recommended by Dr. Brustein, to wit, a right medial epicondylar debridement, and, depending on the operative findings, an anterior transposition of the ulnar nerve.

Request for future temporary total disability is denied.

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

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

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

JULY 21, 2022

Signature of Arbitrator

ICArbDec19(b)

FINDINGS OF FACT:

TESTIMONY AT ARBITRATION

Petitioner

Petitioner testified that on November 16, 2020, she was employed by Masterbrand as an "assembly kitter." On that date she had been employed by Respondent for slightly more than 2 months. The job of a "kitter" involved the assembly of cabinets and side doors. A wheeled cart would bring a cabinet and side doors to the Petitioner's workstation, which she said was a wooden angled station she could set pieces on so they could be screwed together. The Petitioner would lift the cabinet and doors onto her workstation, which was at approximately waist level. Once assembled, the product was then lifted by Petitioner onto a separate cart for the assembly line. The assembled cabinet would weigh approximately 30 to 45 pounds. Petitioner said she performed the assembly task 20 to 50 times per day, using an impact drill to assemble the pieces. A typical workday for the Petitioner was 8 to 12 hours.

Petitioner gave detailed testimony about the manner in which her work was performed. She said the walls of the cabinetry were approximately a foot and a half, to two-feet wide and about 36 inches tall. She testified that the doors of the cabinet were slightly smaller than the cabinet. She said she would to walk to where the cabinet was, pick it up and place it onto her worktable, screw it together, then lift it off the workstation and place it on a cart. She said her workstation had a lip on it and the surface she would place it on for her work would be 30 to 36 inches high, and the cabinet being assembled would then go up higher, about another 36 inches. She demonstrated how she would lift the cabinet parts onto the work station, with her hands approximately 18 inches apart and at her face level when placing the parts onto her work area.

When asked if anything happened to her right elbow on November 16, 2020, the Petitioner said that she had just finished screwing together the two pieces of cabinet, she took the cabinet off her work station to put it on the other cart, and, as she did so, she felt a sharp pain in her right elbow which radiated down her arm. She said the pain was quite intense and sharp, about an 8.

Petitioner said that prior to November 16, 2020, she never had any prior problems with either of her elbows, had never had any prior trauma to either of her elbows, had never received treatment to either of her elbows, had never taken medication for either of her elbows, and had no limitations in the use of her right or left elbows.

Petitioner testified that on November 16, 2020, she reported this incident to her team leader, Zack, and was on that same day placed on a lighter duty job, which she completed for the remainder of the day. Thereafter, the Respondent placed the Petitioner on light duty consisting of office work, which the Petitioner described as paperwork, but after a couple of days she went back to her workstation.

Petitioner testified that on the day of the incident she was seen by Respondent's onsite trainer, "Bob," who examined her elbow. Thereafter she continued to treat with that onsite trainer for approximately two

weeks. The trainer had the Petitioner perform stretches, and also applied ice and athletic tape to her arm to support it. Petitioner testified her pain continued and that she has never been pain free since the incident on November 16, 2020, with the exception of a period of approximately 3 weeks following a steroid shot she later received from Dr. Brustein.

Petitioner testified that Respondent referred her to DMH Occupational Health in Decatur, Illinois, where she treated for several weeks. While at DMH Occupational Health, an X-ray was taken of Petitioner's right elbow, and she was prescribed oral steroids and ibuprofen, which she said did not relieve her pain. DMH Occupational Health referred Petitioner to Phoenix Physical Therapy in Sullivan, Illinois where she received treatment From February 1, 2021 through April 15, 2021. She said the therapy consisted of strengthening exercises for her wrist and lower right arm and elbow. Petitioner testified that she continued working her regular duties for Respondent while receiving that therapy.

Petitioner said DMH Occupational Health then referred her to Dr. Brustein, an orthopedic surgeon. Dr. Brustein first saw Petitioner on February 24, 2021 and then again on March 19, 2021. He ordered an EMG, and that was performed on March 9, 2021. The Petitioner then underwent an MRI of her right arm. She said that on April 16, 2021, she received an injection from Dr. Brustein which provided only temporary relief, with the pain returning after about three weeks. Petitioner said she saw Dr. Brustein on May 28, 2021 and July 12, 2021, with a final visit on November 9, 2021.

Petitioner testified that she voluntarily left employment with the Respondent because mentally and physically the work was just taking its toll and between her arm and trying to keep up, she just felt she could not do it, and she wanted to find something she could do. She therefore returned to work with her previous employer, Dust & Sons, as a parts counter person, mainly using the computer most of the day and answering phones. She said she did not have to do any heavy lifting in that job. She said she continued to work for that company as of the date of arbitration.

Petitioner testified she was familiar with the surgery Dr. Brustein proposed as well as the risk and benefits and desires to go forward with the surgery.

Petitioner testified that she did describe a specific injury to Respondent's examining physician, Dr. Stiehl.

The Petitioner testified that with the exception of the three weeks following the injection of her elbow, her right arm continued be painful, at a level of 5 or 6, and she now has difficulty with activities of daily life such as doing the dishes and washing her hair. The Petitioner related that she used both arms equally to move the objects at her workstation.

Petitioner said she was right handed.

On cross-examination, Petitioner testified that prior to working for Respondent she had worked for the auto parts store, Dust & Sons, in Sullivan, Illinois for about four years as a counter person and doing inventory and stock work. She said the shelves there went above her head, to six feet, while she was 5'6". She said there was a step stool they could use there, and she would sometimes use it. She said she would occasionally lift between 50-75 pounds, but she did not lift more than 50-75 pounds because she could not do so. She said when previously working at the auto parts store she had to take things off the shelf and take them to the counter a lot,

more than 50 times per day. She said the counter at Dust & Sons was three-and-a-half to four feet tall, and she would have to lift parts up onto that counter.

Petitioner said she started work for Respondent on September 20, 2020 and that her onset of pain in her right elbow was eight or nine weeks later, on November 16, 2020. She said the onset of pain on November 16, 2020 was an "ouch" moment where she was doing something, setting a cabinet down onto a cart after taking it off of her work station. She said she did not injure or get treated for left elbow problems, the EMG testing of her left elbow was so the two sides could be compared.

Petitioner testified that the first medical treatment she received was from Bob, the on-site trainer, on the date of the accident, and twice a week thereafter, and the first treatment from a medical doctor would have been one to three weeks later, when Respondent sent her to DMH Occupational Health.

Petitioner testified that subsequent to the accident she worked three days doing paperwork, and then she was returned to her regular duties for the Respondent with some help from others who assisted when she needed something moved. She said Respondent was "short-handed" and there was not always an extra person to assist her with her lifting duties. She said that after her accident it took her about twice as long to assemble a cabinet as it had prior to the accident, as she had to move a lot slower and take more care while doing so.

Petitioner acknowledged that Dr. Brustein had placed the Petitioner on a 10-pound restriction that she was working within while employed for the Respondent. Petitioner said Dr. Brustein gave her a full duty release in May as she asked him to, as she could not get hired with restrictions, she could not get hired anywhere until the restrictions were lifted.

Petitioner testified she also injured her elbow while pushing her personal vehicle out of the snow on February 16, 2021. She said she mainly dug snow out from around the tires and her husband and son pushed on it. She said she hurt her elbow a little bit doing that.

Petitioner said Dr. Brustein first recommended surgery on May 28, 2021.

Petitioner said she currently was working without any restrictions. She said if approved by the arbitrator she intended to have the surgery. She said that as of the date of arbitration she was not under formal medical care and was not taking any prescription medication. She said her pain on the date of arbitration was about a seven or an eight. She said she took Ibuprofen, but it did not really help. She said she has hobbies where she uses her right arm, she prints T-shirts and cups with her mother to make extra cash. She also does puzzles and diamond art with her daughter as well as played on the computer. She said she did not do those at present as after about five minutes the pain became too much and she could not continue. She said that while she had, a few years earlier, been able to put down a new floor, baseboard and trim and done landscaping in the backyard, she was not able to do that as of the date of arbitration. She said she wore a brace on her elbow during the day, at work, but not at home in the evenings. She said the brace prevented her from swinging her arm when she walked. She had started using the present brace several months prior to arbitration, but had another at home which she had worn prior to the present brace. She said she did that of her own accord, no doctor had prescribed it. She said it did not help with the pain, it was preventative, it kept her from overextending her arm.

On redirect examination Petitioner said the pain she had from pushing her vehicle eventually subsided after a day, to baseline, to how it had been before that incident, after she iced it. Petitioner said that her current

work for Dust & Sons involved hardly any stocking, compared to her first period of working for the company, when it was about fifty percent. She said that back then 50 pounds was about the maximum she would lift, with most of the objects she lifted being less than 50 pounds. She said that almost all of her work currently is clerical.

Petitioner said the elbow stress she experienced while working for Respondent compared to what she was currently doing for Dust & Sons was a night and day difference, her current work allowed her to rest her elbow when needed, and she could use an ice pack or medication as needed, luxuries she did not have while working for Respondent. In addition, she had more help at Dust & Sons than she had at Respondent.

On recross examination Petitioner said that when she was digging out her car in the snow, her arm became excruciatingly painful, but after Ibuprofen and ice it returned to her current baseline of daily pain, about a five. She said the objects she would pick up at Dust & Sons could be as heavy as 50 pounds, but the majority were less than 10 pounds. She said the clerical work she did for Dust & Sons was taking of phone calls, looking up parts for customers, taking orders and printing them. She said this was done at a computer at a counter.

MEDICAL EVIDENCE

While Petitioner Exhibit 5 was identified as "Records from Decatur Memorial Hospital," what is contained in that exhibit are not medical records, that exhibit merely contains medical billing of that institution. (PX 5) No medical records for treatment received at that institution was admitted into evidence.

On December 30, 2020 an MRI was performed of Petitioner's right elbow. It revealed mild chondromalacia at the radiocapitallar articulation. (PX 2, Exh. 4 p.28)

Petitioner received physical therapy at Phoenix Physical Therapy from January 8, 2021 through April 15, 2021. The history given to that provider was consistent with Petitioner's testimony at arbitration, including her having been treated by an athletic trainer at work who taped her elbow, but that treatment did not seem to make the elbow feel better. It was noted that Petitioner did not see a physician until two weeks after the accident. Physical examination by the therapist noted a decrease in muscle strength on the right compared to the left, and pain while performing right wrist strength testing. Petitioner was assessed as having decreased wrist, forearm and elbow range of motion, and strength, as well as pain in the right elbow. She received multiple session of physical therapy, and noted during session 6 on February 4, 2021, that she was pretty sore, but she had been doing a lot at work. When seen on February 8, 2021, Petitioner had met none of her short term or long term goals. On March 10, 2021 Petitioner noted that while she had made slight improvements in pain, she still had discomfort in the lateral elbow with stretching of the wrist extensors The therapist felt Petitioner was making gradual progress. On March 17 the therapist reported Petitioner had made improvements in her pain and strength in her right elbow, but she continued to have discomfort throughout the area, especially with lifting activities. When last seen by the therapist on April 15, 2021, Petitioner was telling the therapist that she was about 50 percent better since starting therapy, but she still had significant pain every time she tried to use her elbow to lift, throw or do repetitive movements She did not think therapy was resolving her symptoms. She noted she continued to have occasional symptoms in her right hand when she put pressure on the arm and she had noticed a sharp pain in the medial elbow. (PX 4, Exh. 6 p.78,79,91,93; PX 4, Exh. 8 p.104,110)

Petitioner initially saw Dr. Brustein on February 24, 2021. She advised him her symptoms were sudden in onset and ongoing. The written, and signed, medical history Petitioner gave Dr. Brustein on that date gave a

history consistent with her testimony at arbitration, in describing her right elbow injury she wrote "(i)t happened while I was setting down an authentic end as a cabinet. I have shooting pain from my elbow to my little finger & pain in the joint of my elbow on the opposite side." During his physical examination of that date Dr. Brustein noted Petitioner had a positive Phalen's test on the right with a positive elbow flexion teas and a positive Tinel's sign at the elbow. He noted the MRI of the right elbow showed mild elbow effusion and mild degeneration as well as moderate pain and tenderness at the lateral aspect of the right elbow. His diagnosis was pain in the right elbow, lateral epicondylitis of the right elbow, and paresthesia of the skin. He recommended an EMG for evaluation of the ulnar nerve due to concerns of ulnar nerve entrapment. (PX 4, Exh.2 p.19,21,22,26)

Petitioner saw Dr. Collins for EMG testing on March 9, 2021. That testing was interpreted as normal by Dr. Collins. (PX 2, Exh. 5 p.70)

Dr. Brustein saw Petitioner again on March 19, 2021. She again noted her elbow pain. Petitioner continued to have positive test results in the area of the right elbow on physical examination. Dr. Brustein felt Petitioner was making progress in regard to numbness. He felt some of her inflammation had resolved. He felt it was medial epicondylitis with inflammation which was causing pressure on the ulnar nerve. He recommended an elbow pad for the epicondylitis as well as continued therapy. Petitioner was given a light duty release noting she was to no lifting, pushing, pulling or carrying heavier than 10 pounds. (PX 2, Exh. 2 p.14,16,17,41)

Petitioner was seen by Dr. Brustein on April 16, 2021, and told him she was somewhat better. He interpreted her pain and tenderness on examination to be mild that day. He noted she still had a positive Tinel's sign at the right elbow and positive Phalens and elbow flexion tests. His diagnoses remained the same. He said Petitioner did not appear to be making progress at this time, all of her discomfort was locate at the medial epicondyle and he recommended a cortisone injection. He performed a steroid injection to the right elbow on this date. (PX 4, Exh. 2 p.10,11,14)

On May 2, 2021 Dr. Brustein gave Petitioner a release to return to work with no restrictions, effective May 3, 2021. (PX 4, Exh. 2 p.27)

Petitioner returned to see Dr. Brustein on May 28, 2021, saying she was improving but had occasional right-sided ulnar nerve twinges with numbness to the ring and small fingers. Dr. Brustein felt Petitioner was improving as her pain and tenderness were decreased on that day's examination. He recommended continued observation. (PX 4, Exh. 2 p.7,9)

Respondent had Petitioner examined by Dr. Stiehl on January 7, 2021. Dr. Steihl's report Petitioner did not tell him of a specific injury. Dr. Stiehl reviewed medical records including those of Nurse Practitioner (NP) Patrick for a November 25, 2020 examination which reflected a November 16, 2020 accident involving the lifting of a pre-assembled side of a cabinet, with pain radiating into the fifth finger. He also noted records of a December 2, 2020 evaluation by NP Collins in the occupational medicine clinic with similar elbow and fifth finger complaints. NP Collins restricted Petitioner's work at that time, limiting her to lifting 10 pounds. NP Collins saw Petitioner again on January 11, 2021 and he found her to be improved, with pain of 3/10, but she had tenderness over the anterior aspect of the elbow, suggesting an ulnar sprain. Petitioner then saw Physician's Assistant Karraker on February 18, 2021, who noted Petitioner could do most of her work activities, but could not handle the cabinets, as that caused her to strain. She recommended Petitioner be seen by an orthopedist. Dr. Stiehl also reviewed the other medical records included in this summary, through Mary 28, 2021. During his

physical examination of Petitioner Dr. Stiehl noted Petitioner had no pain in the right upper extremity, modest discomfort to palpation of the ulnar nerve above the elbow, across the cubital tunnel and into the pronator area of her forearm. Dr. Stiehl's opinions are summarized in the summary of his deposition testimony, below. (RX 1 p.1,3-6)

On July 12, 2021, Petitioner was again seen by Dr. Brustein, noting no real improvement in her right elbow condition, despite conservative treatment, including physical therapy and an injection, and he noted her complaints were worsening. He noted the test results and noted continued conservative treatment, including periodic injections, could continue, but that it was also reasonable to discuss a right elbow medial epicondyler debridement with a possible ulnar nerve transposition. Petitioner wanted to proceed with that surgery. Approval from workers' compensation was to be pursued. (PX 2, Exh.3 p.65,66)

Dr. Brustein again saw Petitioner on November 19, 2021. She again voiced no improvement in her condition and she was desiring surgery. As he had before, Dr. Brustein noted that Petitioner's activities were being moderately limited by this injury. During his physical examination of Petitioner the doctor felt her pain was moderate and her tenderness mild, but she also was found to have weakness during this examination. (PX 2, Exh 4 p.68,69)

DEPOSITION TESTIMONY OF DR. MARSHALL BRUSTEIN

Dr. Brustein was deposed as a witness for Petitioner. His curriculum vitae indicates he is a board certified orthopedic surgeon with added qualifications for hand surgery. He testified he specialized in hand surgery. He summarized the histories he received from Petitioner in regard to accident and physical complaints in a manner consistent with the medical summary of his visits, above. He testified that in his opinion Petitioner's diagnosis of ulnar nerve neuritis, an aggravation or irritation to the ulnar nerve at the elbow, could be caused, aggravated or exacerbated by the single lifting incident at work that was described by her, to him. He said that Petitioner's EMG was read as normal but since she was still having ongoing symptoms, they talked about an elbow pad, continuing therapy, and a work limitation of ten pounds. He said that limitation was causally related to the history of lifting at work. He said on March 19, 2021, his diagnosis was medial epicondylitis with inflammation causing pressure on the ulnar nerve. He said that Petitioner's negative EMG did not mean she did not have symptoms of ulnar neuritis, it did not even rule out cubital tunnel syndrome completely. He said it did rule out severe or moderately severe cubital tunnel syndrome, but that nerve compression and peripheral nerve lesions could occur with normal nerve tests. Dr. Brustein said that Petitioner's MRI showed mild elbow effusion with some mild radiocapitellar degeneration. He said she was still undergoing therapy, he injected her with cortisone, and he felt that treatment was necessitated by her lifting incident at work. (PX 4 p.12,14-16,20; PX 4, Exh. 1 p.1)

When Dr. Brustein saw Petitioner on July 12, 2021, her pain continued, so they discussed surgery. He was proposing was a medial epicondylar debridement. If during the surgery he found the nerve appeared to sublux, he would consider an anterior transposition of it. He said that Petitioner's condition was unchanged when last seen on November 19, 2021, and he was still recommending surgery. Dr. Brustein said that given that Petitioner had not improved despite conservative treatment, it was unlikely she would improve without surgery. He said there was a 70 to 80 percent chance of significant improvement with surgery. He testified that the

recuperation time from such a surgery was typically 12 to 16 weeks. He said that surgery would be related to the lifting incident at work. (PX 4 p.17-21)

On cross examination Dr. Brustein said that of the 100 to 150 patients he saw per week between five and ten would be for the type of elbow condition Petitioner was experiencing. He said he performed between ten and 20 surgeries per week. (PX 4 p.24,25)

Dr. Brustein said he was unaware of what type of work Petitioner did before working for Respondent or after working for Respondent. He said that the May 3, 2021 note he issued allowing Petitioner to work full duty without restrictions was not issued on a day he examined her, he suspected she called and requested a release, which they would frequently do, but he did not have any note indicating that was what occurred. He said if she was able to tolerate the work, it would be safe. (PX 4 p.28,48,49)

When asked if his opinion that Petitioner could have aggravated or exacerbated her elbow complaints, he did not mean that there was a preexisting condition that was aggravated or exacerbated, as it was impossible to understand what was there before, but it meant that a specific event could certainly aggravate or exacerbate medial epicondylitis. He noted another name used to describe Petitioner's condition was golfer's elbow, but golfing was not usually the cause for the condition and he did not know why it was called golfer's elbow. He said the activities that oftentimes cause the condition are an acute injury, such as a lift, a fall, or being hit by something, or by repetitive use. He said pushing a vehicle would be a less-likely cause as it is an open-handed event, that a straight pushing event would not be impossible as a cause, but it would be less likely. (PX 4 p.49-52)

Dr. Brustein explained that the medial epicondyle and the ulnar nerve sit right next to each other, and an inflammatory process around the medial condyle can aggravate any type of condition or inflammation around the ulnar nerve as they literally touch each other. (PX 4 p.52)

On redirect examination Dr. Brustein was asked a hypothetical question which presented the basic description of Petitioner's work and of the November incident as it was later described by Petitioner at arbitration. Given those facts, Dr. Brustein said that he was of the opinion that there was a causal relationship between the lifting incident in November and the necessity for surgery. (PX 4 p.56,57)

While Dr. Brustein on recross examination said that he had not considered Petitioner a surgical candidate until after he released Petitioner to full duty work (on May 3, 2021), on redirect examination he was directed to his office note of April 16, 2021, where it was noted they had discussed surgery. He said his earlier testimony that they had not discussed surgery prior to May 3, 2021, was in error. (PX 4 p.58,59)

DEPOSITION TESTIMONY OF DR. JAMES STIEHL

On July 7, 2021, Dr. Stiehl performed a Section 16 examination on Petitioner at the request of Respondent. The history of onset, complaints, medical records review and physical examination findings during that examination have been summarized above, and Dr. Stiehl's testimony in that regard during this deposition was consistent with that summary.

Dr. Stiehl testified that he was board certified in orthopedic surgery and actively treated patients, though he had ceased performing surgery in 2017. He said his practice was now centered on wound care, that he monitored wounds at one nursing home and was hopefully going to overlook the treatment of wounds at 14

nursing homes in the near future. He said he also performed independent medical examinations as part of his practice and had performed such an examination on Petitioner on July 19, 2021. He said the history he took from Petitioner on that day included that she had developed symptoms in her elbow, treated for that, and she had not had any prior issues with her elbow that were relevant. He noted that he had reviewed medical records, including an EMG and MRI reports. He said on the date of his examination Petitioner complained of some pain in her fifth finger, which led to his working diagnosis of a possible radiculopathy of the left arm. (RX 2 p.6-9)

As far as his understanding of the mechanism of specific injury to Petitioner's arm was concerned, Dr. Stiehl said "she was doing some lifting on the job which seemingly caused her right elbow to hurt." He said that was all he knew. He did note that the medical records indicated it was one lifting event involving a cabinet side which brought on her pain. He said he generally accepts what patients tell him, and Petitioner had told NP Patrick of symptoms, so he accepted the fact that there might be something there that he should pay attention to. (RX 2 p.11,12)

Dr. Stiehl said he did not find anything in the medical records indicating a prior history, and the medical records had complaints which could involve the ulnar nerve, though their workup, including an MRI and an EMG, did not find anything. He said his physical examination revealed possible discomfort in the medial elbow, near or on the ulnar nerve, though she had a normal neurologic examination. He said his post-physical examination diagnosis w a temporary aggravation of the ulnar nerve of the right elbow, which he felt could possibly be due to lifting cabinets and work. He said there was not really any objective medical evidence to support that diagnosis. When asked about causal connection Dr. Stiehl said Petitioner had "a relatively minor complaint with medial aspect of the right elbow," and with no other possibility of an inciting event, the cabinet lifting could be a potential aggravation. He said aggravation to him was a person perhaps doing an activity their tissues weren't doing every day, the tissues were not up to the stresses and strains, and they got, "kind of a chronic aggravation of activities." HE said in this case it would be the work Petitioner was doing that aggravated her symptoms. (RX 2 p.13,14,16-19)

Dr. Stiehl did not believe Petitioner was in need of any restrictions or future medical care and had reached maximum medical improvement. He did not consider her to be a surgical candidate, he did not find any operative indications for Petitioner. He specifically said he did not recommend an epicondylar debridement release or an ulnar nerve transposition as he did not find abnormalities in his physical examination. (RX 2 p.20,21,22)

On cross examination Dr. Stiehl said his working diagnosis was aggravation of the ulnar nerve related to lifting cabinets, saying that other tissues in the neighborhood of the ulnar nerve could be responsible. He agreed that on February 25, 2021 Petitioner was found to have a Tinel sign over the cubital tunnel of the right elbow, meaning the neve was irritable when that test was performed. He said that was an objective finding indicating some type of problem over the cubital tunnel of the right elbow. Having only seen Petitioner for the five to ten minutes he examined her, he would agree that Dr. Brustein had more direct contact with Petitioner. He also acknowledged that Petitioner had voiced complaints of elbow pain since the time of her injury. (RX 2 p.25-27)

Dr. Stiehl said he had not seem medical records for treatment after his examination of Petitioner, he had not reviewed the deposition of Dr. Brustein and was not familiar with Dr. Brustein's rationale for recommending surgery. (RX 2 p.27,28)

Dr. Stiehl said his age was part of the reason he stopped performing surgery, that prior to ceasing surgical practice he was performing several elbow surgeries a year, but had not done any in the five years prior to his deposition. He said he was currently treating no more than five patients per week out of his office, which was located in Salem, Illinois, and the patients he saw were generally people he had performed surgery on in the past, not new patients. He said he also does IMEs in Milwaukee and Madison, Wisconsin, two days per month, but he felt that would drop to one day per month. He said he had applied for a Florida license, and it was very possible that in the next year he would be doing medical-legal IME work in Tampa. He said most of his work had been defense cases. He felt 95 percent of his IMEs had been on behalf of respondents and insurance companies. He said he had performing respondent IMEs since 1983. (RX 2 p.28,29,30,32,33,35,37)

Dr. Stiehl testified that he did not have any criticism of the care Dr. Brustein had given Petitioner. (RX 2 p.38)

ARBITRATOR CREDIBILITY ASSESSMENT

The Arbitrator notes that the Petitioner's testimony at arbitration was consistent with the treating medical records introduced at arbitration. She appeared forthright and did not make any apparent attempt to evade any question asked by either attorney. She did not appear to be exaggerating either her complaints or her disability. No evidence was introduced to cause her testimony reference the work she did, the manner in which she performed her job duties or the treatment she received from Respondent's trainer to be questioned. Similarly, no evidence was introduced to rebut her testimony that she had been referred to DMH Occupational Health, and, by them, to Phoenix Physical Therapy and Dr. Brustein. The Arbitrator finds Petitioner to have been a credible witness.

CONCLUSIONS OF LAW:

In support of the Arbitrator's decision relating to whether an accident occurred which arose out of and in the course of Petitioner's employment by Respondent on November 16, 2020, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of medical evidence and deposition testimony, above, are incorporated herein.

Petitioner described a specific action which she performed on November 16, 2020, the lifting and moving of a cabinet piece she had worked on, with sudden pain starting as she was performing that task. She immediately reported the incident and was allowed to work light work for a number of days and then to perform her regular work, but with assistance with lifting and moving items. She received on-site medical care from a company trainer and then medical treatment at an occupational health center, physical therapist, and an orthopedist, giving the physical therapist and Dr. Brustein consistent histories of this incident.

The Arbitrator finds that Petitioner suffered an accident on November 16, 2020, which arose out of and in the course of his employment by Respondent. This finding is based upon the testimony of Petitioner and the medical records of DMH Occupational Health and Dr. Brustein. The denial of a specific incident history contained in Dr. Stiehl's report is not accepted by the Arbitrator, as it appears to be inaccurate, the result of

either Petitioner not hearing or understanding a question, Dr. Stiehl not hearing or understanding an answer, or the transcriptionist mishearing or mistyping the information. There is no logical reason for Petitioner to give such a history to Dr. Stiehl.

In support of the Arbitrator's decision relating to whether Petitioner's current condition of ill-being, medial epicondylitis with inflammation causing pressure on the ulnar nerve, is causally related to the accident of November 16, 2020, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of medical evidence and deposition testimony, above, are incorporated herein.

The findings in regard to accident, above, are incorporated herein.

The issue of causal relatedness of the Petitioner's current condition is a medical question. On balance, the Arbitrator defers to the opinions of Dr. Brustein, the Petitioner's treating orthopedic surgeon over the opinions of Dr. Stiehl. Dr. Brustein is not only a board-certified orthopedic surgeon, but fellowship trained in hand/upper extremity surgery and currently treats between 100 and 150 patients per week and performs between 10 and 20 surgeries per week. Dr. Brustein estimated that between 5 and 10 of the patients he sees weekly have conditions that are similar to the Petitioner's elbow condition. Dr. Brustein testified with reasonable medical certainty that the Petitioner's diagnosed condition of epicondylitis/ulnar nerve neuritis was causally related to her activity at work which involved lifting boxes that culminated in the sharp pain the Petitioner experienced on November 16, 2020. Dr. Brustein was also presented a hypothetical question at page 56 of his deposition that described the frequency with which the Petitioner lifted cabinetry and the weight of cabinetry and the period of time she had been doing such lifting which hypothetical corresponded to the testimony of the Petitioner at time of hearing. Dr. Brustein responded to the hypothetical question that a causal relationship existed between the Petitioner's work activity and the necessity for the surgery. Dr. Stiehl only saw Petitioner on one occasion, for between five and ten minutes. He has not performed orthopedic surgery for the five years prior to his examination of Petitioner and his deposition. The Arbitrator defers to the opinions of Dr. Brustein. The Arbitrator also finds the Petitioner's current condition of ill-being is causally related to the work accident on November 16, 2020 based upon the "chain of events doctrine" discussed in *Schoreder v. IWCC* (Swift Transportation) 2017 IL App. (4th) 160192WC. Prior to November 16, 2020, the unrebutted evidence was that the Petitioner had no prior problems, limitations and no treatment of her right elbow. On November 16, 2020 she experienced sudden pain while performing a physical task associated with her work, immediately reported it to her supervisor, received medical treatment in the days, weeks and months following the incident, thus meeting the requirements of a chain-of-events causal connection finding.

The Arbitrator finds that Petitioner's medical condition, medial epicondylitis with inflammation causing pressure on the ulnar nerve, is causally related to the accident of November 16, 2020. This finding is based upon the testimony of Petitioner, the treating medical records and the testimony of Dr. Brustein.

In support of the Arbitrator's decision relating to whether the medical services that were provided to Petitioner were reasonable and necessary as a result of the Accident of November 16, 2020, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of medical evidence and deposition testimony, above, are incorporated herein.

The findings in regard to accident and causal connection, above, are incorporated herein.

The only unpaid bill included in Petitioner Exhibit 6 is a bill for $185.00 for medical services rendered on March 19, 2021. The medical records indicate that Dr. Brustein provided medical care for Petitioner's medial epicondylitis with inflammation causing pressure on the ulnar nerve condition on that date. That condition has been found to be causally related to the Accident of November 16, 2020.

The Arbitrator finds that the $185.00 bill of Dr. Brustein contained in Petitioner's Exhibit 6 is related to Petitioner's medial epicondylitis with inflammation causing pressure on the ulnar nerve injury, is reasonable and was necessitated to treat or cure Petitioner's injuries suffered in this accident and is to be paid pursuant to the Medical Fee Schedule. Respondent is to get credit for any amounts paid by its group health insurance carrier pursuant to Section 8(j) of the Act. This finding is based upon the medical records introduced into evidence and the testimony of Petitioner and Dr. Brustein.

In support of the Arbitrator's decision relating to whether Petitioner is entitled to any prospective medical treatment, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of medical evidence and deposition testimony, above, are incorporated herein.

The findings in regard to accident, causal connection, and medical, above, are incorporated herein.

The issue of the Petitioner's need for surgical intervention as proposed by Dr. Brustein is a medical question that involves a dispute between the opinions of Dr. Brustein and Dr. Stiehl. Dr. Brustein opined that the Petitioner's need for medial epicondylar debridement/anterior transposition of the ulnar nerve was causally related to the Petitioner's work activities on November 16, 2020, and that the proposed surgery was reasonably necessary to treat the Petitioner as a result of her work activities. Dr. Brustein has considerable background and training and actively treats other patients who have conditions similar to the Petitioner. Petitioner has received several different types of conservative care for this condition but continues to suffer pain which Dr. Brustein felt could be helped by this surgery. Dr. Brustein testified that the proposed surgery will provide the Petitioner with approximately a 70-80% chance of significant improvement. The Arbitrator defers to the opinions of Dr. Brustein over those of Dr. Stiehl based upon the effect Dr. Brustein has far more experience than Dr. Stiehl in diagnosing and treating such conditions, Dr. Brustein's more extensive examination and treating experience with Petitioner and the fact that Dr. Stiehl has not performed any orthopedic surgery for at least five years.

Petitioner in her Request of Hearing also sought an award for temporary total disability for all periods of future lost time due to said surgery. That period of time is unknown, speculative, and, as such, cannot be

awarded at this time but, if a dispute arises in that regard, another Request for Hearing can be filed, as can a Petition under Section 19(b).

The Arbitrator finds that Petitioner is entitled to prospective medical treatment as recommended by Dr. Brustein, to wit, a right medial epicondylar debridement, and, depending on the operative findings, an anterior transposition of the ulnar nerve. Request for future temporary total disability is denied. These findings are based the medical records and testimony of Dr. Brustein summarized above.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC037959
Case Name	Matthew Zajac v. Saline Township
Consolidated Cases	
Proceeding Type	8(a)/19(h) Petition
Decision Type	Commission Decision
Commission Decision Number	23IWCC0380
Number of Pages of Decision	5
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Thomas Rich
Respondent Attorney	Edward A. Coghlan

DATE FILED: 8/23/2023

/s/Marc Parker, Commissioner

Signature

STATE OF ILLINOIS)) SS. COUNTY OF MADISON)	☐ Affirm and adopt (no changes) ☐ Affirm with changes ☐ Reverse ☐ Modify	☐ 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

Matthew Zajac,

Petitioner,

vs. No. 18 WC 037959

Saline Township,

Respondent.

DECISION AND OPINION ON REVIEW PURSUANT TO §19(h) and §8(a)

This matter comes before the Commission on Petitioner's §19(h) and §8(a) Petition, seeking additional permanent partial disability benefits for his cervical spine and right shoulder condition, allegedly due to a material increase in his disability since the Arbitrator's November 9, 2020, decision. In that decision, the Arbitrator awarded Petitioner 25% loss of use of the person-as-a-whole under §8(d)2 of the Act. On April 27, 2022, Petitioner filed a timely Petition for Review under §19(h) and §8(a). A hearing on that Petition was held before Commissioner Parker on July 25, 2023. At that hearing, the parties stipulated that Petitioner's current condition of ill-being in his right shoulder remains causally related to his January 8, 2018, work accident and that the only issue to be decided on review was to what extent the Petitioner's disability had increased. Respondent suggests a 5% increase would be appropriate, while Petitioner seeks an additional 15% over and above the 25% loss of use of the person-as-a-whole awarded by the Arbitrator.

Findings of Fact:

At the time of his original accident on January 8, 2018, Petitioner was an equipment operator who injured his right shoulder and neck while spreading salt on an icy road. He eventually underwent disc replacement surgery at C5-6 and C6-7. Petitioner's surgeon, Dr. Matthew Gornet, noted that a March 2018 MRI report suggested structural problems within the right shoulder. Dr. Gornet also observed in his final treatment note that Petitioner continued to suffer from residual

symptoms that might be permanent. On November 9, 2020, the Arbitrator awarded Petitioner permanent partial disability of 25% loss of use of the person-as-a-whole for his work injury.

On April 27, 2022, Petitioner filed a Petition for Review of Prior Award and Prospective Medical Care pursuant to §19(h) and §8(a) of the Act. Since the time of his arbitration hearing on September 22, 2020, Petitioner had continued to experience right trapezius and right shoulder complaints. Dr. Gornet referred Petitioner to Dr. Matthew Bradley for further evaluation of his ongoing pain complaints. Dr. Bradley recommended an MRI arthrogram, which revealed no definitive tear, and continued home exercise with Tylenol and ibuprofen, as needed. On March 17, 2022, Dr. Bradley administered a corticosteroid injection and referred Petitioner to Dr. Trish Hurford for trigger point injections in his shoulder. These relieved Petitioner's symptoms for a few weeks, but the pain returned, and Dr. Bradley recommended surgical intervention. On October 6, 2022, the doctor performed an arthroscopic biceps tenotomy, labral debridement, subacromial decompression with bursectomy, chondroplasty of the glenoid, and excision of a loose body in the right shoulder. Petitioner performed post-operative physical therapy and work hardening and was released to full duty on April 10, 2023. At that time, Dr. Bradley noted that Petitioner had some pre-existing degenerative disease which could continue to cause occasional shoulder issues.

At the review hearing, Petitioner testified he continues to have symptoms with heavy lifting and overhead work. His hunting and boating hobbies have been adversely affected, and he no longer water-skies. Sleeping on his right side causes pain that wakens him, and, although he continues to volunteer as a fireman, he is less confident performing his duties.

Conclusions of Law:

Section 19(h) seeks to redress changes in circumstances after the entry of an award and is particularly remedial in nature. It should be construed liberally so as to allow review of alleged changes in circumstances. *Hardin Sign Co. v. Industrial Comm'n*, 154 Ill. App. 3d 386, 389-90 (1987). To obtain an increase in the permanent partial disability award under §19(h), Petitioner must show that his disability at the time of his initial arbitration hearing on September 22, 2020, had increased by the July 25, 2023, review hearing, and that that increase was material. *Gay v. Industrial Comm'n,* 178 Ill. App 3d 129, 132 (1989); *Motor Wheel Corp. v. Industrial Comm'n*, 75 Ill. 2d 230, 236 (1979). In order to determine whether Petitioner's condition materially deteriorated from the time of the Arbitrator's award to the present, it is necessary to compare his condition at those two relevant times. *Howard v. Industrial Comm'n,* 89 Ill. 2d 428, 430-31 (1982).

Regarding Petitioner's §19(h) Petition, the Commission notes that the Arbitrator set forth facts relevant to a determination of permanent partial disability as required by §8.1b(b) of the Act. The Commission reviews those factors in order to determine whether Petitioner's permanent partial disability has materially increased enough to justify an increase in the permanency awarded by the Arbitrator. The Commission assigns the following weights to these factors:

(i) **Disability impairment rating:** *no weight,* because neither party submitted an impairment rating.

(ii) **Employee's occupation:** *some weight.* Petitioner did not testify to any change in his occupation. However, the Commission notes that Petitioner reported he had some difficulties with heavy lifting and overhead work. Therefore, some weight should be given to this factor.

(iii) **Employee's age:** *some weight,* because Petitioner was 48 years old at the time of his injury and will have to deal with the effects of his injuries and surgeries for several more years of his working and natural life.

(iv) **Future earning capacity:** *some weight.* Petitioner presented no evidence of any decrease in earning capacity.

(v) **Evidence of disability corroborated by the treating records:** *significant weight,* because Petitioner's right shoulder condition continued to deteriorate following his initial arbitration hearing, requiring additional conservative treatment, an MRI arthrogram, injections, shoulder surgery, and post-operative physical therapy and work hardening.

Based upon the above factors and the record as a whole, the Commission concludes that Petitioner has proved a material increase in his disability, pursuant to §19(h), in the amount of 10% loss of use of the person-as-a-whole.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's §19(h) Petition is granted to the extent discussed above.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $382.50 per week for a period of 50 weeks, as provided in §19(h) of the Act, for the reason that Petitioner sustained a material increase in his permanent disability to the extent of 10% loss of use of the person-as-a-whole. As a result of his work-related accident, Petitioner is now permanently disabled to the extent of 35% loss of use of the person-as-a-whole under §8(d)2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall 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.

Under Section 19(f)(2), no "county, city, town, township, incorporated village, school district, body politic, or municipal corporation" shall be required to file a bond. As such, Respondent is exempt from the bonding requirement. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

August 23, 2023

mp/dak
r-07/25/23
068

/s/ *Marc Parker*
Marc Parker

/s/ *Christopher A. Harris*
Christopher A. Harris

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC019443
Case Name	Estefania Romero Quinones v. Summit Staffing
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0381
Number of Pages of Decision	13
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Steven Saks
Respondent Attorney	Robert Smith

DATE FILED: 8/25/2023

/s/Maria Portela, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ESTEFANIA ROMERO QUINONES,

Petitioner,

vs. NO: 20 WC 19443

SUMMIT STAFFING,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causation, medical expenses and temporary total disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof, but makes a clarification as outlined below. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

We correct a clerical error on page nine of the Decision. The third sentence in the last paragraph should reflect that Petitioner is entitled to temporary total disability benefits commencing August 8, 2020, which is the day after Petitioner's accident, instead of August 7, 2020. This correction makes the Conclusions of Law section consistent with the Order section of the Decision, which accurately states the benefit period and number of weeks awarded.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 19, 2022 is hereby affirmed and adopted with the clarification noted above.

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

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

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

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

August 25, 2023

/s/ *Maria E. Portela*

SE/
O: 7/11/23
49

/s/ *Amylee H. Simonovich*

/s/ *Kathryn A. Doerries*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC019443
Case Name	Estefania Romero Quinones v. Summit Staffing
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	10
Decision Issued By	Stephen Friedman, Arbitrator

Petitioner Attorney	Steven Saks
Respondent Attorney	Robert Smith

DATE FILED: 7/19/2022

/s/Stephen Friedman, Arbitrator

Signature

INTEREST RATE WEEK OF JULY 19, 2022 2.91%

STATE OF ILLINOIS)
)SS.
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
19(b)

Estefania Romero Quinones
Employee/Petitioner

v.

Summit Staffing
Employer/Respondent

Case # **20** WC **019443**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Stephen J. Friedman**, Arbitrator of the Commission, in the city of **Wheaton**, on **June 10, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **August 7, 2020**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**24,890.00**; the average weekly wage was $**518.97**.

On the date of accident, Petitioner was **29** years of age, ***single*** with **2** dependent children.

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

Respondent shall be given a credit of $**17,500.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**0.00**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $345.98/week for 96 weeks, commencing August 8, 2020 through June 10, 2022, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $17,500 for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $17,547.00 to Hinsdale Orthopedic, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall authorize and pay for additional reasonable and necessary treatment consistent the recommendations of Dr. Darwish including an L4-5 transforaminal interbody fusion, any post operative treatment, physical therapy, or other reasonable and necessary care.

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

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

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

/s/ StephenJ. Friedman
Signature of Arbitrator

July 19, 2022

Statement of Facts

Petitioner Estefania Romero Quinones testified in Spanish through an interpreter. Petitioner testified that she was employed with Respondent, Summit Staffing, a job staffing/employment agency, on assignment in a warehouse as a package handler. The job involved picking products that were to be shipped to online shoppers. As of August 7, 2020, she had worked there for three months. She testified she had no prior low back issues. On August 7, 2020, she started her shift at 5:30 AM. When she picked up a 20 pound box, she felt a pain in her back. The supervisor was called by another coworker, and 911 was called. Petitioner testified that her left leg was not responding. She was taken to Edward Hospital Emergency Department. Petitioner was seen on August 7, 2020. X-rays of the lumbar spine noted L4-5 disc space narrowing. The diagnosis was lumbar disc narrowing, lumbar radiculopathy, and acute left-sided low back pain with sciatica. Petitioner was given exercises and medication. She was advised to make a follow-up appointment. She was placed on work restrictions of 5 pound lifting (PX 1).

Petitioner testified she then began treatment at Physicians Immediate Care where her employer sent her. Petitioner testified that when she visited Physicians Immediate Care on August 7, 2020, she felt extremely intense pain, felt like nothing in her body worked, she could not work, and it was difficult for her to breathe. The records note Petitioner reported a consistent accident history with pain in the low back and left leg. She rated her pain as 10/10 (PX 2). The physical exam notes muscle spasm and tenderness bilaterally with reduced range of motion, abnormal gait and positive straight leg raise and cross straight leg raise bilaterally. Petitioner was given a back brace and restricted to work with no prolonged bending or twisting and no lifting over 20 pounds (PX 2). On August 10, 2020, Petitioner was improved, reporting 8/10 pain. She was begun on physical therapy and continued on restrictions. On August 25, 2020, Petitioner reported no improvement with continued 8/10 pain and pain radiating to her left leg. On September 3, 2020, an MRI was requested since she had no improvement. Petitioner completed physical therapy on September 10, 2020 (PX 2). The MRI performed on September 11, 2020 revealed a L4-5 central disc protrusion with slight narrowing of the left-greater-than-right subarticular recess. There was no central canal stenosis or neural foraminal narrowing. The remainder of the lumbar spine was normal with no central canal stenosis, neural foraminal narrowing or focal disc herniation (PX 2, p 64-65).

Petitioner testified she began seeing Dr. Lorenz at Hinsdale Orthopedics. On September 16, 2020, Petitioner complained some back pain, but mostly left-sided leg pain. Physical examination noted limited range of motion with left sided and left leg pain, positive straight leg raise, and decreased sensation in the L5 distribution. Dr. Lorenz reviewed the MRI, which showed a central to left-sided disc herniation impinging the L5 nerve root on the left side. The diagnosis was left-sided L5 radiculopathy. Petitioner was prescribed a Medrol Dosepak and taken off work. Dr. Lorenz ordered physical therapy (PX 3, p 7-8). On September 23, 2020, Dr. Lorenz noted the same neurological exam and ordered epidural steroid injections (PX 3, p 11). Petitioner underwent an L4-5 steroid injection on October 30, 2020 (PX 5). On November 12, 2020, Dr. Lorenz noted a reported 75% improvement. He recommended a second injection and physical therapy (PX 3, p 13-14).

Petitioner saw Dr. Jesse Butler for a Section 12 examination on December 15, 2020 (RX 3). His diagnosis was lumbar disc herniation. He related this to the August 7, 2020 accident. He agreed a second epidural injection was reasonable. He opined that Petitioner could work with a 20 pound lifting restriction (RX 3). Petitioner had the second injection on January 15, 2021 (PX 5). On February 11, 2021, Dr. Lorenz notes the second epidural did not help Petitioner at all. He referred Petitioner to Dr. Darwish for a surgical consideration. He restricted Petitioner to 15 pound occasional lifting (PX 3, p 17). On February 23, 2021, Dr. Darwish reviewed the

treatment to date and the MRI, examined Petitioner and recommended a left L4-5 laminectomy and discectomy (PX 3, p 20). On March 4, 2021, Dr. Butler reviewed the updated treatment records and agreed the surgical recommendation was reasonable and necessary as it relates to the work injury (RX 4).

Dr. Darwish performed surgery on May 17, 2021 consisting of a left L4-5 laminectomy and discectomy (PX 6, PX 3, p 30-31). Petitioner testified that she felt relief for a while after the surgery, but the pain began to intensify in her back and her left leg. On June 1, 2021, Petitioner reported she was doing well but continued experience shooting pain down her left leg randomly throughout the day. Petitioner was put on restrictions of no lifting over 15 lbs. On June 29, 2021, Dr. Darwish ordered physical therapy to start progressing range of motion. On August 11, 2021, Petitioner reported that her pain has flared up. She continues to improve in PT. On September 10, 2021, Petitioner reported continued low back pain occasionally radiating to the left lateral leg. Physical examination noted tenderness in the paraspinal muscles with a normal neurological exam. Dr. Darwish continued physical therapy and discussed work conditioning due to the physical nature of Petitioner's job. He kept Petitioner off work (PX 3, p 32–47).

Petitioner was examined again by Dr. Butler on September 20, 2021. His physical examination was neurologically normal with negative straight leg raise and with no tenderness. Dr. Butler found that treatment to date had been reasonable and necessary. Dr. Butler opined that Petitioner required an additional 4 weeks of physical therapy, after which she would be at maximum medical improvement and capable of full duty work. Petitioner could return to work with restrictions of no lifting greater than 15 lbs. and occasional bending and stooping (RX 5). Respondent offered Petitioner light duty work within these restrictions beginning September 20, 2021 (RX 8). Petitioner testified that she did not accept the offer.

On October 1, 2021, Petitioner reported an increase in low back pain. She could not complete physical therapy yesterday due to pain. On exam, straight leg raise was positive on the left. Strength was intact. An MRI of the lumbar spine was ordered (PX 3, p 48–50). The October 18, 2021 MRI of the lumbar spine demonstrated postsurgical changes at L4-5. There was minimal bulging of the L4-5 disc in the foraminal regions bilaterally with minor bilateral neural foraminal narrowing. There was no L4-5 central canal stenosis (PX 3, p 51). On October 20, 2021, Petitioner informed Dr. Darwish that her pain continued to increase. Physical exam noted paraspinal muscle tenderness with negative straight leg raise and normal neurological exam. Dr. Darwish reviewed the MRI, and his diagnosis was post laminectomy syndrome, low back pain and lumbar disc herniation with radiculopathy. Dr. Darwish recommended L4-5 transforaminal lumbar interbody fusion (TLIF). Petitioner was to remain off work and follow up in 8 weeks (PX 3, p 54-55).

Petitioner was seen for a re-examination with Dr. Butler on November 22, 2021 (RX 6). Petitioner reported that her prior radicular pain complaints from the herniation at L4-5 had resolved. She has persistent low back pain. (RX 6). Petitioner was not on any pain medication and did not exercise. Dr. Butler's physical exam was normal with negative Waddell signs. Dr. Butler found that the MRI demonstrated no residual nerve compression at the L4-5 level. There was no indication for a spinal fusion at L4-5. Petitioner had reached maximum medical improvement (MMI) and may return to work without restriction (RX 6).

Petitioner saw Lauren Reineke at Hinsdale Orthopaedics on December 23, 2021. Petitioner was kept off work (PX 3, p. 57). On March 24, 2022, Dr. Darwish's physical exam noted positive straight leg raise and 4/5 strength in the left extensor hallucis longus. Dr. Darwish was still recommending surgery to the back. Petitioner was to continue work restrictions (PX 8).

Dr. Darwish testified by evidence deposition taken January 14, 2022 (PX 7). He testified to his treatment of Petitioner including the May 17, 2021 surgery and her post-operative care through the October 18, 2021 MRI. He testified his review of the MRI showed compression of the nerves in the neuroforamen. Over the 5 months since her initial surgery, there has been further degeneration of the disc. It could be caused by the surgery or the original disc injury itself. Dr. Darwish recommended an L4-5 fusion based upon the MRI findings supported by the positive straight leg raise and reduced strength indicating nerve root irritation (PX 7). Dr. Darwish testified that he performs 200 fusions per year, but less than 5 on patients 31 years old or younger. There is a risk of adjacent level degeneration with a fusion. He testified that Petitioner was capable of lifting 15 pounds occasionally as of the December 23, 2021 visit. If Petitioner chose not to have surgery, Dr. Darwish would recommend an FCE and continued care with a pain management doctor (PX 7).

Dr. Butler testified by evidence deposition taken February 25, 2022 (RX 9). He testified to his initial examinations and agreement with the L4-5 laminectomy and discectomy. He testified to his September 20, 2021 re-exam finding that Petitioner was in need of 4 weeks additional therapy and was able to return to work with a 15 pound lifting restriction. He testified to his November 22, 2021 examination, including Petitioner's subjective presentation, his physical examination and review of the October 18, 2021 MRI. He noted her Oswesty disability index was lower than his prior exam with the only high score on lifting. He testified that Petitioner's obesity would be a factor in her having some residual back pain after surgery. Petitioner's blood pressure and heart rate were inconsistent with 8/10 pain. He opined that the MRI demonstrated no residual nerve compression at the L4-5 level. Petitioner had some degeneration at that level, but the facet joints were normal. He opined there was no indication for a spinal fusion. There was a mismatch between the subjective pain complaints and the observed behavior, vital signs, and objective imaging. He opined that Petitioner was at MMI and could return to work without restriction. He felt that Petitioner was not a surgical candidate because her BMI was over 40 and a high risk of nonunion (RX 9).

Dr. Butler testified that Petitioner's Waddell signs were negative. She did not have neurological positive testing prior to her initial surgery. Dr. Butler testified it is premature to assign a diagnosis of post laminectomy syndrome after only 5 months. Petitioner's physical fitness issues are going to take months and that they are beyond the scope of what the surgery is designed to do. It is to decompress the nerve root, which it did. Petitioner had appropriate physical therapy and should transition to home exercises. Pain radiating into the thigh is not radicular pain. A reduced tibialis interior strength would be significant. It could be reflective of continuing neurological issues. The MRI showed no basis for that objectively. Dr. Butler disagrees with Dr. Darwish noting bulging of the disc in the foraminal region bilaterally. It is his opinion the L5 nerve is not compressed in any way. If someone has a laminectomy and continued neurological symptoms, a fusion is an option. It is not reasonable or necessary in this specific case (RX 9).

Utilization Review was undertaken, pursuant to Section 8.7 of the Act (RX 10). Medical records were reviewed before the completion of the report including record of correspondence with Dr. Darwish. Peer review with Dr. Darwish was done on March 11, 2022 by telephone. The report did not certify the transforaminal lumbar interbody fusion on the basis that it was not medically reasonable and necessary per ODG guidelines. The guideline note fusion is not recommended for workers compensation patients for degenerative disc disease, disc herniation, spinal stenosis without instability due to lack of evidence or risk exceeding benefit (RX 10).

Petitioner testified she want the surgery recommended by Dr. Darwish. She has not returned to work. She testified that Dr. Darwish continues to keep her off work. She testified that he said the condition of her back is

such that it does not allow her to do things that normal people do. It is getting worse. She is not currently getting any treatment. She is not taking any medication. Ibuprofen does not really do anything.

Conclusions of Law

In support of the Arbitrator's decision with respect to (F) Causal Connection, the Arbitrator finds as follows:

A Workers' Compensation Claimant bears the burden of showing by a preponderance of credible evidence that his current condition of ill-being is causally related to the workplace injury. *Horath v. Industrial Commission*, 449 N.E.2d 1345, 1348 (Ill. 1983) citing *Rosenbaum v. Industrial Com.* (1982), 93 Ill.2d 381, 386, 67 Ill. Dec. 83, 444 N.E.2d 122). The Commission may find a causal relationship based on a medical expert's opinion that the injury "could have" or "might have" been caused by an accident. *Mason & Dixon Lines, Inc. v. Industrial Comm'n*, 99 Ill. 2d 174, 182, 457 N.E.2d 1222, 1226, 75 Ill. Dec. 663 (1983). However, expert medical evidence is not essential to support the Commission's conclusion that a causal relationship exists between a claimant's work duties and his condition of ill-being. *International Harvester v. Industrial Comm'n*, 93 Ill. 2d 59, 63, 442 N.E.2d 908, 911, 66 Ill. Dec. 347 (1982). A chain of events suggesting a causal connection may suffice to prove causation. *Consolidation Coal Co. v. Industrial Comm'n*, 265 Ill. App. 3d 830, 839, 639 N.E.2d 886, 892, 203 Ill. Dec. 327 (1994). Prior good health followed by a change immediately following an accident allows an inference that a subsequent condition of ill-being is the result of the accident. *Navistar International Transportation Co. v. Industrial Comm'n*, 315 Ill. App. 3d 1197, 1205 (2000).

The Petitioner is alleging that her condition of ill-being in the lumbar spine is causally connected to the accident. The unrebutted testimony is that she had no low back issues before the accident on August 7, 2020. Thereafter, she has been under a regular and continuous course of care. All treating medical providers and Dr. Butler have opined that the initial disc herniation, and treatment through the May 17, 2021 L4-5 laminectomy and discectomy and post operative care through Dr. Butler's September 20, 2021 examination was causally related to the accident. Dr. Darwish has testified that Petitioner continues to require treatment including a lumbar fusion causally related to the accident. Dr. Butler, in his November 22, 2021 report, has opined that Petitioner is at maximum medical improvement and is no longer in need of medical treatment or work restrictions.

It is the Commission's province to assess the credibility of witnesses, draw reasonable inferences from the evidence, determine what weight to give testimony, and resolve conflicts in the evidence, particularly medical opinion evidence. *Berry v. Industrial Comm'n*, 99 Ill. 2d 401, 406-07, 459 N.E.2d 963, 76 Ill. Dec. 828 (1984); *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 675, 928 N.E.2d 474, 340 Ill. Dec. 475 (2009); *Fickas v. Industrial Comm'n*, 308 Ill. App. 3d 1037, 1041, 721 N.E.2d 1165, 242 Ill. Dec. 634 (1999). Expert testimony shall be weighed like other evidence with its weight determined by the character, capacity, skill, and opportunities for observation, as well as the state of mind of the expert and the nature of the case and its facts. *Madison Mining Company v. Industrial Commission*, 309 Ill. 91, 138 N.E. 211 (1923). The proponent of expert testimony must lay a foundation sufficient to establish the reliability of the bases for the expert's opinion. *Gross v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100615WC, 960 N.E.2d 587, 355 Ill. Dec. 705. If the basis of an expert's opinion is grounded in guess or surmise, it is too speculative to be reliable. Expert opinions must be supported by facts and are only as valid as the facts underlying them. *In re Joseph S.*, 339 Ill. App. 3d 599, 607, 791 N.E.2d 80, 87, 274 Ill. Dec. 284 (2003). A finder of fact is not

bound by an expert opinion on an ultimate issue, but may look 'behind' the opinion to examine the underlying facts.

Having heard the testimony and studies the evidence, the Arbitrator finds the opinions of Dr. Darwish persuasive. As more fully discussed with respect to Prospective Medical below, the Arbitrator finds that Dr. Darwish's opinions are supported by the diagnostic studies, the objective medical examination evidence, and Petitioner's credible subjective symptoms. Dr. Butler, while disputing Petitioner's need for further care or surgery, does not present any opinions that her low back condition is not causally related to the accident, but rather opines that the condition has resolved and there is no further objective reason for her subjective complaints. The Arbitrator does not find that opinion persuasive. Not only may the Commission decide which medical view is to be accepted, it may attach greater weight to the opinion of the treating physician. *International Vermiculite Co. v. Industrial Comm'n*, 77 Ill.2d 1, 31 Ill. Dec. 789, 394 N.E.2d 1166 (1979); *ARA Services, Inc. v. Industrial Comm'n*, 226 Ill. App. 3d 225, 168 Ill. Dec. 756, 590 N.E. 2d 78 (1992).

Based upon the record as a whole, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that her condition of ill-being in the lumbar spine is causally connected to the accidental injury sustained on August 7, 2020 while working for Respondent.

In support of the Arbitrator's decision with respect to (J) Medical, the Arbitrator finds as follows:

Under section 8(a) of the Act, a claimant is entitled to recover *reasonable* medical expenses that are causally related to the accident and that are *necessary* to diagnose, relieve, or cure the effects of his injury. *Absolute Cleaning/SVMBL v. Illinois Workers' Compensation Comm'n, 409 Ill. App. 3d 463, 470, 949 N.E.2d 1158, 1165, 351 Ill. Dec. 63 (2011)*. Petitioner has submitted the billing of Hinsdale Orthopedics showing a balance due of $17,547.00 (PX 2). The Arbitrator has reviewed the billing and finds that the balances showing are for treatment by Dr. Darwish for office visits in February 2021, laminectomy and discectomy on May 17, 2021 and the MRI on October 18, 2021. These services have not been reduced by fee schedule or negotiated rate. All of these services were before the dispute on further care raised by Dr. Butler's November 22, 2021 examination report. Dr. Butler found this treatment reasonable and necessary. Respondent's payment ledger (RX 1) does not document any payments for these services.

Based upon the record as a whole, the Arbitrator finds that Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $17,547.00 to Hinsdale Orthopedic, as provided in Sections 8(a) and 8.2 of the Act.

In support of the Arbitrator's decision with respect to (K) Prospective Medical, the Arbitrator finds as follows:

Under section 8(a) of the Act, a claimant is entitled to recover *reasonable* medical expenses that are causally related to the accident and that are *necessary* to diagnose, relieve, or cure the effects of his injury. *Absolute Cleaning/SVMBL v. Illinois Workers' Compensation Comm'n, 409 Ill. App. 3d 463, 470, 949 N.E.2d 1158, 1165, 351 Ill. Dec. 63 (2011)*. Dr. Darwish is recommending a second surgery consisting of an L4-5 transforaminal interbody fusion. Dr. Butler has opined that Petitioner is at MMI and that there is no indication for further treatment.

In weighing the reasonableness and necessity of treatment, the Commission considered the medical opinions presented. It is the Commission's province to assess the credibility of witnesses, draw reasonable inferences from the evidence, determine what weight to give testimony, and resolve conflicts in the evidence, particularly medical opinion evidence. *Berry v. Industrial Comm'n*, 99 Ill. 2d 401, 406-07, 459 N.E.2d 963, 76 Ill. Dec. 828 (1984); *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 675, 928 N.E.2d 474, 340 Ill. Dec. 475 (2009); *Fickas v. Industrial Comm'n*, 308 Ill. App. 3d 1037, 1041, 721 N.E.2d 1165, 242 Ill. Dec. 634 (1999). Expert testimony shall be weighed like other evidence with its weight determined by the character, capacity, skill, and opportunities for observation, as well as the state of mind of the expert and the nature of the case and its facts. *Madison Mining Company v. Industrial Commission*, 309 Ill. 91, 138 N.E. 211 (1923). The proponent of expert testimony must lay a foundation sufficient to establish the reliability of the bases for the expert's opinion. *Gross v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100615WC, 960 N.E.2d 587, 355 Ill. Dec. 705. If the basis of an expert's opinion is grounded in guess or surmise, it is too speculative to be reliable. Expert opinions must be supported by facts and are only as valid as the facts underlying them. *In re Joseph S*., 339 Ill. App. 3d 599, 607, 791 N.E.2d 80, 87, 274 Ill. Dec. 284 (2003). A finder of fact is not bound by an expert opinion on an ultimate issue, but may look 'behind' the opinion to examine the underlying facts. Not only may the Commission decide which medical view is to be accepted, it may attach greater weight to the opinion of the treating physician. *International Vermiculite Co. v. Industrial Comm'n*, 77 Ill.2d 1, 31 Ill. Dec. 789, 394 N.E.2d 1166 (1979); *ARA Services, Inc. v. Industrial Comm'n*, 226 Ill. App. 3d 225, 168 Ill. Dec. 756, 590 N.E. 2d 78 (1992).

Having heard the testimony and reviewed the treating records and medical depositions, the Arbitrator finds the opinions of Dr. Darwish more persuasive that those of Dr. Butler. Petitioner has presented credible symptoms and complaints. Dr. Butler noted negative Waddell signs. No evidence of symptom magnification was presented. Petitioner's presentation was credible and in accordance with the complaints advanced in the medical records. The Arbitrator finds Dr. Darwish reading of the MRI is in accordance with the radiologist. He has the advantage of further follow up visits in December 2021 and March 2022 which document objective weakness which Dr. Butler concedes would be significant and could be attributed to L5 radiculopathy. Dr. Butler's opinion that Petitioner is at MMI and can return to work without restrictions as of November 2021 is contradicted by her credible and consistent worsening medical presentation and the subsequent evolving objective physical examinations by Dr. Darwish. Dr. Butler concedes that if someone has a laminectomy and continued neurological symptoms, a fusion is an option. His opinion is in large part based upon the risks of future problems or lack of success. The decision on weighing whether these risks are worth the possible benefit is best determined by the Petitioner and her treating doctor.

Respondent also offered the Utilization Review of Dr. Trotter, non-certifying the surgery based upon a review of ODG guidelines. The Arbitrator has reviewed the report and does not find it persuasive. It appears that the actual MRI films were not reviewed, nor records after October 18, 2021. The reviewer therefore did not consider the loss of strength noted in December 2021 and March 2022 as evidence of nerve involvement. The Arbitrator also notes that the ODG has separate criteria for workers compensation patients, implying an inherent bias to the standard. The Arbitrator also notes that the reviewer noted that further documentation may be submitted by Dr. Darwish. Based upon this review, the Arbitrator finds the UR has little credibility and gives it little weight.

Based upon the record as a whole, the Arbitrator finds that Respondent shall authorize and pay for additional reasonable and necessary treatment consistent the recommendations of Dr. Darwish including an L4-5

transforaminal interbody fusion, any post operative treatment, physical therapy, or other reasonable and necessary care.

In support of the Arbitrator's decision with respect to (L) Temporary Compensation, the Arbitrator finds as follows:

Temporary compensation is provided for in Section 8(b) of the Workers' Compensation Act, which provides, weekly compensation shall be paid as long as the total temporary incapacity lasts, which has interpreted to mean that an employee is temporarily totally incapacitated from the time an injury incapacitates him for work until such time as he is as far recovered or restored as the permanent character of his injury will permit. The dispositive test is whether the claimant's condition has stabilized, i.e., reached MMI. *Sunny Hill of Will County Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 760 (4th Dist. 2003). To be entitled to TTD benefits a claimant must prove not only that he did not work but that he was unable to work. *Freeman United Coal Min. Co. v. Indus. Comm'n*, 318 Ill. App. 3d 170, 175, 741 N.E.2d 1144, 1148 (2000).

The parties agree that benefits were due and paid through September 23, 2021. Prior to that date, Petitioner was either taken completely off work or placed on restrictions which could not be accommodated. Respondent received Dr. Butler's September 20, 2021 report which released Petitioner to work with a 15 pound lifting restriction and extended an offer of modified duty. The offer noted the release to modified duty as of 9/20/21/ The offer of modified duty did not specify the job offered or the particular restrictions to be met, just "Your assignment will be modified to comply with the doctor's restrictions." At that time, Dr. Darwish had authorized Petitioner completely off work. Thereafter, additional visits resulted in a recommendation for further surgery to address Petitioner's worsening complaints.

Based upon the Arbitrator's previous discussion of the medical opinions, the Arbitrator finds the opinions of Dr. Darwish more persuasive. Petitioner was recommended for further treatment and was not at MMI. The Arbitrator finds Petitioner's decision to follow the recommendations of her treating doctor and decline the light duty job offer was reasonable. The Arbitrator does not find Dr. Darwish testimony at deposition that Petitioner could do occasional lifting of up to 15 pounds inconsistent. Dr. Butler did not specify occasional lifting and given the nature of the job Petitioner had been assigned, lifting would not be occasion, but rather the primary activity of her job. The Arbitrator notes that, after Dr. Darwish deposition, the modified work offer was not renewed, not was any detail provided to Petitioner as to the nature of the duties she would be required to perform. The Arbitrator does not find the job offer disqualifying to ongoing benefits.

Based upon the record as a whole, and the Arbitrator's finding with respect to Prospective Medical, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that she is entitled to temporary total compensation commencing August 7, 2020 through June 10, 2022, being the date of the 19(b) hearing in this matter. Respondent is entitled to the credit stipulated to by the parties of $17,500.00 (Arb. Ex. 1).

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC035207
Case Name	Sandra McDorman v. Galesburg District #205
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0382
Number of Pages of Decision	16
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Hania Sohail
Respondent Attorney	Ilir Imeri

DATE FILED: 8/28/2023

/s/Maria Portela, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF KNOX)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SANDRA McDORMAN,

Petitioner,

vs. NO: 19 WC 35207

GALESBURG DISTRICT #205,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causation, medical expenses and temporary total disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

We modify the first period of temporary total disability to reflect that it began on October 9, 2019, the day after Petitioner's accident. We also modify the second period to reflect the dates claimed by Petitioner on the Request for Hearing form and which are supported by the evidence. We affirm the Arbitrator's award for the third period. Therefore, the temporary total disability benefits and number of weeks are calculated as follows:

10/9/19 through 11/5/19 = 4 weeks
11/15/19 through 4/10/20 = 21-1/7 weeks
12/15/21 through 3/31/22 = 15-2/7 weeks

Total = 40-3/7 weeks

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $253.00 per week for a period of 40-3/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $194,627.78 for medical expenses under §8(a) of the Act subject to the fee schedule in §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay for the surgical treatment recommended by Dr. Kube.

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

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

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

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

August 28, 2023

SE/
O: 7/11/23
49

/s/ *Maria E. Portela*

/s/ *Amylee H. Simonovich*

/s/ *Kathryn A. Doerries*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC035207
Case Name	MCDORMAN, SANDRA v. GALESBURG DISTRICT #205
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	13
Decision Issued By	Bradley Gillespie, Arbitrator

Petitioner Attorney	Hania Sohail
Respondent Attorney	Ilir Imeri

DATE FILED: 9/2/2022

THE INTEREST RATE FOR THE WEEK OF AUGUST 30, 2022 3.23%

/s/Bradley Gillespie, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF **Knox**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Sandra McDorman
Employee/Petitioner

v.

Galesburg District #205
Employer/Respondent

Case # **19** WC **35207**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gillespie**, Arbitrator of the Commission, in the city of **Bloomington**, on **03/31/22**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **10/8/19**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**13,156.00**; the average weekly wage was $**253.00**.

On the date of accident, Petitioner was **43** years of age, ***married*** with **0** dependent children.

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

Respondent shall be given a credit of $**6,397.28** for TTD, $**0** for TPD, $**0** for maintenance, and $**27,069.74** for other benefits, for a total credit of $**33, 467.02.**

Respondent is entitled to a credit of $**582.81** under Section 8(j) of the Act.

ORDER

The Arbitrator orders the Respondent to pay the Petitioner directly medical bills in the amount of $194,627.78 for reasonable and necessary medical treatment. The medical bills are to be paid to the Petitioner directly at a rate prescribed by the Illinois Workers' Compensation Commission Fee Schedule.

The Arbitrator finds that Petitioner is entitled to TTD for a period of 57 3/7 weeks in the amount of $ 253 per week.

Based upon the finding of causal connection, the Arbitrator orders the Respondent to authorize and pay for the surgical treatment recommended by Dr. Kube.

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

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

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

SEPTEMBER 2, 2022

Bradley D. Gillespie
Signature of Arbitrator

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SANDRA MCDORMAN,	)	
	)	
Petitioner,	)	
vs.	)	**No. 19WC035207**
	)	
GALESBURG COMMUNITY UNIT SCHOOL DISTRICT #205,	)	
	)	
Respondent.	)	

19(b) DECISION OF ARBITRATOR

This claim proceeded to hearing on March 31, 2022, in Bloomington, Illinois pursuant to 19(b) of the Act. (Arb. Ex. 1) The following issues were in dispute at arbitration:

- Causal Connection;
- Medical Expenses;
- Temporary Total Disability;
- Credit for Medical Bills Previously Paid;
- and, Prospective Medical Treatment.

FINDINGS OF FACT

Sandra McDorman [hereinafter "Petitioner"] filed an Application for Adjustment of Claim alleging she sustained accidental injuries on October 8, 2019, while working for Galesburg Community Unit School District #205 [hereinafter "Respondent"]. (PX #2)

Petitioner testified that she is currently employed as a cook at Knox County Mary Davis Home. (Tr. p. 14) She has been employed there since April of 2020. *Id.* Petitioner testified that prior to being employed at Knox County Mary Davis Home, she was employed at Galesburg Community Unit School District #205. (Tr. p. 15) She indicated that she started working for Galesburg School District around 2013. (Tr. p. 16) Petitioner was first hired as a cook's helper/floater. *Id.* She was promoted to a cook position in 2016. (Tr. p. 18) Petitioner testified that she last worked for the school district in November of 2019. She testified that after she got injured on October 8, 2019, she returned back to work sometime in November and worked for about 1 week. (Tr. p. 17) Petitioner testified that her job as a cook required her to lift at least 80 pounds with the help of her co-workers. (Tr. p. 19) Her position required her to stand for her entire shift. *Id.* Petitioner testified that she never experienced any issues while performing her job duties. *Id.* She testified that she worked for Respondent on a full-time basis. (Tr. p. 20)

Petitioner testified that on October 8, 2019, she injured her back while opening a temporary cooler. (Tr. p. 20) She testified that there was construction on the building and the original walk-in cooler had been removed. (Tr. p. 21) A separate temporary cooler and freezer was placed outside of the building months before the accident. (Tr. p. 22) Petitioner indicated

that the temporary cooler was set up on gravel. *Id.* A crowbar was provided to her by the principal of the school. (Tr. p. 23) Petitioner testified that the day of the accident was the first day that food had been placed into the cooler. *Id.* Petitioner described this cooler as a big semi-trailer with large, tall doors and a handle which had to be turned, rotated, and pulled in order to be opened. (Tr. p. 20) Petitioner explained that she was opening this with the help of her co-worker, Pamela Osborn. (Tr. p. 24) Petitioner was trying to pull the handle and while she was pulling the handle, she stepped back and felt immediate pain in her left low back. *Id.* Petitioner identified Petitioner's Exhibit 11 as a photograph of the temporary freezer and cooler. (Tr. p. 25) Petitioner stated that a co-worker had taken the photograph and that it accurately depicted the cooler she had been trying to open. (Tr. p. 26)

Petitioner testified that she experienced pain all across her back down into her left leg. (Tr. pp. 26-27) Petitioner testified that her boss came out and she notified her that she injured her back. (Tr. p. 20) Petitioner testified that she attempted to continue working but, she was having some trouble doing her job. (Tr. p. 21) She testified that after about two hours, the principal of the school and his secretary came down and said she had to leave. *Id.* Petitioner testified she was choice to go to IWIRC in Peoria or to the emergency room in Galesburg. (Tr. p. 27) Petitioner testified that she ended up going to Galesburg Cottage Hospital. (Tr. p. 29)

The records reflect that Petitioner presented to Galesburg Cottage Hospital on October 8, 2019. (PX #2) The history recorded by Galesburg Cottage Hospital personnel indicates that patient presents with complaints of left lower back pain from pushing/pulling at work. *Id*. The records reflect that patient's symptoms began acutely, suddenly, just prior to the arrival. *Id.* Petitioner reported that she twisted wrong at work. (PX #2) She reported pain in her left lower back that goes down to her left upper leg. *Id.* Petitioner reported no numbness, tingling, weakness, midline pain, just pain left of the midline in the lumbar sacral region. *Id.* Her physical examination revealed pain to the left of the lower lumbar sacral spine region with trigger points, and pain with range of motion. *Id.* Petitioner was discharged by Galesburg Cottage Hospital with a prescription for Norco and instructions to follow up with Dr. Faskett James and Physician's Assistant, Kristen Lee. (PX #2)

Upon instructions from Respondent, Petitioner followed up with IWIRC. (Tr. p. 31; PX #4 p. 1) IWIRC records reflect that Petitioner was first evaluated on October 11, 2019. (PX #4 p. 1) Petitioner reported that she was preparing for the day by pulling food out of the external freezers. *Id.* She stated she was opening 12 foot doors by pulling, pushing, and using a crowbar. *Id.* Petitioner stated that she developed pain in her lower back and notified her supervisor. *Id.* She reported that she continued to work but her pain intensified, and she was sent to emergency department for evaluation. (PX #4 p. 1) Physical examination revealed mild spinous process tenderness to palpation and moderate pain with lumbar flexion. (PX #4 p. 2) Lateral rotation of the lumbar spine was noted to be full to the right and left with mild pain. *Id.* Petitioner was diagnosed at IWIRC with lumbar strain. *Id.* She was provided a Back Support, a lumbar roll, ThermalSoft Gel cold/hot pack, Coban wraps, instructions for back exercises and OTC Naproxen/Aleve was dispensed. *Id.* She was given a prescription for Cyclobenzaprine and provided with light duty restrictions that included lifting of 20 pounds occasionally and 10 pounds frequently, minimal bending or twisting of the back. (PX #4 p. 3) Petitioner was scheduled to return to IWIRC on October 18, 2019. *Id.*

On October 18, 2019, Petitioner returned to IWIRC. (PX #4) She reported that she had improved slightly since her last visit. *Id.* Petitioner continued to report low back pain which was worse on the left side. *Id.* She indicated that her pain intensifies with bending over and that her employer had not been accommodating restrictions previously provided to her by IWIRC. *Id.* IWIRC continued to diagnose Petitioner with a low back sprain. (PX #4) IWIRC continued their previous treatment recommendations and sent her for a formal physical therapy evaluation. *Id.*

Petitioner returned to IWIRC on October 28, 2019. (PX #4) The interim history reports that Petitioner continued to have low back pain which was worse on the left side. *Id.* Petitioner was once again diagnosed with a low back strain. *Id.* IWIRC continued to recommend light duty while noting that the employer had nothing available in that capacity. *Id.* On November 14, 2019, Petitioner returned to IWIRC. (PX #4) Petitioner reported that she had been doing physical therapy three times per week at the Azer Clinic. *Id.* She indicated that her pain had begun radiating down her right leg. *Id.* Petitioner reported that she had been returned to full duty but that her pain gets worse with heavy lifting. *Id.* A recommendation was made for an MRI due to her persistent low back pain. (PX #4) Her differential diagnosis now included a herniated disc. *Id.*

On November 21, 2019, Petitioner followed up with IWIRC. (PX #4) She reported 5/10 pain which she described as intermittently aching and sharp. *Id.* Petitioner indicated that she had continued to do physical therapy three times per week at the Azer Clinic. *Id.* She reiterated that her pain was radiating down her right leg. *Id.* Petitioner indicated that she was now on light duty work and continued to await approval of the MRI. (PX #4) She was scheduled to return on December 5, 2019. *Id.*

Petitioner testified that she did not return to IWIRC as she did not like the treatment they were providing, she had been returned to work and was still in terrible pain. (Tr. p. 33) She stated that she hired an attorney and with the help of the attorney was able to go see Dr. Rhode. (Tr. p. 34) Petitioner testified that Dr. Rhode prescribed medications, patches, injections and physical therapy. (Tr. p. 35) Dr. Rhode referred her to Dr. Kube. *Id.* Petitioner testified that the injections she received from Dr. Rhode did temporarily help with her pain. (Tr. p. 36) Petitioner testified that she stopped attending physical therapy at Azer Clinic as the employer refused to pay for medical treatment and started attending physical therapy at Dr. Rhode's office. (Tr. pp. 36-38) Medical records of Azer Clinic reflect that Petitioner started attending physical therapy on October 29, 2019, and continued until January 24, 2020. (PX #10)

An MRI of Petitioner's lumbar spine was performed at Galesburg Cottage Hospital on December 16, 2019. (PX #3)

Physical therapy records from Orland Park Orthopedics show that Petitioner attended therapy from November 27, 2019 through March 2, 2022. (PX #5) Petitioner first presented to Dr. Rhode's office on November 27, 2019. *Id.* Petitioner reported that she sustained a work related injury to her low back on October 7, 2019. *Id.* Physician's Assistant, Mark Bordick noted that she was employed as a cook for School District 205 in Galesburg. *Id.* Petitioner reported that

she was injured while going to a makeshift cooler to get food. (PX #5) She stated that the cooler was like a train car and the doors are 10 feet plus. *Id.* As she attempted to open the doors, she felt a pulling sensation in her low back with radiation into her buttocks and both legs. *Id.* She reported that she had attended four physical therapy sessions but continued to experience persistent pain in her low back radiating into the legs. *Id.* She denied a prior history of back issues. (PX #5) Physician's Assistant Bordick indicated that he would hold off on physical therapy until an MRI was completed. *Id.* Petitioner was placed off of work. *Id.*

Dr. Rhode evaluated Petitioner on December 24, 2019. (PX #5) Dr. Rhode noted that Petitioner was involved in a work related accident on October 7, 2019 and that she continued to experienced right lateral thigh pain radiating down her right lateral calf. *Id.* Dr. Rhode interpreted the MRI to show an L5-S1 right paracentral disc herniation and L4-L5 disc bulge with bilateral foraminal stenosis. *Id.* Dr. Rhode noted that Petitioner had prior low back issues 15 years ago for which she had underwent epidural injections and returned to normal. *Id.* Dr. Rhode noted that Petitioner's symptoms were primarily down the posterior aspect of her thigh and lateral aspect of her calf suggesting L5-S1 distribution. (PX #5) He also indicated that the MRI revealed pathology at the L4-L5 level. *Id.* Dr. Rhode indicated that he believed Petitioner sustained an aggravation of her underlying condition. *Id.* Dr. Rhode recommended epidural injections and physical therapy. *Id.*

The medical records of Dr. Rhode reflect his office took Petitioner off of work from her initial visit on November 27, 2019. (PX #5) She started physical therapy at Dr. Rhode's office on February 14, 2020. *Id.* Petitioner was allowed to return to work on modified duty beginning March 11, 2020, and was allowed back to work at a full duty capacity on March 27, 2020. *Id.* Orland Park Orthopedics records note that Petitioner demonstrated a positive straight leg raise bilaterally on her initial visit. *Id.* Petitioner was placed back on modified duty on May 27, 2020 because she remained moderately symptomatic. (PX #5) Petitioner underwent 2 right sided epidural injections at L5-S1 on September 1, 2020 and December 8, 2020. (PX #6 & PX #7 respectively) On January 20, 2021, Dr. Rhode referred Petitioner to Dr. Kube. (PX #5) Petitioner completed her last physical therapy visit on February 17, 2021, shortly after she saw Dr. Kube. (PX #5) Petitioner continued to follow up with Dr. Rhode's office on a monthly basis and was provided palliative care in the form of medication and activity modification. *Id.*

Petitioner testified that Dr. Rhode referred her to Dr. Kube. (Tr. p. 35) Petitioner's first appointment with Dr. Kube's office was on February 2, 2021. (PX #8) Petitioner was seen by Physician's Assistant Andrew Kitterman on her initial visit. *Id.* Petitioner presented to their office complaining predominantly of axial low back pain across the belt line, worse on the right than on the left with occasional pain that shoots into bilateral buttocks and posterior thigh. *Id.* Petitioner provided a consistent history of injury on October 8, 2019, while working as a cook at a junior high school. *Id.* Petitioner described a pulling and twisting motion while attempting to open the large doors on a trailer. (PX #8) She felt pain in her back as she pulled open the trailer door. *Id.* Petitioner described sharp pain in her low back as well as a pulling sensation. *Id.* She stated that since then she has been dealing with low back pain as well as pain shooting down her legs into her buttocks and posterior thigh. *Id.* Petitioner indicated that 10-15 years ago she had some sciatic pain and she underwent some epidural injections which resolved her pain until the time of her injury. (PX #8) Her physical examination revealed some sensory deficits bilaterally

in the S1 distribution, pain in the right SI joint, and lumbar spine. *Id.* Point tenderness at the SI joint and a positive FABER maneuver were noted. *Id.* X-rays were obtained during her initial visit and Physician's Assistant, Andrew Kitterman noted Petitioner had a severe loss of disc height at L5-S1. *Id.* Mr. Kitterman felt the MRI demonstrated a broad based L5-S1 disc protrusion with a right paracentral displacement. (PX #8) Other discs were noted to be of relatively good height and hydration. *Id.* An L4-L5 disc bulge with bilateral L4-L5 lateral recess stenosis was observed. *Id.* Mr. Kitterman recommended Petitioner have a Motion Analysis Study Scan to look for any instability and a right sacroiliac joint injection for both diagnostic and therapeutic purposes was recommended. *Id.* The Motion Analysis Study was performed on February 17, 2021, and right sided SI joint injection was performed on February 22, 2021. (PX #8)

Petitioner first saw Dr. Kube on February 23, 2021. (PX #8) Dr. Kube noted that Petitioner continued to have pain across the mid low back. *Id.* Dr. Kube's examination was consistent with that of his physician's assistant. *Id*. Dr. Kube noted that he went through Petitioner's history and the pulling maneuver which he felt caused the aggravation that she described. *Id.* He also noted Petitioner's prior treatment history, that she had recovered completely and was release to activity as tolerated without restrictions. (PX #8) Dr. Kube diagnosed S1 radiculopathy, more right than left. *Id.* After reviewing Petitioner's history, performing physical examination, and reviewing diagnostic studies Dr. Kube recommended a decompression and fusion at the L5-S1 level. *Id.* Dr. Kube placed a 20-pound lifting restriction on Petitioner.

Petitioner next followed up with Dr. Kube on May 25, 2021 and he continued to recommend surgical intervention. (PX #8) Dr. Kube recommended a repeat sacroiliac joint injection due to the return of the right sacroiliac joint pain, continued radiculopathy and axial low back pain. *Id.* Physician's Assistant Kitterman provided a repeat SI joint injection on June 1, 2021. *Id.* Petitioner next followed up with Dr. Kube's office on June 8, 2021, at which time Petitioner noted approximately 50% improvement of her regional back pain. *Id.* Petitioner continued to follow up with Dr. Kube's office. (PX #8) Sher was last seen by Dr. Kube's office on March 1, 2022. Dr. Kube continued to recommend a lumbar fusion and decompression.

Medical records of Orland Park Orthopedics that on October 20, 2021, Petitioner was once again recommended to restart formal physical therapy at Dr. Rhode's office. Petitioner started formal physical therapy once again on October 26, 2021 and remained in physical therapy until March 2, 2022. Dr. Rhode's medical records reflect that on December 15, 2021 Petitioner was once again taken off of work due to increased pain. Petitioner also received a right GT steroid injection. It was noted in Dr. Rhode's medical records that Petitioner's lateral hip condition has developed due to overcompensation because of her lower back. Petitioner was last seen by Dr. Rhode on March 2, 2022. Dr. Rhode at that point discharged Petitioner from his care. Dr. Rhode at that point indicated that patient will continue care with Dr. Kube and he will transfer all care to Dr. Kube.

Consistent with Petitioner's testimony, Dr. Rhode's medical records reflect that Petitioner was taken off of work on November 27, 2019 and remained on modified/restricted activities until April 10, 2020. (*See* PX #4 & Tr. p. 38) Petitioner testified that Respondent was not

accommodating her restrictions. (Tr. p. 38) Petitioner testified that she started working for Knox County Mary Davis Home starting in April of 2020. Petitioner testified that she left her previous position for financial reasons and that her new employment was within her restrictions. (Tr. p. 39) She indicated that she took the new position after her workers' compensation benefits were terminated. (Tr. pp. 39-40) She was once again taken off of work on December 15, 2021. (Tr. p. 43)

Evidence deposition of Dr. Kube was taken on June 10, 2021. (PX #9) Dr. Kube testified about the treatment provided by his office to Petitioner and his recommendation for a right sided decompression and fusion at the L5-S1 level. Dr. Kube diagnosed Petitioner with lumbar stenosis, aggravated degenerative disc disease causing pain in her back as well as radicular findings. (PX #9 p. 17) He also felt that Petitioner may have some level of SI joint dysfunction but that it was not as much of an issue. *Id.* Dr. Kube discussed the option of doing a minimally invasive decompression and fusion of her lumbar spine through the right side. *Id.* Dr. Kube indicated that his surgical recommendation was necessary to address Petitioner's lumbar stenosis and radiculopathy. (PX #9 p. 18) He stated that the standard procedure to deal with stenosis and radiculopathy was to perform a decompression. *Id.* Dr. Kube opined that some of the compression was due to facet joints and disc material, while part of it was due to the loss of the intraarticular distance top to bottom. *Id.* He testified that Petitioner also has back pain based upon his assessment at the S1 level so one needs to stabilize the spine at L5-S1. (PX #9 pp. 18-19) The standard approach that would be to do a decompression and either do a fusion or at times they could do a stabilization procedure like Coflex. (PX #9 p. 19) Dr. Kube testified that the right sided decompression is to predominantly alleviate patient's right sided complaints; however, when restabilizing the disc height, it will indirectly decompress the left side by increasing the neuroforaminal cross-sectional surface area. *Id.* Dr. Kube testified that since patient's problems were predominantly on the right side, he did not believe that direct decompression on the left side was needed. *Id*.

Dr. Kube testified that, as of his last visit with Petitioner, he continued to recommend a decompression and fusion right sided at L5-S1 level. (PX #9 pp. 25-26) Dr. Kube testified that based upon Petitioner's history and the mechanism that was described as a pulling, twisting mechanism, she probably irritated her SI joint in some manner, but more importantly aggravated the stenosis that she had at L5-S1 and the disc that she has at L5-S1. (PX #9 p. 26) He believed that the treatment he was recommending was causally related to Petitioner's work accident. *Id.*

Dr. Kube disagreed with Dr. O'Leary's opinion that Petitioner only sustained a lumbar strain or sprain for which she required no further treatment after 3 months following the accident. (PX #9 p. 28) Dr. Kube testified that the treatment that he is recommending is reasonable and necessary to treat Petitioner's condition and is causally related to her work accident. (PX #9 pp. 30-31)

During cross examination, Dr. Kube was questioned regarding Petitioner's x-rays from 2015. Dr. Kube indicated that the x-rays taken in 2015 does not tell him that anything about what was going on between 2015 to 2019. (PX #9 p. 41) Dr. Kube testified that he believed whatever was going on with Petitioner from 2015 to 2019 had assumed was resolved. (PX #9 pp. 41-42) Dr. Kube maintained that he was not aware of any ongoing treatment when she injured her back

on October 8, 2019. *Id.* Dr. Kube looked at the history that was provided to Dr. O'Leary, himself and Andrew and indicated that the Petitioner basically told all of these providers the same thing. (PX #9 p. 42) He indicated that he was not aware of Petitioner needing any restrictions for her back until her accident. (PX #9 p. 44)

Petitioner testified that she wants to undergo the low back decompression and fusion recommended by Dr. Kube. (Tr. p. 45) Petitioner testified that prior to October 8, 2019, she did have sciatic issues. (Tr. p. 46) She indicated that she had sciatic issues maybe 10-15 years prior to the accident. *Id.* Petitioner indicated that she had a couple of injections and never had a problem after that until 2019. *Id.* She indicated that she did have some low back problems in 2015 but that she doesn't really recall what those problems were and that she had completely forgotten about it. She indicated that she had a brief stint of physical therapy for low back. (Tr. p. 47) She testified that she forgot to disclose those problems to Dr. Rhode, to Dr. Kube and to Dr. O'Leary. She testified that in 2015 when she saw her primary care physician no MRI was ordered, no injections were performed, and no surgery was recommended. (Tr. pp. 47-48) Petitioner testified that she only was able to recall her problem from 2015, once she had seen the medical records for her visit. (Tr. p. 50) She testified that she didn't think it was a big deal and just had forgotten about it. *Id.* Petitioner testified that after a brief stint of physical therapy in 2015 her problems had resolved. *Id.* Petitioner testified that to the best of her knowledge her medical bills still remain outstanding. (Tr. p. 51)

Petitioner underwent an Independent Medical Evaluation with Dr. O'Leary at the behest of Respondent. Dr. O'Leary authored an Independent Medical Evaluation report dated February 6, 2020 and an addendum report dated April 5, 2020. (*See* RX #3 & RX #4 respectively) The Independent Medical Evaluation report of Dr. O'Leary dated February 6, 2020 was introduced into the evidence. (RX #3) Dr. O'Leary diagnosed Petitioner with ill-defined back pain with lower extremity symptoms. *Id.* He indicated that Petitioner had pain down her right posterior thigh and left posterior thigh. *Id.* Dr. O'Leary did not believe that Petitioner had reached a point of maximum medical improvement when he saw her. *Id.* He indicated that was due to fact that he had not reviewed Petitioner's prior medical records. (RX #3) Dr. O'Leary noted that Petitioner subjectively related her symptoms to the October 8, 2019 accident. *Id.* He opined that the etiology of her ongoing subjective complaints is unknown. *Id.* Dr. O'Leary suggested that the mechanism of injury makes sense for potentially creating a back injury, but there are no acute findings on any of the advanced imaging and Petitioner's pain persists for nearly 4 months after the injury. *Id.* Dr. O' Leary noted that Petitioner's pain was 0 of 10 one month after the injury after being out of work. (RX #3) He thought an epidural injection may be helpful. *Id*. Dr. O'Leary opined that Petitioner was able to work at a limited duty capacity with frequent lifting of 20 pounds and occasionally lifting up to 30 pounds. *Id.*

Dr. O'Leary's addendum report of April 5, 2020 was admitted into the evidence. (RX #4) Dr. O'Leary was not provided with any of Petitioner's prior medical records with the exception of an x-ray from 2015. *Id.* Dr. O'Leary diagnosed Petitioner with a lumbar strain and indicated that lumbar strain would typically have been resolved 3 months after the injury and certainly within 6 months after the injury. *Id.* He believed that Petitioner did not require any work restrictions or any further treatment. *Id.* Dr. O'Leary indicated that physical therapy would be

considered reasonable for a condition like this. *Id.* He felt that her ongoing pain complaints were related to her pre-existing disc degeneration. (PX #4)

Dr. O'Leary did not see the Petitioner or rendered any addendum report after Dr. Kube recommended surgical intervention. Dr. O'Leary did not review any other pre-accident medical records except for prior x-ray of Petitioner's low back from 2015.

Dr. O'Leary's deposition was taken on January 13, 2022. (RX #1) Dr. O'Leary's testified consistently with his report. Dr. O'Leary testified that Petitioner suffers from substantial degenerative disc changes. Dr. O'Leary could not explain why, despite substantial changes, Petitioner did not receive any treatment from 2015 to 2019. (RX #1 pp. 42-43) Dr. O'Leary could not testify whether there were any structural changes in Petitioner from 2015 to 2019 as it relates to her lumbar spine. Dr. O'Leary admitted that the only diagnostic studies that he reviewed pre-dating the accident was an x-ray and after the accident was an MRI. (RX #1 pp. 44-45) Dr. O'Leary admitted that other than the x-ray taken in November of 2015 he did not review any pre-injury records. (RX #1 pp. 45-46) Dr. O'Leary admitted that one of the principal reasons underlying his causation opinion was the fact that Petitioner had an x-ray of her lumbar spine in November of 2015. (RX #1 p. 48) Dr. O'Leary admitted that the mechanism of the accident that Petitioner was involved in theoretically could cause a disc herniation and also be a competent mechanism for aggravating a pre-existing herniation. (RX #1 p. 50)

The Arbitrator notes that Respondent did introduce the medical records for Petitioner from the date of November 10, 2015, when Petitioner underwent the x-rays that have been noted by multiple providers. (RX #5) Petitioner presented to Cottage Medical Arts Clinic with low back pain radiating down her legs causing numbness. *Id.* Petitioner reported that her radiating pain was mostly down the left leg but symptoms were present in both. *Id.* Petitioner was diagnosed with sciatica likely secondary to over use causing sciatica. *Id.* She given a few days off work, advised to complete lumbar x-rays for further evaluation and referred for physical therapy. (RX #5) The Arbitrator notes these records to be consistent with Petitioner's testimony. No other prior treatment records were introduced by either party.

CONCLUSIONS OF LAW

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

The parties agree that Petitioner sustained accidental injuries on October 8, 2019, arising out of and in the course of her employment with Respondent. The parties also agreed that Petitioner reported her accident in a timely matter. The Arbitrator incorporates by reference the findings of fact as set forth in the paragraphs above. Reiteration of those factual findings will only be made to clarify the conclusions set forth below.

The Arbitrator finds Dr. Kube's opinion on causation to be more credible than Dr. O'Leary. The Arbitrator notes that both Dr. Kube and Dr. O'Leary provided testimony via evidence deposition and agreed that the mechanism of the accident Petitioner described could cause or aggravate Petitioner's underlying condition. Furthermore, the Arbitrator notes that Dr. Rhode indicated in his medical records that Petitioner's condition of ill-being was causally

related to her work accident. The Arbitrator notes that Dr. Kube provided a persuasive explanation why he believed Petitioner's condition of ill-being was causally related to her work injury. Dr. O'Leary simply denied causation based on the fact that Petitioner had some prior issues to her low back for which she had an x-ray. The Illinois Workers' Compensation Act does not bar an injured worker from recovering benefits simply because they have a prior condition. The Arbitrator notes that the Act covers work injuries that caused an aggravation to an injured employee's condition.

As further support, the Arbitrator notes that the history of the accident was consistently provided to all of the medical providers. Moreover, Petitioner testified credibly that she had been working full time without any issues prior to the date of accident. This fact is unrefuted. Other than the medical records from four years prior, there is nothing to endorse the idea that Petitioner's underlying condition was causing her problems immediately prior to the October 8, 2019 accident. No evidence was introduced that Petitioner had previously undergone an MRI. No evidence was presented that Petitioner had ever had a surgical recommendation prior to the date of injury.

Based on Petitioner's credible testimony, Dr. Kube's persuasive opinions and other supporting evidence submitted at the time of the trial, the Arbitrator finds Petitioner's current condition of ill-being is related to the work accident on October 8, 2019.

(J) Were the medical services that were provided to the Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

The findings of fact and conclusions regarding causal connection as stated above are incorporated by reference. Therefore, the Arbitrator finds and concludes as follows:

The Arbitrator having found a causal relationship between the accident and Petitioner's condition of ill-being, awards medical the outstanding medical bills as found in Petitioner's Exhibit 13 according to the Fee Schedule. The Arbitrator finds and concludes that the medical bills listed in Petitioner's Exhibit 13 were reasonable and necessary to treat Petitioner's condition of ill-being. The Arbitrator orders Respondent to pay the medical bills directly to Petitioner at the rate prescribed by the Illinois Workers' Compensation Commission Fee Schedule. Respondent shall be allowed a credit for $27, 069.74 for medical bills previously paid.

The Arbitrator notes that Respondent's Exhibit 8 is the medical payment ledger outlining medical bills already paid by Respondent. Respondent asserted a total credit of $27,069.74. Petitioner disputed the credit for the amounts paid by TMESYS, INC. After carefully reviewing Respondent's Exhibit 8 and comparing that document to the medical bills submitted, the Arbitrator agrees with Respondent that those bills paid by TMESYS, INC. were made for pharmacy charges submitted on behalf on Petitioner. Therefore, the Arbitrator finds and concludes that Respondent be allowed a credit for $27, 069.74 as outlined above and set forth in Respondent's Exhibit 8.

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

As of his last visit with Petitioner, Dr. Kube testified that he continued to recommend a right sided decompression and fusion at L5-S1 level. (PX #9 pp. 25-26) Dr. Kube believed that the treatment he was recommending was causally related to Petitioner's work accident. Based upon the finding of causal connection, the Arbitrator orders Respondent to authorize and pay for the surgical treatment recommended by Dr. Kube.

(L) What temporary total benefits are in dispute?

Consistent with medical records of Dr. Rhode and Dr. Kube, supported by Petitioner's testimony, the Arbitrator finds and concludes that Petitioner was temporarily and totally disabled from October 8, 2019, to November 5, 2019, and from November 5, 2019, to April 20, 2020. Petitioner was also temporarily and totally disabled from December 15, 202,1 through the date of trial of March 31, 2022. Wherefore, the Arbitrator finds and concludes that Petitioner is entitled to TTD for a period totaling 57 3/7 weeks in the amount of $253.00 per week.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC016273
Case Name	Neil Schopp v. City of East Peoria Fire Department
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0383
Number of Pages of Decision	9
Decision Issued By	Amylee Simonovich, Commissioner

Petitioner Attorney	Kevin Elder
Respondent Attorney	Michael Bantz

DATE FILED: 8/28/2023

/s/ Amylee Simonovich, Commissioner

Signature

DISSENT: /s/ Amylee Simonovich, Commissioner

Signature

23IWCC0383

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Neil Schopp,

Petitioner,

vs. NO: 20 WC 16273

City of East Peoria,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering all issues, and after being advised of the facts and law, reverses the Decision of the Arbitrator.

Findings of Fact

Petitioner has worked as a firefighter paramedic for Respondent since February 2000. His job duties include patient care, firefighting duties, driving the engine, and writing reports. He also performs station duties such as cleaning and other upkeep activities. Petitioner estimated his work consisted of 80% paramedic activities and 20% firefighting. He testified that his paramedic duties included lifting patients, carrying equipment, and delivering care, while his firefighting duties included dragging hoses and tools, pumping the engine, and performing other duties at a scene.

Petitioner testified that there is no typical scene. The situation could be as minor as a stubbed toe to as significant as a full cardiac arrest. He testified that they get "…a fair amount of medical and trauma blended…somebody just needs a bandage, something bandaged up to pulling somebody out of a [bathroom] that's in cardiac arrest and working them on the floor." (Tr. at 13). He testified that most of their calls are in bedrooms and bathrooms and the patients are larger than normal. He testified that usually there are at least four paramedics and/or firefighters on the scene and many times dispatch will call in additional personnel if the patient is over a certain weight.

On July 15, 2020, Petitioner filed an Application for Adjust of Claim in which he alleged he sustained an injury on December 30, 2019, due to "repetitive trauma / lifting at work." (Arb. Exh. 2). Petitioner testified that he first noticed occasional groin pain—flare-ups—in the summer of 2018. He denied that any activity incited the pain and testified, "I just started to notice it." (Tr.

at 14). He testified that his groin pain continued to occasionally flare up for approximately 18 months. He testified that on December 30, 2019, he "…noticed that the flares had become more frequent and…noticed a bulging on the left inguinal area." (Tr. at 15). Petitioner was worried about the bulging because he knew that one can develop a twisted bowel if there is a protrusion that twists. He testified that is why he finally sought medical care with his primary care doctor, Dr. Marshall, who diagnosed a large inguinal hernia. Petitioner testified that he did not report his groin pain earlier because he had a history of back problems and the groin pain was similar to the back pain he occasionally experienced. He initially thought the pain would go away, but decided he needed medical care once the bulge developed.

Petitioner completed an accident report on December 30, 2019. (RX 1). He testified that he reported that while he did not know when the hernia occurred, he had been having problems for a while. On the accident report, Petitioner did not indicate whether his injury occurred at a location other than work and listed the location as unknown. He also listed the date of injury as unknown. He indicated that he sustained an injury to his abdomen and identified the cause of his injury as "lift/pull/push object/strain." (RX 1). Petitioner wrote only "LEFT INGUINAL HERNIA" when asked to provide a description of his injury, including how the injury occurred. (RX 1). Petitioner testified that Dr. Evans surgically repaired his hernia in January 2020. Petitioner returned to work full duty on March 4, 2020.

Petitioner testified that in August 2019 he went on a family vacation to Florida. He denied doing any hiking, rock climbing, or heavy lifting. He testified that any walking he did was on the beach. He denied even carrying a large cooler to the beach and testified that the family returned to their condo for lunch. Petitioner denied engaging in any strenuous activities. He testified that he noticed a flare up of groin pain while walking during his vacation. He testified that he walked a lot during the vacation, but it was on level ground. He testified that he experienced occasional groin pain before the August 2019 vacation. Petitioner did not notice any swelling or bulging in the groin area during his vacation. He testified, "It was just the pain that I was dealing with. It was waves of pain. I didn't notice the bulging until December." (Tr. at 21-22).

Petitioner denied any prior injuries to his groin or stomach area before the summer of 2018. He denied reinjuring his groin since the January 2020 surgery. He testified that he continues to feel occasional pulling and a bit of pain, which he attributed to the mesh. He testified that his job is physically very demanding. He testified that over the years he has suffered numerous work injuries involving various body parts including his shoulders and back. He testified that several coworkers have suffered similar injuries.

When asked why he did not seek treatment until December 2019, Petitioner testified:

> Because like I said I've had issues with my back. It's a similar pain in a similar area because of where I had partially herniated disks in my back. I figured it was that and I was hoping it—that flares sometimes and it would go away. I thought it was that.

(Tr. at 28). He testified that by December 2019, the bulge was a new symptom and that his pain had worsened and become more frequent. He testified that he told his doctors about his symptoms

during the August 2019 vacation because they asked what he was doing and what he had noticed regarding his symptoms. Petitioner agreed that he told doctors that he suffered severe bouts of pain while walking for significant periods during his August 2019 vacation.

Medical Treatment

Dr. Marshall examined Petitioner on December 30, 2019. He recorded the following history:

> The patient…presents to the office complaining of an 18-month history of left lower quadrant pain "on and off." The pain can radiate into his left groin and left thigh. He tells me that the pain has not previously been severe enough, or frequent enough, for him to seek medical attention for this issue. However, when the patient was on vacation in August 2019, he had to do a lot of walking, and the pain increased rather significantly. More recently, the patient has noted that the left lower abdomen/inguinal region appears to be slightly "swollen" compared to the right side…He does note that lifting heavy objects, such as patients, or sneezing can worsen his pain.

(PX 2). Dr. Marshall diagnosed a left inguinal hernia. He recommended Petitioner avoid strenuous activity, particularly activity that increased pressure in the abdomen. He also referred Petitioner to a surgeon for further treatment.

The next day, Petitioner visited the company clinic. He reported feeling groin discomfort for approximately one year. (PX 3). Petitioner reported he had been seeing his chiropractor for what he thought was a psoas muscle strain. He complained of achiness, particularly when he was more active. The clinic doctor diagnosed a left inguinal hernia and prescribed work restrictions.

Dr. Evans examined Petitioner on January 13, 2020. He recorded the following history:

> He has noted pain with a bulge over the last 1.5 years. He does feel that more recently the bulges enlarge and he is having more significant discomfort. He had more severe bouts of pain while doing significant walking on vacation.

(PX 1). The doctor recommended Petitioner undergo surgery to repair the hernia. On January 22, 2020, Dr. Evans performed a laparoscopic left inguinal hernia repair with mesh. The postoperative diagnosis was a unilateral inguinal hernia.

On January 26, 2021, Dr. Marshall authored a narrative report at the request of Petitioner's attorney. He wrote:

> It is my understanding that the patient's occupation as a firefighter involves carrying heavy equipment and lifting patients. While straining to lift patients, carry heavy equipment, etc., can certainly increase the risk of developing an inguinal hernia, or can worsen an inguinal hernia that is already present, I have seen many patients who are not employed as a firefighter, but who have nonetheless developed

> an inguinal hernia. Therefore, I cannot, with any degree of medical certainty, establish a direct causal relationship between his employment as a firefighter and his development of a left inguinal hernia.

(PX 2). On February 5, 2020, Dr. Evans' nurse practitioner examined Petitioner and wrote that he was doing well. She prescribed restrictions of no lifting more than 20 pounds for four weeks. On March 4, 2020, the nurse practitioner determined Petitioner was doing well after the hernia surgery. Petitioner was to return as needed.

Conclusions of Law

Petitioner bears the burden of proving each element of his case by a preponderance of the evidence. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203 (2003). He must prove he suffered a disabling injury which arose out of and in the course of his employment. *Id*. The phrase "in the course of employment" refers to the time, place and circumstances surrounding the injury. *Id*. To satisfy the "arising out of" prong, Petitioner must show that the injury "…had its origin in some risk connected with, or incidental to, the employment." *Id*. Petitioner's claim is compensable only if he meets his burden of proving his inguinal hernia arose out of and in the course of his employment as a firefighter paramedic. After carefully considering the totality of the evidence, the Commission finds Petitioner did not meet his burden of proof.

In determining the compensability of Petitioner's claim, the Commission must first address whether the presumption of accident and causal connection established in Section 6(f) applies and if there is sufficient evidence to rebut the presumption. Section 6(f) of the Act states, in relevant part:

> Any condition or impairment of health of an employee employed as a firefighter, [EMT], or paramedic which results directly or indirectly from any bloodborne pathogen…heart or vascular disease or condition,…resulting in any disability…to the employee shall be rebuttably presumed to arise out of and in the course of the employee's firefighting, EMT, or paramedic employment and, further, shall be rebuttably presumed to be causally connected to the hazards or exposures of the employment. This presumption shall also apply to any hernia or hearing loss suffered by an employee employed as a firefighter, EMT, or paramedic…

This rebuttable presumption only applies to employees who have been employed as a firefighter, EMT, or paramedic for at least five years. It is undisputed that as of the alleged date of accident, Petitioner had worked as a firefighter paramedic for approximately 20 years; thus, Petitioner met his burden of proving the presumption applies to his claim. However, the presumption can be rebutted if there is some evidence sufficient to support a finding that something other than Petitioner's occupation caused his inguinal hernia. *See Johnston v. Ill. Workers' Comp. Comm'n*, 2017 IL App (2d) 160010WC, ¶ 44.

The Arbitrator determined that Petitioner met his burden of proving his hernia arose out and in the course of his employment. This conclusion relied exclusively on the Arbitrator's determination that the Section 6(f) presumption was not successfully rebutted. The Arbitrator

narrowly interpreted the relevant case law and concluded that only evidence submitted by Respondent could be considered when assessing whether the Section 6(f) presumption has been rebutted. The Commission interprets the applicable case law differently.

The Commission was unable to find any Illinois Appellate Court or Illinois Supreme Court cases that mandate that the Section 6(f) presumption can only be rebutted by evidence submitted by Respondent. In *Diederich v. Walters*, the Illinois Supreme Court, when addressing the effect of a rebuttable presumption, stated that "…a presumption ceases to operate in the face of contrary evidence…" 65 Ill. 2d 95, 102 (1976). The court further stated:

> …Presumptions are never indulged in against established facts. They are indulged in only to supply the place of facts. As soon as evidence is produced which is contrary to the presumption which arose before the contrary proof was offered the presumption vanishes entirely…These presumptions do not shift the burden of proof. Their only effect is to create the necessity of evidence to meet the *prima facie* case created thereby, and which, if no proof to the contrary is offered, will prevail…Stated differently, the presence of a presumption in a case only has the effect of shifting to the party against whom it operates the burden of going forward and introducing evidence to meet the presumption. If evidence is introduced which is contrary to the presumption, the presumption will cease to operate…However, where there is an absence of evidence to the contrary, the *prima facie* case created under the presumption will support a finding.

Id. at 102-03 (internal citations and quotation marks omitted). In *Franciscan Sisters Health Care Corp. v. Dean*, the court stated that Illinois adheres to Thayer's bursting-bubble hypothesis that "…once evidence is introduced contrary to the presumption, the bubble bursts and the presumption vanishes." 95 Ill. 2d 452, 462 (1983).

In the absence of any contrary precedent by the courts, the Commission finds it should consider the totality of the evidence when assessing whether an employer has successfully rebutted the Section 6(f) presumption, not just evidence submitted by the employer. Several cases support this conclusion. For example, in *In re Estate of Williams*, the court considered all the evidence—regardless of the submitting party—when determining whether the presumption of delivery of a deed was rebutted. 146 Ill. App. 3d 445 (1986). Notably, the court stated: "Our examination of the records leads us to the conclusion that both at the close of plaintiffs' evidence and at the close of all the evidence, plaintiffs have failed to rebut the presumption of delivery…" *Id*. at 454. The Illinois Appellate Court has also indicated that a claimant, through their testimony or other submitted evidence, can rebut the presumption. *See, e.g.*, *Carter v. Ill. Workers' Comp. Comm'n*, 2014 IL App (5th) 130151WC, ¶ 23-24 (stating, "But even if there was a rebuttable presumption of pneumoconiosis in this case, the presumption was rebutted by Dr. Houser, the claimant's own IME physician, who opined that the claimant did not have pneumoconiosis.").

The Arbitrator acknowledged that Dr. Marshall's narrative report was evidence that undercut Petitioner's claim that his hernia was the result of work-related repetitive trauma. As evident in this case, a narrow interpretation of the relevant case law can at times lead to an absurd result. Here, the result was that the Arbitrator chose to ignore evidence that clearly was sufficient

to rebut the Section 6(f) presumption simply because that evidence was not submitted by Respondent. The Commission does not agree that an employer must submit redundant exhibits if the claimant's own evidence rebuts the Section 6(f) presumption.

After reviewing the evidence, the Commission finds the narrative report authored by Dr. Marshall successfully rebutted the Section 6(f) presumption. Dr. Marshall knew Petitioner's occupation as a firefighter and knew that his work duties included carrying heavy equipment and lifting patients. The doctor acknowledged that straining to lift heavy equipment or patients could increase the risk of developing an inguinal hernia, or worsen a preexisting hernia. However, Dr. Marshall wrote that because he had seen many patients who developed inguinal hernias, but were not employed as a firefighter, he could not state with any medical certainty that there was a direct causal relationship between Petitioner's employment and his hernia. Dr. Marshall's inability to find a connection between Petitioner's employment and his hernia is certainly evidence that supports a finding that something other than Petitioner's occupation caused his inguinal hernia. Consequently, the Commission must now consider all the evidence as if the presumption never existed. *Johnston*, 2017 IL App (2d) 160010WC, ¶ 37.

Petitioner alleges that he sustained an inguinal hernia due to work-related repetitive trauma. However, the evidence does not support this claim. An employee alleging an injury due to repetitive trauma must meet the same standard of proof as a claimant alleging an injury due to a single, definable accident. *E.g.*, *A.C. & S. v. Indus. Comm'n*, 304 Ill. App. 3d 875, 879 (1999). An employee must prove that "…some act or phase of his employment was a causative factor in his ensuing injury." *Tolbert v. Ill. Workers' Comp. Comm'n*, 2014 IL App (4th) 130523WC, ¶ 54. To prove his inguinal hernia was the result of work-related repetitive trauma, Petitioner must prove his work duties were sufficiently repetitive in nature, occurrence, and force to cause a gradual breakdown of his physical condition. *See Williams v. Indus. Comm'n*, 244 Ill. App. 3d 204 (1993). After carefully considering the evidence, the Commission finds Petitioner failed to meet his burden of proving any work duties caused or contributed to his inguinal hernia.

Petitioner presented no credible evidence that any of his work duties caused or aggravated his hernia. He testified that he began experiencing occasional groin pain in the summer of 2018. He denied that any specific activity, work-related or otherwise, incited this pain. Petitioner continued to experience intermittent groin pain for approximately 18 months before he finally sought medical treatment on December 30, 2019. He testified that by December 2019, his groin pain had become more frequent and he first noticed swelling in the left inguinal area. Petitioner testified that his job duties involved lifting patients and carrying and maneuvering equipment; however, he admitted that there is no typical accident or incident scene. Petitioner failed to provide any details regarding work duties he believed were repetitive. He also failed to provide examples of any work duty causing or aggravating his chronic flare ups of groin pain from the summer of 2018 until December 30, 2019. While he testified that he believed his job as a firefighter paramedic was physically demanding, his testimony did not even allude to an instance when the physical nature of his job caused or aggravated his groin pain.

The Commission found only a single piece of evidence that arguably shows a relationship between his occupation and his symptoms. When he finally sought treatment on December 30, 2019, Petitioner noted that lifting heavy objects, such as patients, or sneezing could worsen his

pain. However, Petitioner did not provide any details regarding the relationship between his episodes of pain and lifting patients to any of his providers and failed to provide such details during his testimony. The Commission finds the lack of testimony or other evidence corroborating this single report of lifting patients worsening his pain glaring. Similarly, Petitioner testified that he finally sought treatment primarily due to appearance of a bulge or swelling in the left inguinal region. However, there is no evidence that any of Petitioner's work duties caused or contributed to the development of the swelling in the inguinal region. Notably, Dr. Marshall was aware of Petitioner's work duties, and the detailed history Petitioner provided regarding the progression of his groin pain, and the more recent development of inguinal swelling; however, he was unable to determine that Petitioner's occupation or any of his work duties were a causative factor of Petitioner's condition with any degree of medical certainty. Petitioner notably did not identify his occupation as a possible cause or contributor to his symptoms to any of his other medical providers—including the doctor at the company clinic.

The Appellate Court has affirmed the Commission's denial of benefits when there is little or no evidence that the claimant engaged in work-related repetitive actions. In *Williams*, the claimant alleged his condition was the result of work-related repetitive trauma. 244 Ill. App. 3d 204. The court affirmed the Commission's finding that the claimant failed to prove his condition was the result of accidental injuries that arose out of and in the course of his employment. *Id*. As part of its analysis, the court highlighted the lack of evidence that the claimant performed any task in a repetitive fashion. *Id*. at 211. The claimant testified that there was no single task that he performed daily or regularly. The claimant also denied that that he used any tool or object regularly or daily, and further denied having to lift any object daily. *Id*. Likewise, the Commission denies Petitioner's claim that his inguinal hernia was the result of work-related repetitive trauma due to a lack of evidence. The Commission finds Petitioner failed to provide sufficient evidence that any of his work duties caused, contributed to, or aggravated the inguinal hernia diagnosed by Dr. Marshall on December 30, 2019.

For the foregoing reasons, the Commission denies benefits because Petitioner failed to prove he sustained an injury arising out of and in the course of his employment on December 30, 2019.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on March 4, 2022, is reversed in its entirety and all benefits are denied.

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

August 28, 2023

o: 7/11/23

AHS/jds

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/s/ *Maria E. Portela*

Maria E. Portela

/s/ *Kathryn A. Doerries*

Kathryn A. Doerries

DISSENT

I respectfully dissent from the opinion of the majority and would affirm the Decision of the Arbitrator. After carefully considering the totality of the evidence, I do not believe the presumption pursuant to Section 6(f) of the Act was rebutted.

As to what is necessary to rebut the presumption, the Appellate Court concluded "…that the legislature intended an ordinary rebuttable presumption to apply, simply requiring the employer to offer *some* evidence sufficient to support a finding that something other than claimant's occupation as a firefighter caused his condition." *Johnston v. Ill. Workers' Comp. Comm'n*, 2017 IL App (2d) 160010WC, ¶ 45. The Appellate Court expounds on this further in *Simpson v. Ill. Workers' Comp. Comm'n*, 2017 IL App (3d) 160024WC, ¶ 46: "…once the employer introduces some evidence of another potential cause of the claimant's condition, the presumption ceases to exist…"

While the majority finds that Dr. Marshall's report of January 26, 2021, rebutted the presumption, this report fails to put forward "another potential cause of the [Petitioner's] condition." *Id.* Further, the record as a whole does not present "…evidence sufficient to support a finding that *something other than* [Petitioner's] occupation as a firefighter…" caused his hernia. *Johnston*, supra. (emphasis added).

Respondent asks this Commission to infer, without medical opinion, that evidence of Petitioner's increased pain while walking during his vacation is credible evidence that Petitioner's hernia was caused by something other than his occupation. Respondent argues that the evidence shows Petitioner's hernia was a result of his excessive walking while on vacation. However, I do not believe evidence of increased pain during his vacation rebuts the presumption of causation. After all, the evidence shows Petitioner experienced flare-ups of pain long before the August 2019 vacation. Furthermore, Respondent did not submit any credible evidence that any amount of walking is a known cause of hernias. Respondent also failed to submit any credible evidence that Petitioner's walking, or any other activity during his August 2019 vacation, caused *his* hernia. Most importantly, Respondent failed to submit any credible evidence of another potential cause of Petitioner's hernia.

The Appellate Court has held that "…where the question is one within the knowledge of experts only and not within the common knowledge of laypersons, expert testimony is necessary to show that claimant's work activities caused the condition complained of." *Nunn v. Indus. Comm'n*, 157 Ill. App. 3d 470, 478 (1987). Similarly, the question of whether extensive walking can cause a hernia is not within the common knowledge of laypersons. Such a speculative inference is not evidence that can rebut the presumption pursuant to Section 6(f) of the Act.

For the foregoing reasons, I would affirm the Decision of the Arbitrator.

/s/ *Amylee H. Simonovich*
Amylee H. Simonovich

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	14WC014159
Case Name	Trina K Tangerose v. Jasper Oil Producers Inc & IWBF
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0384
Number of Pages of Decision	15
Decision Issued By	Marc Parker, Commissioner, Stephen Mathis, Commissioner

Petitioner Attorney	Robert Javoronok
Respondent Attorney	John Langfelder, Chelsea Grubb

DATE FILED: 8/28/2023

/s/Stephen Mathis, Commissioner

Signature

/s/Marc Parker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF ADAMS)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TRINA TANGEROSE,

Petitioner,

vs. NO: 14 WC 14159

JASPER OIL PRODUCERS, INC.,
ILLINOIS STATE TREASURER as *ex-officio* custodian of the
INJURED WORKERS' BENEFIT FUND,
and GARY SHIELDS,

Respondents.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by Respondent Jasper Oil Producers, Inc. and Petitioner and notice given to all parties, the Commission, after considering the issues[1] of whether Petitioner sustained an accidental injury arising out of and occurring in the course of her employment with Jasper Oil Producers, Inc., whether Petitioner's right knee condition is causally related to the work accident, entitlement to temporary disability benefits, entitlement to medical expenses, and the nature and extent of Petitioner's permanent disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below, but otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

PROLOGUE

The Commission observes Petitioner's personal identity information was unredacted from Petitioner's Exhibit 7. The Commission cautions Counsel to adhere to Supreme Court Rule 138. *Ill. S. Ct. R. 138* (eff. Jan. 1, 2018).

[1] Respondent Jasper Oil Producer's Petition for Review identifies employment relationship, wage calculation, benefit rates, liability of IWBF, credit, and evidentiary issues as issues on Review, however Respondent Jasper Oil Producers did not advance arguments on those issues in its **S**tatement of Exceptions or during oral arguments, and thus the Commission views the issues as forfeited.

CONCLUSIONS OF LAW

On the Request for Hearing, Petitioner alleged she was entitled to Temporary Partial Disability ("TPD") benefits from December 17, 2013 through January 15, 2014 and January 16, 2014 through March 21, 2014. Arb.'s Ex. 1. The Commission, like the Arbitrator, finds Petitioner established entitlement to TPD benefits. We observe, however, the Decision contains an internal inconsistency and also miscalculates the weeks and parts thereof. The record reflects Gary Shields cut Petitioner's hours on January 17, 2014; therefore, the initial TPD period ends January 16, 2014, and the second period commences January 17, 2014. The Commission modifies the Decision as follows:

Petitioner is entitled to TPD benefits in the sum of $147.67 per week for 4 3/7 weeks, representing the December 17, 2013 through January 16, 2014; and

Petitioner is entitled to TPD benefits in the sum of $280.80 per week for 9 1/7 weeks, representing January 17, 2014 through March 21, 2014.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 14, 2022, as modified above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner temporary partial disability benefits in the sum of $147.67 per week for a period of 4 3/7 weeks, representing December 17, 2013 through January 16, 2014, as provided in §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner temporary partial disability benefits in the sum of $280.80 per week for a period of 9 1/7 weeks, representing January 17, 2014 through March 21, 2014, as provided in §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the sum of $38,185.62 for medical expenses, as provided in §8(a), subject to §8.2 of the Act. Respondent shall be given a credit for medical benefits that have been paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $372.72 per week for a period of 64.5 weeks, as provided in §8(e)12 of the Act, for the reason that the injuries sustained caused the 20% loss of use of the right leg.

The Illinois State Treasurer as *ex-officio* custodian of the Injured Workers' Benefit Fund was named as a co-Respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award hereby is entered against the Fund to the extent permitted and allowed under §4(d) of the Act, in the event of the failure of Respondent-Employer to pay the benefits due and owing the Petitioner. Respondent-Employer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent-Employer that are paid to the Petitioner from the Injured Workers' Benefit Fund. The Respondent-Employer's obligation to reimburse the Injured Workers' Benefit Fund, as set forth above, in no way limits or modifies its

independent and separate liability for fines and penalties set forth in the Act for its failure to be properly insured.

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 the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $60,600.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

/s/ *Stephen J. Mathis*

/s/ *Deborah L. Simpson*

SPECIAL CONCURRING OPINION

This case was scheduled for Oral Arguments on July 26, 2023, before a three member panel of the Commission including members Deborah J. Baker, Stephen J. Mathis, and Deborah L. Simpson, at which time Oral Arguments were either heard, waived or denied. Subsequent to Oral Arguments and prior to the departure of Commissioner Baker, the panel members had reached agreement as to the results set forth in this decision and opinion, as evidenced by the internal Decision worksheet initialed by the entire three member panel, but no formal written decision was signed and issued.

Although I was not a member of the panel in question at the time Oral Arguments were heard, waived or denied, and I did not participate in the agreement reached by the panel members in this case, I have reviewed the Decision worksheet showing how Commissioner Baker voted in this case, as well as the provisions of the Supreme Court in *Zeigler v. Industrial Commission*, 51 Ill. 2d 342 (1972), which authorizes signature of a Decision by a member of the Commission who did not participate in the Decision. Accordingly, I am signing this Decision in order that it may issue.

August 28, 2023

/s/ *Marc Parker*

mck

O:7/26/23

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ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	14WC014159
Case Name	TANGEROSE, TRINA K. v. JASPER OIL PRODUCERS, INC., IWBF AND GARY SHIELDS
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	11
Decision Issued By	Edward Lee, Arbitrator

Petitioner Attorney	Charles Edmiston
Respondent Attorney	John Langfelder, Chelsea Grubb

DATE FILED: 6/14/2022

THE INTEREST RATE FOR THE WEEK OF JUNE 14, 2022 2.16%

/s/Edward Lee, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OFADAMS)

☒ 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

Trina K. Tangerose
Employee/Petitioner

v.

Jasper Oil Producers, Inc., IWBF and Gary Shields
Employer/Respondent

Case # **2014** WC **14159**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Quincy**, on **May 4, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **December 17, 2013**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**33,431.84 in concurrent employment**; the average weekly wage was $**$621.20**.

On the date of accident, Petitioner was **44** years of age, ***single*** with **1** dependent child.

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

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

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

ORDER

Respondent shall pay Petitioner temporary partial disability benefits of $147.67/week for 4 2/7 weeks, commencing 12/17/13 through 1/15/14, and benefits of $280.80 per week for 10 5/7 weeks commencing 1/15/14 through 3/21/14 as provided in Section 8(a) of the Act.

Respondent shall pay reasonable and necessary medical services of $38,185.62, as provided in Sections 8(a) and 8.2 of the Act, subject to reductions under the Worker's Compensation Fee Schedules and with credit for any amounts that Respondent can demonstrate have been made on the bills listed in Petitioner's Exhibit 5 and received by the providers.

Respondent shall pay Petitioner permanent partial disability benefits of $372.72/week for 64.5 weeks, because the injuries sustained caused the 20% loss of the right leg, as provided in Section 8(e) 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.

Edward Lee
Signature of Arbitrator

JUNE 14, 2022

In considering the disputed issues in this case, the Arbitrator considers the following facts:

Petitioner testified that on December 17, 2013, she was employed by Jasper Oil Producers, Inc. in Mt. Sterling, Illinois, as an administrative assistant. Petitioner described the business as an oil drilling company and that Gary Shields was the owner of the company. Petitioner testified that her duties consisted of office work. She testified that she would get and process the mail, pay bills, answer the phone, draw contracts, talk with investors and pay the operating expenses of the oil companies. Petitioner testified that she had been so employed since 2002. Petitioner testified that she worked a 40-hour work week, initially working from 8:00 a.m. to 3 p.m., but later working varying hours to accommodate her second job as a CNA. Petitioner testified that at the time of her injury, her earnings were based on $10 per hour times 40 hours per week, and that she was paid monthly. Petitioner testified that she was not required to clock in and out or keep her hours in any way. Petitioner testified that at the time of the accident she was also working at the second job and that Jasper Oil had been informed of that second employment at the Golden Good Shepherd Home where she worked as a CNA. She testified that her work there was also full time and involved daily care of residents of the nursing home, including feeding, showering, lifting and basic care. Petitioner testified that she would work evenings and weekends to make up the 40-hour work week for Jasper Oil.

Petitioner testified that on December 17, 2013, she went out of the back door of the office to collect the mail from the post office as she routinely did on a daily basis. Petitioner testified that when she had arrived, she had parked her car at the back of the building and went inside briefly, then came back out to get the mail. Petitioner testified that getting the mail was a task that she did every day and was an essential task of her job. Petitioner testified that there is a sidewalk to the back door of the office, and a parking area where she would park her car. She testified that the night before there had been freezing rain followed by snow. Petitioner testified that she slipped on the ice and fell. Petitioner testified that she fell just a couple of steps outside of the building on property that was owned by Jasper Oil. Petitioner testified that she fell on all fours, landing on her hands and knees. Petitioner testified that she noticed immediate sharp pain to her right knee. She testified that she had difficulty getting up, but was able to do so and "hobbled" into the office as she was not able to bear weight on her right leg very well. Petitioner testified that she called Mr. Shields at home and told him about her accident and that she was going to the clinic where her primary care doctor, Dr. White, was located at the East Adams Clinic in Golden. Petitioner testified that she had to use cruise control on her car to get to the clinic as she was unable to use her right leg on the accelerator very well.

Petitioner testified that she went that day to the Blessing Physician Services clinic in Golden and saw Donna White, a nurse practitioner. Records from that date confirm that Petitioner was seen that day and provided a consistent history of having fallen on her right knee landing directly on her patella and was now unable to fully extend her knee and it was very painful to try to walk. (PX 3, p. 9) On examination, it was noted that effusion was noted in the knee and it was tender to touch. Petitioner was unable to fully extend the knee and the Petitioner had great difficulty tolerating examination of her knee. Hydrocodone was prescribed and Petitioner was referred for orthopedic evaluation.

Petitioner was next seen by Matthew Bruns, a nurse practitioner working in the orthopedic department at Quincy Medical Group, on December 23, 2013. Petitioner provided a consistent history of having fallen on ice and came down on her knees, with pain and swelling thereafter. (PX 2, p. 3-6) Petitioner stated that the swelling had improved but pain remained. Petitioner was non-weightbearing and using crutches and that use if ibuprofen and icing had failed to relieve her pain. Petitioner stated that she was unable to physically straighten the knee. On examination, the right knee had moderate effusion and was tender to palpation through the medial and lateral joint lines. (PX 2, p. 5) The knee lacked 20 degrees of full extension and the doctor was unable to flex her knee beyond 30 degrees. Petitioner was provided an off work slip for two weeks. (PX 1, p. 7) An MRI was ordered for suspected internal derangement in the knee. An MRI of the knee was performed on December 26, 2013 at Blessing Hospital. (PX 1, p. 5, PX 2, p. 9) The radiologist read this scan to show a minimally displaced coronally oriented fracture involving the

anterior pole of the patella with adjacent soft tissue edema. Petitioner returned to Matt Bruns on December 30, 2013, reporting slight improvement but still complaining of considerable pain. (PX 2, pp. 11-12) On examination, NP Bruns noted mild effusion and moderate tenderness over the patellar tendon and base of the right patella. He noted that she lacked a few degrees of extension and flexion was limited to 30 degrees with moderate increase in her discomfort. He noted that the MRI did not show any meniscal or ligamentous injury, but that it was consistent with bony contusion and microfracture to the patella. He provided her with a straight leg immobilizer for weightbearing and recommended gentle range of motion exercise with perhaps some formal therapy in three weeks. He commented that Petitioner would be unable to pursue her CNA job for the next three weeks. Petitioner was restricted from climbing stairs or ladders, should be sitting 100% of the time, should do no work requiring repetitive bending of her right knee and no lifting, pushing or pulling over 5 pounds and no kneeling or squatting. (PX 2, p. 13) Petitioner was directed to follow up in three weeks.

Petitioner was next seen by Matt Bruns on January 20, 2014, reporting some improvement but she was still using a crutch to guard weightbearing. (PX 2, pp. 17-19) Petitioner complained of some burning feeling over the anterior aspect of her knee. On examination, NP Bruns noted moderate palpable tenderness over the patellar tendon and that Petitioner was quite sensitive to any palpation. Range of motion lacked 5 degrees of full extension and flexion was to 75 degrees. X-rays taken that day were consistent with some healing of the fracture and good alignment. NP Bruns indicated that he would take her out of the straight leg knee immobilizer and transition her to a hinged knee brace for continued support and protection. He also recommended aggressive formal physical therapy to improve her motion and increase her quad strength and get her back to work with some restrictions. Petitioner was released to work on January 21, 2014 with restrictions of no climbing stairs or ladders, sitting 75% of the time, no work requiring repetitive bending of the right knee and no lifting, pushing or pulling over 10 pounds and no squatting or kneeling. (PX 2, p. 21)

Petitioner returned to Matt Bruns on February 19, 2014, reporting continued discomfort in the knee especially with difficulty extending and flexing the knee. (PX 2, pp. 23-25) Petitioner reported that she had been unable to pursue therapy for financial reasons. On examination, it was noted that Petitioner had very mild swelling over the anterior aspect of her right knee and moderate palpable tenderness through the medial and lateral joint line and anteriorly over the kneecap and patellar tendon. Range of motion lacked 5 degrees of full extension and flexion was now to 90 degrees. X-rays showed further healing of her fracture. NP Bruns urged Petitioner to get into physical therapy for one month for strengthening and to refit her brace. Petitioner was kept on the same work restrictions. (PX 2, p. 26) Records show that Petitioner did undergo evaluation for therapy on March 17, 2014. (PX 2, pp. 30-31) It was noted at that time that Petitioner was having decreased strength, swelling and joint/soft tissue dysfunction and decreased ability to squat and work.

Petitioner returned to Matt Bruns on March 21, 2014, reporting that she was doing well and had very little discomfort at that time. (PX 2, pp. 32-33) She reported a “weird” feeling in the bottom part of her knee but felt much improved. On examination, no limitation in motion was noted. Petitioner had a mild palpable tenderness over the right patellar tendon. Her quad strength was +3. NP Bruns discharged her from care to return to activity as tolerated. He recommended that she continue quad strengthening. Petitioner was released to return to full duties as of March 21, 2014. (PX 2, p. 41) In a therapy note on the same date, it was noted that Petitioner still had limitations in squatting and working. (PX 2, p. 34) It was noted that she was “shakey” with most exercises due to weakness.

Petitioner testified that she returned back to work at Good Shepherd Home when she was released to full duty work by NP Bruns on March 14, 2014. Petitioner testified that she did not return to her CNA duties at that time but was instead folding laundry. Petitioner testified that she did not feel comfortable returning to her full duties there because she did not feel safe being able to lift residents and bear full

weight on her right knee. Petitioner testified that she continued to experience a constant pain in the lower part of her left knee, right below the kneecap where the tibia bone and the kneecap meet. Petitioner affirmed that prior to her fall on December 17, 2013, she had not had problems with her right knee and had never had any treatment to her right knee. Petitioner testified that she eventually did attempt to return to her full CNA duties at the nursing home, but noticed that the more activity that she did with her leg, the more pain it would cause, so she still did not feel safe lifting residents. Petitioner testified that she returned to NP Matt Bruns on November 11, 2015.

Medical records confirm that Petitioner returned to Matt Bruns on November 11, 2015. (PX 2, pp. 42-43) At Arbitration, Petitioner acknowledged that she had not seen a doctor for her ongoing knee pain between March 2014 and November 2015, but indicated that she had communicated with a nurse who had told her to continue her exercises to strengthen her knee. Petitioner testified that she just needed to give her knee time to heal, but returned to treatment in November 2015 because her pain was getting increasingly worse at that time and the more activity she would do, the worse the pain would get. NP Bruns' record indicates that Petitioner reported that she had been experiencing pain in her right knee for the past three or four weeks. The record indicates that she reported that her knee did get better from her previous injury, but she denied any new recent injury or event that precipitated her current discomfort. Petitioner advised NP Bruns that she was unable to run due to the discomfort and had been taking Ibuprofen and Tramadol with minimal relief. She reported that the pain was primarily in the medial aspect of the right knee and was a constant achy pain. On examination, Petitioner had moderate palpable tenderness over the anterior medial joint line and a positive McMurray's test. She had increased discomfort with full extension during range of motion testing, and showed some quad weakness on the right compared to the left. Based upon his examination, NP Bruns suspected some internal derangement and recommended an MRI scan. Petitioner was given a prescription for Tramadol and was permitted to continue working without restrictions.

An MRI was completed on November 28, 2015, which was read by the radiologist to show a nondisplaced fracture of the medial tibial plateau. It was noted that edema in the area was mild suggesting that that fracture was subacute. The previous patella fracture was noted to be healed. No significant internal derangement was noted.

Records include a Work Ability Report dated November 30, 2015, limiting Petitioner to no climbing of stairs or ladders, no lifting, pushing or pulling over 5 pounds, no kneeling and squatting and recommending limited use of the right leg and sitting 75% of the time.

Petitioner returned to Matt Bruns on December 21, 2015 reporting slight improvement but continued to complain of moderate discomfort in the medial aspect of her right knee. (PX 2, pp. 48-49) At the December 21, 2015 visit, Petitioner reported achy pain at rest and sharp pain with weight bearing and reported that she had been using a crutch to guard weightbearing. NP Bruns reviewed the x-rays and MRI with Petitioner at that time and indicated that "the area of concern" appeared to be healing with some sclerotic appearance and recommended a corticosteroid injection to see if it provided relief, which was performed. He recommended that she continue to use crutches to avoid weightbearing on the right knee for the next 3 weeks. Petitioner was provided with a work slip indicating that she should be sitting 100% of the time and should be on partial weight bearing of the right leg with crutches. (PX 2, p. 54) Petitioner returned again to Matt Bruns on January 13, 2016 again reporting that she was a little better but had persistent discomfort in the medial aspect of her knee. (PX 2, pp. 55-56) She reported that she was able to tolerate weight bearing and that the previous injection had provided some relief. On examination, he noted significant medial tenderness about the proximal tibia that he felt was most consistent with bursitis. He also noted increased discomfort with deep flexion. X-rays showed a healing right medial tibial plateau with increased sclerotic appearance. NP Bruns diagnosed a tibial plateau fracture, right, closed, with routine healing and a pes anserinus bursitis. He expressed some uncertainty

as to which condition was causing her discomfort and provided a steroid injection into the bursa to see if that was the source of her pain. If it turned out that the pain was related to her bone contusion, he would prescribe an unloader brace. Petitioner was provided with work restrictions of no running, kneeling or squatting. (PX 2, p. 58)

Petitioner returned again to Matt Bruns on February 12, 2016, reporting that the steroid injection had not provided much relief. (PX 2, pp. 62-63) She continued to have discomfort in the knee that she did not feel was getting better. As she had not responded to conservative treatment, NP Bruns referred her to Dr. Crickard for further evaluation and consideration of a subchondroplasty. Her work restriction was continued. (PX 2, p. 64)

Petitioner initially saw Dr. Crickard on February 18, 2016 complaining of right knee pain that she had been suffering for the past three or four months. (PX 2, pp. 65-67) His note indicates that Petitioner reported that her knee did get better from the previous injury but denied any recent injury or event that could have precipitated her current discomfort. She described constant achy pain in the medial aspect of her knee. He noted that Petitioner had fractured her kneecap in December 2014 and continues to have knee pain every day. Dr. Crickard noted that the MRI done on November 28, 2015 showed a medial tibial plateau fracture as well as a medical meniscus tear and discussed a knee arthroscopy and subchondroplasty. He instructed Petitioner to return when she was ready for surgery. He instructed her to keep up with activities as tolerated, though a work slip released her to work without restrictions. (PX 2, p. 68)

Petitioner saw Dr. Crickard again on March 22, 2016. (PX 2, pp. 69-71) He noted that she had not been ready to proceed with the surgery he proposed because she was starting a new job. She was being seen this date for a red ring on the medial side of her knee that she thought might be related to an injection she had in January. Dr. Crickard advised her to ice the knee down from then until she was ready to proceed to surgery.

Petitioner returned to Dr. Crickard on May 13, 2016 as a pre-operative visit (PX 2, p. 73) and underwent surgery on May 23, 2016 consisting of a right knee arthroscopy with excision of a medial plica and proximal tibia medial Zimmer subchondroplasty. (PX 2, pp. 75-76)

Dr. Crickard's evidence deposition was taken on August 7, 2018, and was offered into evidence as Petitioner's Exhibit 6. After reviewing the previous medical records and presented with a hypothetical question including the Petitioner's ongoing pain that persisted until she underwent surgery, Dr. Crickard testified that the December 2013 accident "certainly could be" causally related to the conditions that he treated in her knee, noting that this was the only history of any injury and that the mechanism of injury was consistent with the injuries that he saw. (PX 6, pp. 26-28) No contrary medical opinion was offered.

Petitioner returned to Dr. Crickard on June 7, 2016 for follow-up. (PX 2, pp. 77-78) Petitioner reported that her knee felt better but was still a little stiff. Petitioner was directed to pursue physical therapy and follow-up in a month. Records show that Petitioner underwent a therapy evaluation on June 16, 2016 and attended therapy on June 17, 2016 and June 21, 2016. (PX 2, pp. 80-85)

In his deposition, Dr. Crickard identified a return to work slip without restrictions as of June 21, 2016, which he indicated may have been provided at her request as he had noted that as of June 7, 2016 she was instructed to return to activities as tolerated. (PX 6, p. 30, PX 2, p. 79)

Petitioner returned to Dr. Crickard on May 11, 2017, reporting that she continued to have some medial joint pain and was exquisitely tender over the pes bursal area. (PX 2, pp. 87-89) He offered her an injection to that area but she wanted to wait. Petitioner questioned a statement by Dr. Crickard that she

was "100%" and Dr. Crickard told her that this was a presumption from the fact that she had failed to show for two follow-up appointments in July 2016. In his deposition, Dr. Crickard acknowledged that the Petitioner was "still struggling with" the knee at that point but she "was trying to figure out the whole workmen's comp issue and didn't know exactly what to do as far as treatment goes". (PX 6, pp. 32-33)

Petitioner testified that following her injury she continued to work for Jasper Oil largely from home and received her full salary, but on January 17, 2014, Gary Shields had provided her with a letter indicating that from that point forward she would be paid on a half-time basis receiving half of the pay that she had previously received from Jasper Oil, or $433.33 twice per month, which works out to $200 per week. PX 7, p. 2) Petitioner testified that she continued to work for Respondent on this basis until she was released to her full duty work.

Petitioner testified that at the time of her surgery, she was working at the Rushville Treatment and Detention Center. Petitioner testified that she is employed as a security therapy aid and sits in a chair in a glass bubble and opens and closes doors. She said that the job is not strenuous and she was able to perform that work with the problems that she continued to have with her knee. She testified that she was able to continue working there while on light duty during her treatment in 2015 and 2016. She testified that she was off work from the date of her surgery until released by Dr. Crickard.

Petitioner testified that she continues to have constant pain that becomes worse with any strenuous activity, such as walking for a period of time or climbing up and down stairs. Petitioner testified that she is unable to kneel down, run or squat. She testified that she feels that the strength in her leg is about half what it was before her injury. Petitioner testified that prior to this injury she was very athletic. Petitioner expressed particular frustration and not being able to perform the CNA work that she had trained for.

Petitioner testified that in her present job she earns around $4000 per month which works out to in excess of $20 per hour.

Petitioner testified that she did not receive any compensation for the time that she missed from the Good Shepherd home or following her surgery.

Respondent called Gary Shields to testify who testified that the Petitioner had failed to perform her work duties to his satisfaction after her injury. He alleged that she rarely came into the office and did not perform her duties. Mr. Shields also alleged that the Petitioner had misappropriated money from the business on several occasions but offered no documentary evidence of such acts and acknowledged that he had taken no action against the Petitioner for such malfeasance. He acknowledged that he continued to employ the Petitioner despite his allegations that she failed to perform her work and took money from the business. Mr. Shields initially denied that he had ever authorized the Petitioner to work from home but subsequently on cross examination acknowledged the opposite, stating that he had agreed to the arrangement because it seemed to be the only way that she could get her work done. The Arbitrator finds that Mr. Shield's testimony was not credible.

Based on the foregoing facts, the Arbitrator makes the following findings on the disputed issues:

1. **Employment relationship and application of the Worker's Compensation Act:**

   Based upon the testimony of the Petitioner and Mr. Shields, the Arbitrator finds that the Petitioner was an employee of Jasper Oil and Mr. Sheilds and that the business was one that was covered by the Illinois Worker's Compensation Act.

2. Accident:

Petitioner's testimony establishes that she was engaged in her work duties and performing an essential function of her job when she left the building to obtain the mail. Petitioner testified that she fell on the company property on snow and ice that had not been cleared from the sidewalk behind the building, thus being a risk associated with her employment. The Arbitrator therefore finds that the Petitioner suffered an injury arising out of and in the course of her employment for Respondent Jasper Oil and Gary Shields.

3. Notice:

Both Petitioner and Mr. Shields testified that Petitioner provided timely notice of her fall.

4. Causal connection:

The Petitioner's testimony regarding the onset of symptoms and lack of prior similar symptoms and the initial treatment histories provide a course of events that establishes that the Petitioner's fractured patella and initial treatment through March 21, 2013 were causally related to her work related fall. Based upon the Petitioner's credible testimony regarding persistent pain after her initial release in March 2014, the 2015 MRI findings indicating that the tibia fracture found at that time was subacute at the time that she presented for treatment in November 2015, the opinion of Dr. Crickard that the findings at that time were consistent with the trauma that the Petitioner had suffered, the absence of any contrary opinion and the absence of any evidence of any intervening cause of the Petitioner's right knee complaints, the Arbitrator finds that that it is more likely than not that the subsequent course of treatment from November 2015 through May 2017 remained causally related to the Petitioner's work related accident, and that the Petitioner's current condition of ill being remains causally related to that accident.

5. Earnings:

The Petitioner and Respondent Jasper Oil stipulated to an average weekly wage based upon concurrent earnings of $621.20. This amount is supported by the wage records offered for Jasper Oil showing that Petitioner was based a salary based upon $400 per week, and wage records from Golden Good Shepherd Home showing earnings of $2654.40 over 12 weeks for an additional wage of $221.20.

6. Petitioner's age, marital status and dependents:

Based upon the Petitioner's testimony, the Arbitrator finds that the Petitioner was 44 years of age at the time of her accident, was single and had one child under 18.

7. Medical expenses:

Based upon the Petitioner's credible testimony and the medical records submitted into evidence, as well as the foregoing findings on Accident and Causal Connection, the Arbitrator finds that the medical expenses submitted into evidence by Petitioner in the total amount of $38,185.62 and awarded, subject to reductions under the Medical Fee Schedules and subject to credit to Respondent for any payments previously made by Respondent on the specific bills attached to Petitioner's Exhibit 5 that can be shown to have been made and received by the providers.

8. TTD and TPD:

For the period 12/17/13 through 1/15/14, Petitioner seeks temporary partial disability based upon lost earnings from her work at Golden Good Shepherd home during that time period. For these 4 2/7 weeks, the Arbitrator awards $147.67 per week, being 2/3 of the earnings that Petitioner would have earned at that employment ($221.20).

For the period 1/16/14 through 3/21/14, Petitioner seeks benefits for the loss of her earnings at the Golden Good Shepherd home ($221.20) as well as the reduction of her earnings at Jasper Oil by $200 per week. For this period of 10 5/7 weeks, during which the Petitioner remained under restrictions from her doctors, the Arbitrator awards $280.80 per week, being 2/3 of $421.20.

9. Additional credits claimed:

The Respondent claims credit against TTD, TPD and PPD for what Respondent claims to be overpayment of wages and amounts that he claims to have pai in connection with a car loan (about which the Arbitrator sustained a relevance objection). Petitioner asserts that she earned all wages paid. It is not within the jurisdiction of the Commission to resolve issues related to wage claims or liabilities in regard to loans. Respondent is permitted no credits for any such alleged payments.

10. Permanent partial disability:

Nature and extent findings:

In addressing an award of permanent partial disability, the Arbitrator must address the factors set forth in Section 8.1b of the Act:

a. AMA impairment evaluation:
Neither party offered an AMA impairment evaluation, so this factor is given no weight.

b. Occupation of the injured employee:
At the time of her injury, the Petitioner was employed by Jasper Oil in a clerical capacity and by Golden Good Shepherd home as a CNA. Petitioner testified that she has abandoned her work as a CNA over concerns about her ability to lift patients due to the persistent problems with pain and strength in her right leg. Petitioner's current employment is largely sedentary. The Petitioner's loss of career as a CNA is given moderate weight.

c. Age of the employee at time of injury:
At the time of the injury, the Petitioner was 44 years old, and therefore has more than 20 years of work life expectancy during which she must continue to suffer the effects of this injury. This factor is given moderate weight.

d. Employee's future earning capacity:
The evidence shows that the Petitioner is earning substantially more in her new employment than she was receiving at the time of her injury. Fortunately, this job is sedentary in nature and able to accommodate her current condition. If she were to lose this job in the future, Petitioner's difficulty with walking, running and climbing could limit the job market that is available to her. This factor is given moderate weight.

e. Evidence of disability corroborated by medical records:
Petitioner credibly testified that she continues to have constant pain that becomes worse with any strenuous activity, such as walking for a period of time or climbing up and down stairs. Petitioner testified that she is unable to kneel down, run or squat. She testified that she feels that the strength in her leg is about half what it was before her injury. Petitioner testified that prior to this injury she was very athletic. Petitioner expressed particular frustration and not being able to perform the CNA work that she had trained for. These complaints are consistent

with the injuries the Petitioner suffered, the surgery that she underwent and the Petitioner's ongoing complaints after her surgery.

Based on the foregoing factors, the Arbitrator finds that the Petitioner has suffered a permanent partial disability of 20% of her right leg.

11. Liability of Injured Worker's Benefit Fund

The Illinois State Treasurer, ex-officio custodian of the Injured Workers' Benefit Fund, was named as a co-respondent in this matter. The Treasurer was represented by the Illinois Attorney General. Documentary evidence submitted by Petitioner and Respondent Jasper Oil establish that Jasper Oil and Gary Shields were uninsured for worker's compensation coverage at the time of this injury and that Mr. Shields as owner of Jasper Oil had been sanctioned by the IWCC for this failure. This award is hereby entered against the Fund to the extent permitted and allowed under Section 4(d) of this Act. In the event the Respondent/Employer/Owner/Officer fails to pay the benefits, the Injured Workers' Benefit Fund has the right to recover the benefits paid due and owing the Petitioner pursuant to Section 5(b) and 4(d) of this Act. Respondent/Employer/Owner/Officer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent/Employer/Owner/Officer that are paid to the Petitioner from the Injured Workers' Benefit Fund.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC000670
Case Name	Kyle O'Brien v. State of Illinois – Southwestern Illinois Correctional Center
Consolidated Cases	
Proceeding Type	8(a)/19(h) Petition
Decision Type	Commission Decision
Commission Decision Number	23IWCC0385
Number of Pages of Decision	5
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Thomas C Rich
Respondent Attorney	Caitlin Fiello

DATE FILED: 8/28/2023

/s/Marc Parker, Commissioner

Signature

STATE OF ILLINOIS)) SS. COUNTY OF MADISON)	☐ Affirm and adopt (no changes) ☐ Affirm with changes ☐ Reverse ☐ Modify	☐ 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

Kyle O'Brien,

Petitioner,

vs. No. 21 WC 000670

Southwestern Illinois Correctional Center,

Respondent.

DECISION AND OPINION ON REVIEW PURSUANT TO §19(h) and §8(a)

This matter comes before the Commission on Petitioner's §19(h) and §8(a) Petition, seeking additional permanent partial disability benefits for his lumbar spine condition, allegedly due to a material increase in his disability since the Arbitrator's March 24, 2022, decision. In that decision, the Arbitrator awarded Petitioner 17.5% loss of use of the person-as-a-whole under §8(d)2 of the Act. On September 9, 2022, Petitioner filed a timely Petition for Review under §19(h) and §8(a). A hearing on that Petition was held before Commissioner Parker on July 25, 2023. At that hearing, the parties stipulated that Petitioner's current condition of ill-being in his lumbar spine remains causally related to his December 2, 2020, work accident and that the only issue to be decided on review was to what extent the Petitioner's disability had increased. Respondent suggests a 17.5% increase would be appropriate, while Petitioner seeks an additional 25% over and above the 17.5% loss of use of the person-as-a-whole awarded by the Arbitrator.

Findings of Fact:

At the time of his original accident on December 2, 2020, Petitioner was a correctional officer who injured his back while sanitizing his vehicle. He eventually underwent decompression surgery at L5-S1. Petitioner's surgeon, Dr. Kevin Rutz, noted that a recurrent herniation or persistent back pain might eventually require a fusion at that level. On March 24, 2022, the

Arbitrator awarded Petitioner permanent partial disability of 17.5% loss of use of the person-as-a-whole for his work injury.

On September 9, 2022, Petitioner filed a Petition for Review of Prior Award and Prospective Medical Care pursuant to §19(h) and §8(a) of the Act. Since the time of his arbitration hearing on November 24, 2021, Petitioner had continued to experience limited range of motion in his back and lost sleep due to discomfort. His low back pain and tingling and numbness in his left leg had increased. Dr. Rutz ordered a new lumbar MRI which revealed a re-herniation at L5-S1. Dr. Rutz recommended physical therapy and anti-inflammatories, but these conservative measures proved insufficient to alleviate Petitioner's complaints. The doctor recommended proceeding with a revision discectomy and fusion, which was performed on June 14, 2022. Petitioner underwent post-operative physical therapy and returned to work full duty on January 7, 2023. Dr. Rutz released him at maximum medical improvement on February 7, 2023.

At the review hearing, Petitioner testified he continues to have symptoms with sitting for extended periods, difficulty keeping up with others while walking, and tingling in his left toes which interrupts his sleep. He no longer can play basketball or softball with his daughter, has trouble driving long distances, and must pay someone to care for his lawn. He takes ibuprofen and Tylenol for his back pain and inflammation.

Conclusions of Law:

Section 19(h) seeks to redress changes in circumstances after the entry of an award and is particularly remedial in nature. It should be construed liberally so as to allow review of alleged changes in circumstances. *Hardin Sign Co. v. Industrial Comm'n*, 154 Ill. App. 3d 386, 389-90 (1987). To obtain an increase in the permanent partial disability award under §19(h), Petitioner must show that his disability at the time of his initial arbitration hearing on September 22, 2020, had increased by the July 25, 2023, review hearing, and that that increase was material. *Gay v. Industrial Comm'n,* 178 Ill. App 3d 129, 132 (1989); *Motor Wheel Corp. v. Industrial Comm'n*, 75 Ill. 2d 230, 236 (1979). In order to determine whether Petitioner's condition materially deteriorated from the time of the Arbitrator's award to the present, it is necessary to compare his condition at those two relevant times. *Howard v. Industrial Comm'n,* 89 Ill. 2d 428, 430-31 (1982).

Regarding Petitioner's §19(h) Petition, the Commission notes that the Arbitrator set forth facts relevant to a determination of permanent partial disability as required by §8.1b(b) of the Act. The Commission reviews those factors in order to determine whether Petitioner's permanent partial disability has materially increased enough to justify an increase in the permanency awarded by the Arbitrator. The Commission assigns the following weights to these factors:

(i) **Disability impairment rating:** *no weight,* because neither party submitted an impairment rating.

(ii) **Employee's occupation:** *some weight.* Petitioner testified that he requested and received a change to a desk position, although he continued to work for Respondent as a correctional officer. Therefore, some weight should be given to this factor.

(iii) **Employee's age:** *significant weight,* because Petitioner was 36 years old at the time of his injury and will have to deal with the effects of his injuries and surgeries for many more years of his working and natural life.

(iv) **Future earning capacity:** *some weight.* Petitioner presented no evidence of any decrease in earning capacity.

(v) **Evidence of disability corroborated by the treating records:** *significant weight,* because Petitioner's lumbar spine condition continued to deteriorate following his initial arbitration hearing, requiring additional conservative treatment, physical therapy, injections, and revision surgery, with residual pain and numbness complaints.

Based upon the above factors and the record as a whole, the Commission concludes that Petitioner has proved a material increase in his disability, pursuant to §19(h), in the amount of 20% loss of use of the person-as-a-whole.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's §19(h) Petition is granted to the extent discussed above.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $788.44 per week for a period of 100 weeks, as provided in §19(h) of the Act, for the reason that Petitioner sustained a material increase in his permanent disability to the extent of 20% loss of use of the person-as-a-whole. As a result of his work-related accident, Petitioner is now permanently disabled to the extent of 37.5% loss of use of the person-as-a-whole under §8(d)2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall 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.

Pursuant to §19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review. Therefore, no appeal bond is set in this case.

August 28, 2023

mp/dak
r-07/25/23
068

/s/ *Marc Parker*
Marc Parker

/s/ *Christopher A. Harris*
Christopher A. Harris

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	14WC004345
Case Name	Kevin Judy v. Ken French DBA Quality Care Construction and Injured Workers' Benefit Fund
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0386
Number of Pages of Decision	17
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Frederick Glassman
Respondent Attorney	Joseph Blewitt

DATE FILED: 8/29/2023

/s/Christopher Harris, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF LASALLE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KEVIN JUDY,

Petitioner,

vs. NO: 14 WC 4345

KEN FRENCH, d/b/a QUALITY CARE CONSTRUCTION, and ILLINOIS STATE TREASURER, as EX-OFFICIO CUSTODIAN of the INJURED WORKERS' BENEFIT FUND,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent, the Injured Workers' Benefit Fund, and notice given to all parties, the Commission, after considering the issues of jurisdiction, employment, causal connection, medical expenses, temporary total disability (TTD) benefits and permanent partial disability (PPD) benefits, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed December 2, 2022, 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.

IT IS FURTHER ORDERED BY THE COMMISSION that the Illinois State Treasurer, as *ex-officio* custodian of the Injured Workers' Benefit Fund, was named as a co-respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby

entered against the Fund to the extent permitted and allowed under Section 4(d) of this Act. In the event the Respondent/Employer/Owner/Officer fails to pay the benefits, the Injured Workers' Benefit Fund has the right to recover the benefits paid due and owing the Petitioner pursuant to Sections 5(b) and 4(d) of this Act. Respondent/Employer/Owner/Officer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent/Employer/Owner/Officer that are paid to the Petitioner from the Injured Workers' Benefit Fund.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $12,500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in the Circuit Court.

August 29, 2023

CAH/pm
d: 8/24/23
052

/s/ *Christopher A. Harris*
Christopher A. Harris

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	14WC004345
Case Name	Kevin Judy v. Ken French d/b/a Quality Care Construction and Injured Workers' Benefit Fund
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	14
Decision Issued By	Roma Dalal, Arbitrator

Petitioner Attorney	Frederick Glassman
Respondent Attorney	Joseph Blewitt

DATE FILED: 12/2/2022

THE INTEREST RATE FOR THE WEEK OF NOVEMBER 29, 2022 4.55%

/s/ Roma Dalal, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF **LaSalle**)

☒ 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

Kevin Judy
Employee/Petitioner

v.

Case # **14** WC **004345**

Consolidated cases: _____

Ken French d/b/a Quality Care Construction and Injured Workers' Benefit Fund
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Falcioni and Dalal**, Arbitrator of the Commission, in the city of **Ottawa**, on **November 23, 2016, May 25, 2017 and September 29, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **January 16, 2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**400.00**; the average weekly wage was $**400.00**.

On the date of accident, Petitioner was **39** years of age, ***single*** with **2** dependent children.

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

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

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

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

ORDER

Respondent shall pay reasonable and necessary medical services of $7,013.11, as provided in Sections 8(a) and 8.2 of the Act as outlined in the Arbitrator's Decision.

Petitioner's claim for TTD benefits is denied.

Respondent shall pay Petitioner permanent partial disability benefits of $286.00/week for 19 weeks, because the injuries sustained caused 25% loss of use of the right thumb, as provided in Section 8(e) of the Act.

The Illinois State Treasurer, ex-officio custodian of the Injured Workers' Benefit Fund, was named as a co-respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under Section 4(d) of this Act. In the event the Respondent/Employer/Owner/Officer fails to pay the benefits, the Injured Workers' Benefit Fund has the right to recover the benefits paid due and owing Petitioner pursuant to Sections 5(b) and 4(d) of this Act. Respondent/Employer/Owner/Officer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent/Employer/Owner/Officer that are paid to the Petitioner from the Injured Worker's benefit Fund.

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

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

DECEMBER 2, 2022

Signature of Arbitrator

STATE OF ILLINOIS)
) SS
COUNTY OF)

ILLINOIS WORKERS' COMPENSATION COMMISSION

Kevin Judy ,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	Case No. 14 WC4345
Ken French,		
Quality Care Construction,		
Injured Workers' Benefit Fund	)	
	)	
	)	
Respondent.	)	

FINDINGS OF FACT

This matter proceeded to hearing on November 23, 2016 and May 25, 2017 before Arbitrator Robert Falcioni. The Parties closed proofs on September 29, 2022 in Ottawa, Illinois before Arbitrator Roma Dalal on Petitioner's Request for Hearing. The parties agreed for Arbitrator Roma Dalal to review the transcripts and issue a decision. (Arb. Ex. 3). All issues are in dispute. (Arb. Ex. 1 and 2).

Petitioner testified on January 16, 2014 he was working for Ken French with a business name of Quality Care Construction. (T1, p.12). Petitioner worked for a week. He testified he earned $10 cash per hour and was paid $400 for the week prior. *Id*. Petitioner testified he had two children who did not live with him, but he for whom he paid child support. (T1, p.13). Petitioner was hired to prepare and clean the floor. He testified he had his own tools. (T1, p.16).

Petitioner testified he was cleaning the floor, pulling staples from the floor, and cut his hands and fingers up. (T1, p.17). Petitioner noticed redness and eventually went to St. Elizabeth Hospital on January 22, 2014. *Id*. at 18.

Petitioner testified he advised Ken French of the accident. (T1, p.20).

Petitioner eventually underwent surgery. Petitioner was prescribed therapy and was eventually released to return to back to work on March 25, 2014. (T1, p.21). After that date Petitioner did not return for further medical care. Petitioner stated today the thumb shakes and has lack of strength. *Id*. at 22-23. The Arbitrator noted the outside of the thumb where the nail is located, there is a Z-shaped scar which is the width of a lead from a pencil. *Id*. at 23.

On Cross-examination, Petitioner testified he first met Mr. French's brother at a pool tournament. (T1, p.26). Petitioner never applied for a job. Petitioner testified he was playing pool at a tournament and Mr. French advised him he could help him out and get him a job making some money. *Id*. at 26.

Petitioner testified he was given the address of the job site when he was playing pool. He was advised to bring his own tools. (T1, p.27). Petitioner further testified he was never issued a W-2 for this job. Petitioner utilized Mr. French's table saw but brought his own tools. *Id*. at 27. Petitioner testified he would arrive at different times in the morning, but usually around 6:30 or 7. Petitioner testified he would do whatever Mr. French said to do. *Id*. at 29. He was strictly the saw man. *Id*. at 29.

Petitioner testified he was feeling the floor, getting debris off the floor when he cut his hand. (T1, p.29. Petitioner reported he later called or texted Mr. French to report it. *Id*. at 31. Petitioner testified he never contacted his employer with any outstanding medical bills. *Id*. at 32. Petitioner testified he told his doctor what happened to him. *Id*. at 33. Petitioner was provided cash for the work and never deposited in a bank. *Id*. at 34. Petitioner further testified the money was never reported as income on taxes as he was receiving disability at that time. *Id*. at 34.

Petitioner testified he did not remember when he was released back to work. (T1, p.37). Petitioner stated after he was released to work, he never contacted his employer to return to work. *Id*. at 38. Lastly Petitioner stated he did not treat until six days after the injury and was probably sitting home during that time. *Id*. at 42.

Mr. French, the Respondent, also Cross-Examined Petitioner. Petitioner testified he worked for five days and ran a saw. (T1, p.43). Petitioner stated Jamie, the head man, would give him a measurement, and he would measure it out and cut it. *Id*. at 44. He was cutting wood for the floor. *Id*. at 45. Petitioner testified that he met a woman Joan, but she never gave him money or work. *Id*. at 52. Petitioner testified in order to find staples he would put his hand on the ground, then pull them out with pliers. *Id*. at 58.

Mr. French, the Respondent, subsequently testified. (T1, p.64). Mr. French testified that he did not own his own company. He was trying to start Quality Care Construction. *Id*. at 64. He testified he was trying to complete that job to start his own business. *Id*. at 66. Mr. French testified Petitioner worked for Joan, and she told him he could work for her. *Id*. at 66. Mr. French was employed to redo her upstairs apartment, specifically re-insulate, re-drywall the walls, paint the trims, new windows and do the doors. *Id*. at 67. He testified that everyone he had working was not through him directly but through Joan. She had to okay it. *Id*. at 68. Mr. French indicated anyone who worked there would speak with Joan, to get their pay and to get paid. She would give everybody an envelope. *Id*. at 69. Mr. French testified he told Petitioner he could make money and to meet him at the address. *Id*. at 70. Mr. French testified Petitioner talked to Joan and would earn $10.00 an hour. Mr. French stated he was not told about the January 16, 2014 accident. *Id*. at 71. Mr. French said he never spoke with Petitioner after the phone call about surgery and later saw him at a pool tournament. *Id*. at 73.

On Cross-Examination, Mr. French testified there was no such thing as Quality Care Construction Company. (T1, p.73). Mr. French authenticated Petitioner's exhibit 12. Mr. French's signature was at the bottom, and the letterhead at top. *Id.* at 74. Mr. French admitted he drafted the contract himself. *Id.* at 75. The Arbitrator notes that the contract heading indicates the company is called Quality Care Construction and that the owner is Ken French. It states that Quality Care Construction is fully licensed and insured.

The contract was for $5,000.00 and purported to include all labor and materials in that price, including installing floors. The contract was signed on January 15, 2014. (PX12).

Mr. French testified he provided specific instructions of what work was to be done. (T1, p.77). He claimed that James Petry, Dave Bowman, Shawn, and Kevin Judy worked with him on the job. He testified they were not working for him, but rather for the Homeowner. He just oversaw the project. He testified himself and the others were paid directly by the Homeowner in envelopes. *Id*. at 67-69. Mr. French indicated Joan requested he find help for the job. She said she would pay them but needed to okay the workers first. *Id*. at 85. Mr. Judy testified he would instruct everyone how to do the floor and what cutting to be done. In addition, his chop saw was used. *Id*. at 86.

Mr. French further testified he previously worked for Elite Seamless Gutters with his brother John. Under that company, he worked for Joan. (T1, p.88). Mr. French testified Joan helped him create the name of the business he wanted to start. *Id.* at 89. He further testified Joan was aware that he did not have insurance when he did the job. *Id*. at 90. Mr. French did admit he told Mr. Judy to remove staples. *Id*. at 101, 106.

James Petry was called to testify on behalf of Petitioner. (T1, p.116). Mr. Petry testified he performed work at a home at the 1511 Birch Lawn Ottawa job site for Ken French who owned Quality Care Construction. *Id*. at 117. He testified he worked for Ken French in Fall of 2013 when he painted a house. *Id*. at 118. He noted the company he worked for was Quality Care Construction. *Id*. at 119. Mr. Petry testified there was a large 4' x 4' sign with the words Quality Care Construction on it. *Id*. at 119-120. Mr. Petry testified he worked with Kevin, Shawn and Bone on the job and was paid in cash by Mr. French. He noted he was never paid by the owner of the house, Joan. *Id*. at 121. He was present when Mr. French asked Petitioner to remove the staples. He did not hear Petitioner make any complaints about his hands at the job site, but Petitioner did tell Petry later on that he needed surgery. *Id*. at 121-123. He testified he was paid in cash like Shawn was. *Id.* at 125.

On Cross-Examination, Mr. Petry testified he never applied for a job at Quality Care Construction. Rather, he was asked to work on it. *Id*. at 126. He did recall Petitioner stating on the day of the accident that he had scrapes on his fingers. *Id*. at 123.

Respondent then testified again. He admitted he did work in Princeton in the Fall of 2013. He admitted he made the Quality Care Construction sign that was placed there in order to attract some business. (T1, p.141-142).

Respondent's fiancée, Amber Davis, was called by Respondent to testify. (T2, p.4). She worked for Quality Care Construction performing hiring, firing, payroll and insurance. *Id*. at 14. She testified Kevin Judy or Jamie Petry never worked for Quality Care Construction. *Id*. at 14. Joan wanted her upstairs remodeled and paid for supplies. *Id*. at 16. Joan would then put cash in envelopes and hand them to whoever. *Id*. at 16. Ms. Davis testified she was there every day and did not remember Petitioner getting hurt. *Id*. at 20. She denied working for Quality Care in January of 2014 as she claimed there was no business by that name at the time. *Id*. at 35-36. In January of 2014, Ms. Davis was a stay-at-home mom living with Ken French. *Id*. at 39. She further noted she was there every day but was not paid. She would help with clean up. *Id*. at 41-42.

MEDICAL SUMMARY

On January 22, 2014 Petitioner presented to St. Elizabeth Hospital. (PX4, p. 254). Petitioner presented with complaints of an open area to the right thumb with surrounding redness, tenderness, and a reported green discharge from opening. *Id*. at 254. It was noted Petitioner had a history of MRSA on other sites of the body. An ER doctor tried to aspirate the wound with a needle. He was diagnosed with cellulitis and prescribed Bactrim DS (PX4, p.254-257).

Petitioner returned to St. Elizabeth's hospital on January 24, 2014. Petitioner was a 39-year-old Caucasian man with psychiatric issues who stated he was pulling up carpeting and presented with complaints of right thumb redness and swelling. He noted swelling of the right PIP joint and was prescribed Bactrim DS and was discharged. He returned to the ER when it was not significantly improved. He had cellulitis of the thenar eminence and was admitted. While in the hospital, he underwent an incision and drainage of the right thumb with Dr. Ali on January 25, 2014. His post-operative diagnosis was cellulitis of the right thumb. Petitioner was discharged from the hospital on January 27, 2014. His final diagnosis was abscess cellulitis of the right thumb (MRSA) and was advised to follow up with Orthopedics. (PX4, p. 315, 378).

During his hospital stay, Petitioner said he notified Ken French via phone that he cut his hands while at work. (T1, p.20).

After his discharge from the hospital, he treated with his PCP, Dr. Love. (PX3). On February 4, 2014 Petitioner presented to Dr. Mir Ali at Rezin Orthopedics. Petitioner was a 39-year-old male who presented for an evaluation of his postoperative right thumb. He underwent an irrigation and debridement for a right thumb abscess on January 25, 2014 at Ottawa Hospital. They did an exploration of his right PIP joint at that time and there was no evidence of septic arthritis. Petitioner had been on antibiotics. Petitioner was to undergo a gentle course of hand therapy and return in four to six weeks. (PX2, p.13). The Arbitrator notes no off-work notes were presented into evidence.

On February 5, 2014, Petitioner presented to ATI for occupational therapy and attended several sessions until he was discharged on March 24, 2014. (PX5). Per his discharge summary Petitioner had improved grip and pinch strength. All of his long-term goals had been met but he continued to be limited by pinch strength. Petitioner noted problems with opening wrappers, opening/closing lids, squeezing soap or shampoo bottles and turning keys with some right thumb strength and range of motion deficits. *Id.* at 32.

On March 25, 2014 Petitioner presented to Dr. Mir Ali at Rezin Orthopedic. Petitioner's chief complaint was two months status post right thumb abscess, irrigation, and debridement. Petitioner's incision was well healed, clean, dry, and intact. Petitioner was two months status post irrigation and debridement of his right thumb. Petitioner was to follow up as needed. He was to return to full activities with no restrictions. (PX2, p.11).

On March 27, 2015 Petitioner presented to Dr. Robert Eilers at request of his attorney. (PX7). Dr. Eilers went over his medical records and examined Petitioner. Petitioner was diagnosed with a cellulitis occurring in this right thumb secondary to a laceration while removing carpet. This necessitated the incision and drainage of his right thumb. Petitioner showed significant weakness with thumb opposition which had impaired his activities of daily living with finger opposition and carrying. In his opinion the activity he was carrying out caused the laceration which resulted in the staph infection which necessitated

his emergency care, to include incision and drainage of the wound. Petitioner would not be able to return to work using his right thumb for find motor skills or tasks. (PX7).

The parties proceeded with Dr. Robert Eilers's deposition testimony on September 29, 2015. (PX8). At the time of the deposition on September 29, 2015, the Respondent was represented by Attorney Nigel Smith. The IWBF was represented by the Attorney General's office. Dr. Eilers testified he performed a Section 12 examination on March 27, 2015. *Id*. at 5. He took a history, went over Petitioner's alleged accident and medical care. Dr. Eilers testified Petitioner had complaints of muscle twitching and tremoring which were due to the fact that some of the nerve tissues were probably affected going to the muscles. *Id*. at 17. Dr. Eilers diagnosed Petitioner with Cellulitis and MRSA that he related to removing the carpet on January 16, 2014. *Id*. at 21-23. He further noted Petitioner had work restrictions with his finger opposition, so it was difficult grasping, picking up like a claw. *Id*. at 23.

On Cross-Examination, Dr. Eilers testified the infection was in both the thumb and the index finger. (PX8 at 26). Dr. Eilers noted he reviewed medical records but did not keep them. *Id*. at 27. He further noted the source of the injection was the skin penetration which introduced MRSA into his wound. *Id*. at 33. The Doctor further noted his reported indicated Petitioner had good healing, which meant good scar closure. *Id*. at 37. In addition, Petitioner was taking Norco long term for another injury. *Id*. Dr. Eilers testified he is board certified in Physical Medicine and Rehabilitation but not infectious disease. *Id*. at 40.

At trial Petitioner submitted a medical bill exhibits with unpaid medical bills from OSF St. Elizabeth Medical Center, Midwest Emergency, Central Illinois Radiological Associates, Ottawa Osteopathic Physician/Dr. Love, Rezin Orthopedic and ATI Physical Therapy. (PX1).

Petitioner's attorney submitted pictures of Petitioner's thumb and while Petitioner was in the hospital. (PX6). The Arbitrator cannot establish when these pictures were taken.

Petitioner presented a certification from NCCI stating that "Ken French d/b/a Quality Care Construction" did not have insurance on the date of the accident at issue here. (PX10). Petitioner introduced several certified letters addressed to Mr. French that were marked by the Post Office as "unable to forward," "return to sender," or "not deliverable as addressed." (PX11, 13).

CONCLUSIONS OF LAW

Regarding issue (A), whether Respondent was operating Under and Subject to the Illinois Workers' Compensation Act on January 16, 2014, the Arbitrator finds as follows:

The Arbitrator finds on January 16, 2014, Respondent was operating under and subject to the Illinois Workers' Compensation Act. Pursuant to Section 3, the Act automatically applies to a Respondent who meets any one of the seventeen listed "extra-hazardous" activities. Testimony at trial established that Respondent was engaged in business at the time of the accident conducting construction work as well as acting as an enterprise utilizing cutting tools. This falls under Subsection 2 as a business or enterprise in which Construction, excavating or electrical work is utilizing. It also falls under Subsection 8, in which any enterprise in which sharp edged cutting tools, grinders or implements are used, as the testimony indicated a table saw was utilized in the job. All testimony in this matter demonstrated Petitioner was the "saw man." In addition, he was part of a crew who was doing remodeling and construction. No evidence

was presented to the contrary. Accordingly, the Arbitrator finds that Respondent was operating under and subject to the Illinois Workers' Compensation Act on January 16, 2014.

Regarding issue (B), whether an employee-employer relationship existed, the Arbitrator finds as follows:

The Arbitrator finds that the record as a whole supports a finding that an employer-employee relationship between Petitioner and Respondent existed on January 16, 2014.

Determining employer-employee relationships remains a complex issue in workers' compensation claims. Reviewing courts have used many factors to aid in this determination. In *Ragler Motor Sales v. Industrial Comm'n*, 93 Ill.2d 66, 442 N.E.2d 903 (1982), the court found that the question of the employment relationship is a question of fact but stated that the court had been giving "increased significance to the nature of the work performed in relation to the general business of the employer." 442 N.E.2d at 905. The Fifth District reinforced this test in *City of Bridgeport v. Illinois Workers' Compensation Comm'n* where the court stated that a "factor of great significance is the nature of the work performed by the alleged employee in relation to the general business of the employer." 2015 IL App 140532WC ¶38, (2015) citing *Ware v. Industrial Comm'n*, 318 Ill.App.3d 1117 (1st Dist. 2000). The Court continued to state, "because the theory of workers' compensation legislation is that the cost of industrial accidents should be borne by the consumer as a part of the cost of the product, this court has held that a worker whose services form a regular part of the cost of the product, and whose work does not constitute a separate business which allows a distinct channel through which the cost of an accident may flow, is presumptively within the area of intended protection of the compensation act." *Id.*, quoting *Ragler*, supra, 442 N.E.2d at 905. No single factor controls this issue's determination. The control of an employee's work remains an important factor. See *Crepps v. Industrial Comm'n.* 402 Ill. 606 (1949).

The record shows that Petitioner and Mr. Petry were hired by Respondent. They both testified they worked for Respondent on the date of accident and were both paid by Respondent in cash. Respondent admitted to working on the job site and admitted that he signed a contract, under the name of Quality Care Construction, with the Homeowner for the job particulars, and that he received payment from the Homeowner for that job. The specific details in the contract for what was to be done by Quality Care Construction exactly matched what was performed by Petitioner and Mr. Petry. In the contract, it stated that Quality Care Construction would install the floors and that the price of the contract would include labor costs. Petitioner was performing a job instructed by Respondent when he was injured. Respondent admitted he was overseeing the job site and would give instructions to Petitioner on what specifically he was to do. Mr. Petry testified when he told Respondent about the staples that were in the floor, Respondent told Petitioner to remove them. In cutting the pieces for the floor, Mr. Petry would give the measurements to Petitioner, who would cut them using the chop saw owned by Respondent.

Respondent's testimony denying he was Petitioner's employer or that Quality Care Construction had no employees at the time of the accident is simply not credible. At first, he testified the January 2014 job was his first job as Quality Care, and that he was going to use that money to start his business. He also denied that he had advertised for Quality Care Construction before the 2014 job in Ottawa. However, his testimony was directly contradicted by Mr. Petry who testified he worked for Respondent, as Quality Care Construction, a few months prior in the fall of 2013 at job in Princeton. He further testified that

Respondent purchased and bought a large sign to be placed at that job site with the name Quality Care Construction. Respondent later admitted to doing that work and that he had purchased the sign.

Respondent's claim that the Homeowner, who was deceased at the time of the hearing, paid everyone out of her own pocket was not substantiated by Petitioner, Mr. Petry nor the contract he signed with Homeowner. The Arbitrator does not find this testimony persuasive.

In addition, Respondent supervised Petitioner and advised him of his tasks of his job. Petitioner utilized Respondent's saw and was called the "saw man." Respondent also advised Petitioner of the task to do that injured him. The Arbitrator finds Respondent paid Petitioner in cash on an hourly basis. Based on the same, these factors suggest a level of control that goes beyond an independent contractor arrangement. The Arbitrator finds the testimony of Petitioner to be more credible than that of Mr. French.

Based on the foregoing, the Arbitrator finds that an employer-employee relationship existed between Petitioner and Respondent on November 8, 2016.

Regarding issue (C), whether an accident occurred that arose out of and in the course of Petitioner's employment with Respondent, the Arbitrator finds as follows:

The Arbitrator finds that an accident did occur that arose out of and in the course of Petitioner's employment with Respondent.

Petitioner bears the burden of showing, by a preponderance of the evidence, that he has suffered a disabling injury which arose out of and in the course of his employment. *Baggett v. Industrial Comm'n*, 201 Ill. 2d 187, 194 (2002). There are three general types of risks to which an employee may be exposed: 1) risks that are distinctly associated with the employment, 2) risks that are personal to the employee, and 3) neutral risks that do not have any particular employment or personal characteristic. *Potenzo v. Ill. Workers' Comp. Comm'n*, 378 Ill. App. 3d 113 (1st Dist. 2007).

The Arbitrator finds Petitioner presented sufficient, credible evidence that Petitioner's injuries arose out of and during the course of work performed for Respondent. Petitioner's and Mr. French's testimony, corroborated by the medical records, provides sufficient evidence that Petitioner was injured on January 16, 2014 while pulling up carpet.

Regarding issue (D), the Date of the Accident, the Arbitrator finds as follows:

The Arbitrator finds Petitioner presented sufficient, credible evidence that the accident occurred on January 16, 2014. Petitioner's unrebutted testimony was corroborated by Petitioner's medical records which reflect a date of injury of January 16, 2014.

Regarding issue (E), whether timely notice of the accident was given to Respondent, the Arbitrator finds as follows:

The Arbitrator finds Petitioner presented sufficient, credible evidence that notice of the accident was timely provided to the Respondent-Employer. Based on the testimony from Petitioner and Respondent, timely notice was given.

Regarding issue (F), whether Petitioner's condition of ill-being is causally related to his injury, the Arbitrator finds as follows:

The totality of the medical evidence supports Petitioner's current condition of ill-being is causally related to the injury of January 16, 2014. There is no evidence suggesting Petitioner had difficulty performing his job duties or underwent any right thumb care prior to the January 16, 2014 accident. Petitioner provided notice of his accident and provided all physicians with a consistent account of the mechanism of injury. Furthermore, Petitioner's Section 12 examiner stated Petitioner's condition of ill-being was causally related to the work injury of January 16, 2014.

The evidence supports Petitioner sustained cuts on his thumb, which became infected, with a diagnosis of abscess cellulitis of the right thumb (MRSA). (PX4, p.315). The medical records support a consistent history from his hospitalization and treatment with Dr. Ali. It is also supported by Dr. Eilers's Section 12 report. Dr. Eilers wrote a report and testified that the injury at work caused the abscess cellulitis and MRSA, which necessitated his surgery on January 25, 2014. This is also consistent with the records from St. Elizabeth's Hospital and Dr. Ali. None of this evidence was rebutted by Respondent. Petitioner treated and was released as of March 25, 2014 with no restrictions. (PX2, p.11).

Based on the foregoing, the Arbitrator finds causal connection between the work accident and Petitioner's right thumb and subsequent abscess cellulitis injury (MRSA).

Regarding issue (G), Petitioner's earnings, the Arbitrator finds as follows:

Based on the testimony from Petitioner and Respondent, Petitioner earned $10 per hour, resulting in $400 per week in the week before the accident. Therefore, Petitioner's AWW is $400.

Regarding issue (H), Petitioner's age, the Arbitrator finds as follows:

The evidence supports Petitioner was 39, and the Arbitrator finds the same.

Regarding issue (I), Petitioner's Marital Status, the Arbitrator finds as follows:

The Arbitrator finds the evidence in the record supports a finding Petitioner was single with two dependent children at the time of his accident. This testimony was unrebutted.

Regarding issue (J), whether the Medical Services provided were Reasonable and Necessary, and whether Respondent paid all appropriate charges, the Arbitrator finds as follows:

The Arbitrator incorporates by reference the above Findings of Fact and refers to them by reference herein. The Arbitrator finds Petitioner's treatment to be reasonable and necessary. The Arbitrator further finds Respondent has not paid for any of the bills in evidence. The bills were paid by Petitioner's Medicaid carrier and Respondent must reimburse Medicaid for such payments in the amount of $2,473.17. Respondent shall further pay $4,532.14 for the outstanding bills from ATI Physical Therapy and $7.80 for out-of-pocket payments for these related medical expenses incurred by Petitioner pursuant to Section 8(a) and section 8.2.

Regarding (K), Temporary Benefits are due, the Arbitrator finds as follows:

Petitioner claims entitlement to TTD from January 25, 2014 through March 25, 2014. Although Petitioner underwent surgery on January 25, 2014, he was not medically excused off work. (PX4). Petitioner followed up with Dr. Ali on February 4, 2014 who once again was silent as to work restrictions. (PX2, p.13). Although Dr. Ali eventually releases Petitioner to full duty work on March 25, 2014, there is no medical documentation that he was taken off work. No TTD will be awarded without appropriate authorization. Therefore, the claimed TTD from January 25, 2014 through March 25, 2014 denied.

Regarding issue (L), the Nature and Extent of the injury, the Arbitrator finds as follows:

The Arbitrator incorporates by reference the above Findings of Fact and refers to them by reference herein.

Consistent with the Illinois Workers' Compensation Act, the Arbitrator is to base the permanency determination on the following factors:

i. The reported level of impairment pursuant to subsection (a) (e.g., the AMA rating)
ii. The occupation of the injured employee
iii. The age of the employee at the time of the injury
iv. The employee's future earning capacity
v. Evidence of disability corroborated by the treating medical records.

With regard to subsection (i) of § 8.1b(b), the Arbitrator notes no party introduced an impairment rating at trial and as such, no weight is given to this factor.

With regard to subsection (ii) of § 8.1b(b), the Arbitrator notes Petitioner is employed as a laborer who had to cut wood, utilized a saw, and prepared the floors for installation of flooring. As Petitioner's job is physically demanding, the Arbitrator therefore gives moderate weight to this factor.

With regard to subsection (iii) of § 8.1b(b), the age of the employee at the time of the injury, the Arbitrator notes Petitioner was 39 years old at the time of the accident. The Arbitrator notes Petitioner has several more years of work life before him. Given the length of his estimated work life, the Arbitrator gives great weight to this factor.

With regard to subsection (iv) of § 8.1b(b), the Arbitrator concludes Petitioner is capable of working with no restrictions and as such, is capable of making the same amount in wages as Petitioner was previous to his injury. There was no evidence that Petitioner has a diminished earning capacity. As Petitioner's injury did not truly affect his earning capacity, the Arbitrator assigns significant weight to the lack of effect Petitioner's injury had on Petitioner's wages.

With regard to subsection (v) of § 8.1b(b), the Arbitrator notes Petitioner's medical records indicated Petitioner underwent an incision and drainage of the right thumb with Dr. Ali on January 25, 2014. His post operative diagnosis was cellulitis of the right thumb. Following the same, Petitioner remained on antibiotics and underwent a gentle course of course of occupational therapy. Dr. Ali released Petitioner to return to work full duty as of March 25, 2014.

At trial, Petitioner testified that his thumb shakes and doesn't work. (T1, p.22). He also indicated that there is a problem with his strength. In addition, he has a Z-shaped scar which was the width of a lead from a pencil. (T1, p.23). Per Petitioner's physical therapy discharge summary, Petitioner met all of his long-term goals but continued to be limited by pinch strength. Petitioner noted problems with opening wrappers, opening/closing lids, squeezing soap or shampoo bottles and turning keys with some right thumb strength and range of motion deficits. (PX5).

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 25% loss of use of the thumb pursuant to Section 8(e) of the Act.

Regarding issue (O), whether the Injured Workers' Benefit Fund is Liable and Insurance Compliance, the Arbitrator finds as follows:

The Illinois State Treasurer as ex officio custodian of the Injured Workers' Benefit Fund was named as a party respondent in this matter. Section 4 of the Workers' Compensation Act provides that the Fund is liable to pay benefits to an injured worker where the Respondent has failed to obtain insurance, and where Respondent has failed to pay benefits due. Petitioner submitted sufficient credible evidence by means of a certification from the National Council on Compensation Insurance Certificate demonstrating that Respondent-Employer was not insured at the time of the injury. Further, Petitioner provided sufficient credible evidence that notice of the proceedings were provided to the Respondent-Employer. Respondent-Employer was present at the initial two hearings but failed to be present for the last hearing.

Accordingly, the Arbitrator enters this award against the State Treasurer as *ex officio* custodian of the Injured Workers' Benefit Fund. Respondent-Employer shall reimburse the Injured Workers' Benefit Fund for any compensation paid to the Petitioner from the Injured Workers' Benefit Fund. The Employer-Respondent's obligation to reimburse the IWBF, as set forth above, is in no way limited or modified and is entirely independent and separate from Employer-Respondent's potential liability for fines and penalties set forth in the Act for its failure to be properly insured.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC024436
Case Name	John Tigar v. West Liberty Foods
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0387
Number of Pages of Decision	17
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Patrick Shifley
Respondent Attorney	Kevin Luther

DATE FILED: 8/30/2023

/s/Marc Parker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF KANKAKEE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

John Tigar,

Petitioner,

vs. NO: 20 WC 024436

West Liberty Foods,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by both Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, prospective medical care, temporary total disability,[1] and penalties and fees, as well as evidentiary issues, and being advised of the facts and law, modifies the Arbitrator's award to include §19(l) penalties as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

Petitioner filed his Application for Adjustment of Claim on October 14, 2020. On July 13, 2022, Petitioner filed a Petition for Penalties, alleging *inter alia* that Respondent failed to comply with §19(l) and Commission Rule 9110.70 by failing to provide a written explanation for its refusal to pay TTD benefits. Petitioner's attorneys had emailed Respondent on October 14, 2020, October 19, 2020, October 21, 2020, November 5, 2020, November 6, 2020, November 18, 2020, and December 29, 2020, providing medical records, off-work slips, and demands for payment of TTD. Petitioner alleges that no written response was ever received from Respondent in response to his

[1] Respondent included PERMANENT DISABILITY as an issue on its Petition for Review. As this case was tried under §19(b), permanent disability was not at issue at arbitration and will not be addressed on review.

attorneys' requests for payment of benefits, and Respondent offered no written responses into evidence at arbitration or in its response to Petitioner's Petition for Penalties.

Section 19(l) states:

> If the employee has made written demand for payment of benefits under Section 8(a) or Section 8(b), the employer shall have 14 days after receipt of the demand to set forth in writing the reason for the delay. In the case of demand for payment of medical benefits under Section 8(a), the time for the employer to respond shall not commence until the expiration of the allotted 30 days specified under Section 8.2(d). In case the employer or his or her insurance carrier shall without good and just cause fail, neglect, refuse, or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or the Commission shall allow to the employee additional compensation in the sum of $30 per day for each day that the benefits under Section 8(a) or Section 8(b) have been so withheld or refused, not to exceed $10,000. A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay.

820 ILCS 305/19(l). In *McMahan v. Industrial Commission,* 183 Ill. 2d 499 (1998), the Illinois Supreme Court addressed the issue of the appropriate fact situation for the imposition of §19(l) penalties.

> The additional compensation authorized by section 19(l) is in the nature of a late fee. The statute applies whenever the employer or its carrier simply fails, neglects, or refuses to make payment or unreasonably delays payment 'without good and just cause.' If the payment is late, for whatever reason, and the employer or its carrier cannot show an adequate justification for the delay, an award of the statutorily specified additional compensation is mandatory.

McMahan, 183 Ill. 2d at 515.

The Commission finds that Respondent was without good or just cause to delay the payment of TTD benefits. Petitioner's attorney repeatedly issued written demands and requests for explanation of the denial of benefits. Respondent failed to provide a written explanation of the basis for its denial. Petitioner sent his first demand for payment of benefits on October 14, 2020. From that date to the date of hearing on July 25, 2022, is 441 days. The §19(l) penalty is $30/day, not to exceed $10,000. Penalties calculated at the daily rate would exceed the $10,000 cap.

Accordingly, the Commission awards Petitioner $10,000.00, the maximum allowed for §19(l) penalties.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 2, 2022, is modified as stated herein. The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner $10,000.00 in penalties, pursuant to §19(l) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision.

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.

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

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

August 30, 2023
MP:dk
o 8/24/23
68

/s/ *Marc Parker*
Marc Parker

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

/s/ *Christopher A. Harris*
Christopher A. Harris

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC024436
Case Name	TIGAR, JOHN v. WEST LIBERTY FOODS
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	13
Decision Issued By	Roma Dalal, Arbitrator

Petitioner Attorney	Patrick Shifley
Respondent Attorney	Kevin Luther

DATE FILED: 9/2/2022

THE INTEREST RATE FOR THE WEEK OF AUGUST 30, 2022 3.23%

/s/ Roma Dalal, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF **Kankakee**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

JOHN TIGAR
Employee/Petitioner

v.

WEST LIBERTY FOODS
Employer/Respondent

Case # **20** WC **024436**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Roma Dalal**, Arbitrator of the Commission, in the city of **Kankakee**, on **7/25/22**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **10/05/20**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**29,379.40**; the average weekly wage was $**564.99**.

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

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

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**3,011.68** for other benefits, for a total credit of $**3,011.68**.

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

ORDER

The Arbitrator finds Petitioner sustained an accident arising out of or occurring in the course of his employment on October 5, 2020.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule regarding Petitioner's right knee condition as provided in Sections 8(a) and 8.2 of the Act. Respondent shall receive credit for amounts paid.

Pursuant to Section 8(a) of the Act, the Respondent shall authorize and pay for, pursuant to the fee schedule, the treatment recommended by Dr. Somalli, including, but not limited to a right knee total arthroplasty and all necessary ancillary care.

Respondent shall pay Petitioner temporary total disability benefits of **$376.66/week** for 94 1/7 weeks, commencing October 5, 2020 through July 25, 2022, as provided in Section 8(b) of the Act. Respondent shall receive credit for amounts paid.

Petitioner's request for penalties and fees is denied.

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

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

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

SEPTEMBER 2, 2022

Signature of Arbitrator

ICArbDec19(b)

STATE OF ILLINOIS)
) SS
COUNTY OF)

ILLINOIS WORKERS' COMPENSATION COMMISSION

John Tigar,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	Case No. 20 WC 024436
West Liberty Foods,	)	
	)	
	)	
Respondent.	)	

FINDINGS OF FACT

This matter proceeded to hearing on July 25, 2022 in Kankakee, Illinois before Arbitrator Roma Dalal on Petitioner's Request for Hearing. Issues in dispute include accident, causation, disputed medical, TTD benefits, prospective medical, and penalties. (Arb. Ex. 1).

John Tigar (hereinafter referred to as the "Petitioner") was a 60-year-old single male. He testified he worked at West Liberty Foods (hereinafter referred to as the "Respondent") in housekeeping. His job responsibilities were to pick up all the cardboard and meat that hit the floor. Petitioner explained that Respondent made meat for Subway and sandwiches for Walmart. As it was producing meat, some would fall on the floor. Contaminated meat that dropped on the floor would be brought to the garbage room and dyed to prevent it from being accidentally ingested. It was then placed into a 6ft tall white plastic container. Petitioner identified that the floor of the garbage room would be hosed down with water when meat had been dropped on its floor and was prone to being wet and greasy. He testified he would take the garbage, weigh it, and dump it. He would weigh the garbage in a different room than the garbage room.

On October 5, 2020 he was working a normal day. Petitioner testified he was picking up garbage and meat from all the departments, doing his regular duties. He was taking a garbage full of meat into the garbage room. The existing disposal container for the meat was full and he had to move the container. While moving the container his foot slipped out from under him, and his legs went in opposite directions. His legs went wide, and he felt his right knee pop. He said the floor was wet, a mixture of water and grease on the floor. He felt a burning sensation in his knee. He never experienced anything like that in his right knee and denied pain in his left knee.

After his injury, Petitioner reported the incident to the security station and completed an accident report. He was given permission to transport himself to the emergency room. He then went to the Hospital.

On October 5, 2020 Petitioner presented to Adventist Bolingbrook Hospital. Petitioner presented stating he slipped on a wet floor while at work and felt a popping his right knee. He is now complaining of right

knee pain. (PX1, p.10). X-rays revealed a possible nondisplaced fracture of the medial tibial plateau. *Id*. at 22. Petitioner was discharged with crutches and was to follow up with orthopedics. *Id*. at 12.

On October 6, 2020 Petitioner presented to Stephen Mizera, PA. Petitioner noted he slipped and twisted his knee while at work and was now experiencing right knee pain. (PX2, p.5). Petitioner was diagnosed with a possible nondisplaced fracture of the medial tibial plateau and a small suprapatellar effusion of the right knee and arthritis of the right knee. *Id*. at 6. Petitioner was to undergo a right knee MRI. *Id*. at 7.

Petitioner testified he then proceeded with treatment on his own and proceeded to treat at Associated Medical Centers of Illinois.

On October 9, 2020 Petitioner presented to Associated Medical Centers of Illinois (AMCI). (PX3). Petitioner was a 54-year-old male who was on duty as a housekeeper. He was walking through the garbage room when he slipped on a drain cover which caused his right leg to shoot out in front of him and his knee twisted. (PX3, p.6). Petitioner noted a motorcycle accident 30 years ago resulting in an injury to his left knee. *Id*. Petitioner was diagnosed with a right knee sprain. Petitioner was placed off work, ordered an MRI and recommended physical therapy. *Id*. at 7.

On October 13, 2020 Petitioner underwent an MRI at Preferred Open MRI. The MRI revealed a small effusion, chondromalacia patella with tricompartment osteoarthritis most severely affecting the medial compartment; complex multidirectional tear posterior horn medial meniscus with a prominent free edge/radial component and a Baker's cyst measuring 5cm in length. (PX6, p.3).

Petitioner followed up at AMCI on October 19, 2020. Petitioner rated his knee pain an 8 out of 10. Petitioner felt like he was unable to perform his regular work duties. (PX3, p.9). Petitioner was provided an orthopedic consultation and kept off work. *Id.* at 10.

On November 3, 2020 Petitioner first presented to Dr. Chandrasekhar Sompalli. Petitioner was a 59-year-old male who complained of right knee pain. Petitioner stated he was working in housekeeping. Petitioner was pushing a bin of raw meat and slipped on water and twisted his right knee. When he twisted his right knee, he heard a pop in the right knee outward and then inward. Petitioner complained of a pain of 8 out of 10. (PX5, p.3). Petitioner was diagnosed with severe tricompartment arthritis, chondromalacia, medial compartment effusion, bone marrow edema and medial meniscal tear due to the arthritis. Petitioner had a preexisting severe arthritis that was aggravated by the work injury. Petitioner was given an injection into the right knee to alleviate the pain. Petitioner was to also begin with therapy. Petitioner remained off work. *Id*. at 6-7.

Petitioner began physical therapy at AMCI on November 16, 2020. (PX3, p.11).

Petitioner followed up with Dr. Sompalli on December 1, 2020. Petitioner noted the injection helped for four weeks. Petitioner was to continue with therapy and remained off work. (PX5, p. 11). In a December 29, 2020 follow up, Petitioner noted a pain of a 10 out of 10. Petitioner had completed six weeks of therapy with no improvement. *Id.* at 21. Petitioner was to continue with therapy. The Doctor also recommended another Synvisc injection and surgery. Petitioner remained off work. *Id*. at 24.

Petitioner underwent physical therapy through January 5, 2021. At that visit Petitioner was to continue with therapy. (PX3). This is the last medical record provided.

On September 15, 2021, Petitioner underwent a Section 12 examination with Dr. Ryon Hennessy. (PX7, RX1). Dr. Hennessey reviewed medical records and examined Petitioner. Petitioner advised on October 5, 2020 he slipped on a wet floor at work, twisting his right knee and felt a pop. He went to the ER that day. *Id*. at 2. Dr. Hennessy diagnosed Petitioner with osteoarthritis of right greater than left knee. He also noted mild patellofemoral chondromalacia. *Id.* at 7. He noted Petitioner's right knee osteoarthritis predated the accident. Dr. Hennessy noted that with the assumption of the video provided capturing the time of the alleged injury, there was no evidence of the video of activity that would have caused the right knee arthritis to become symptomatic. The video contradicts Petitioner's recollection of events at the time of the injury. Therefore, Dr. Hennessy did not find causation. *Id*. at 7. Dr. Hennessy further indicated Petitioner would benefit from a right total knee arthroplasty. With regard to causation, if it is determined that an injury took place, the right total knee arthroplasty would be causally related by aggravation of a previously asymptomatic condition. At the present time, however, Dr. Hennessy found no causal relationship. *Id*. at 8. Dr. Hennessy further opined that if an accident occurred, the Petitioner was not at MMI. *Id*. at 8. He would reach MMI 6 months after treatment. Petitioner was found to be capable of working with restrictions of lifting no more than 30lbs and climbing no ladders. *Id*. at 9. Finally, Dr. Hennessy opined the treatment to date had been reasonable and necessary but wished for Petitioner to transition to a lower dose of Ibuprofen due to health risks related to his diabetic condition. *Id*. at 10.

Evidence Deposition of Dr. Sompalli

The parties proceeded with the evidence deposition of Dr. Chandrasekhar Sompalli on March 10, 2022. (PX8). Dr. Sompalli is an orthopedic surgeon specializing in sports, shoulders, and knee scopes. He does about 20 percent joint replacements. *Id*. at 7-10. Dr Sompalli went over his medical records beginning on November 3, 2020. *Id*. at 12. Dr. Sompalli testified he had treated Petitioner on three occasions. Upon physical examination and review of the imaging studies, he diagnosed him with right knee pain, severe arthritis, chondromalacia, and medial meniscal tear. *Id.* at 14. A Synvisc injection was eventually recommended to attempt to alleviate pain, and Petitioner was placed off work. *Id.* at 16. At the final visit on December 29, 2020, Dr. Sompalli prescribed a surgical knee replacement for Petitioner's injured knee. *Id.* at 18. Dr. Sompalli noted Petitioner never received authorization for the surgery. Dr. Sompalli opined Petitioner had pre-existing severe arthritis that was asymptomatic. This became symptomatic after his twisting injury. Based on the same, this was an aggravation of a pre-existing asymptomatic condition. *Id*. at 19. Dr. Sompalli testified that after the knee replacement there would be a 6-month period of conservative care before Petitioner reached MMI. *Id.* at 21.

Dr. Sompalli agreed that it was possible that Petitioner would have had symptoms prior to the accident. (PX8 at 25). He further testified that he did not review any reports or videos from the accident. *Id*. Dr. Sompalli further testified it takes decades for arthritis to develop. *Id*. at 26. Dr. Sompalli testified that 30 percent of his patients are referrals from the Petitioner's attorney's office. *Id*. at 26.

At trial, Petitioner testified he had not returned to work or received any type of benefits. Petitioner testified that his medical care was terminated because of non-approval by the Respondent. Petitioner stated, if approved, he would pursue ongoing care, including his recommended knee replacement.

Petitioner testified he had reviewed the video imaging introduced as Respondent's Exhibit 3. Petitioner noted the room depicted was not the garbage room and was not the site of his accident.

Respondent called Tyrell Watson as a witness. Mr. Watson testified on October 5, 2020 he was working for West Liberty Foods as the head of the security team. He currently does not work with Respondent any longer. Mr. Watson recalled the accident. He noted he prepared the Security Incident report. (RX2). Mr. Watson testified Petitioner was seen limping as he walked to the security station. Because no other HR staff were present, Petitioner and Mr. Watson, walked an additional 15 seconds to the reporting office, during which time Petitioner did not limp.

Mr. Watson testified he had downloaded a copy of the video introduced as Respondent's Exhibit 3. Mr. Watson testified the video was from the same facility and time of the accident. The video showed the hallway to the maintenance room and garbage room. In reviewing the video, he did not see Petitioner entering or leaving the garbage room at the time of the reported accident. The video was between 8:30 PM and 8:50 PM.

On Cross-Examination, Mr. Watson was shown the first of the six videos contained in Respondent's Exhibit 3. Mr. Watson testified the videos were recorded by a system named Milestone, which worked on a motion sensing basis. Absent motion, the system would not record video, instead capturing the last still image. Mr. Watson agreed the videos do not show a date or time stamp and could not be exactly matched to a time or date. Mr. Watson identified the door in the upper left corner of the video was the door to the garbage room. When shown the video, Mr. Watson agreed that the video showed an individual approaching and entering the garbage room door at 2 minutes and 58 seconds. The person seen entering the garbage room door appeared in the video between one frame and the next, already in the field of view of the camera. Mr. Watson agreed he was not seen in the video until the motion sensor was triggered, possibly by a forklift also traveling in the frame at that time. He noted it was possible for a person to enter the room without the motion sensor picking it up. In addition, there were no cameras inside the garbage room. He also noted he had no personal knowledge of the garbage room.

At trial, Respondent introduced, and Petitioner authenticated a Security Incident Report. This report stated, Petitioner reported to the security office that he slipped and fell. Petitioner advised he was attempting to move a bin in the garbage room when he slipped on the metal drain cover. He reported having went down and having hit and twisted his right knee. This was reported around 8:50PM. (RX2).

Video Exhibit

Respondent introduced six video files on a CD-ROM. Each is a short video of the interior of an industrial facility depicting a hallway with an area of equipment and boxes. At the top left is a door set in a white wall. To the top right there is another door, also set in a white wall.

Video 1: At the beginning of video one a forklift is seen driving in the top right corner. After 15 seconds the motion stops, and the video continues without changes. At 1:45, the video suddenly shifts, and the forklift is in another position, and the doors in the top right are open. The forklift drives to the left and the open-door closes. The video stops at 2:08 and resumes at 2:57. A forklift can be seen moving from the center of the video to the right. A walking employee can be seen walking along the ground near the door on the left before entering the door around 3:07. (RX3).

Video 2: The second video begins with a forklift visible moving inside the door at the top right. After 10 seconds the video freezes. No other activity is seen. Videos 3, 4 and 5 depict no motion and no activity. It looks like some of these videos are still images. Video 6: The sixth file begins as a still image. At 2:19 the image suddenly changes, and a person is seen walking along the right edge, apparently triggering the motion sensor halfway through a walk down. In the upper left-hand corner, next to the door to the garbage room, an item on the wall has shifted suddenly to the right. At 2:39 an individual can be seen walking along the far white wall toward the door on the left. This individual reaches the door in the last frame of the video but is not seen to enter.

CONCLUSIONS OF LAW

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

Decisions of an Arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e). Credibility is the quality of a witness which renders his evidence worthy of belief. The Arbitrator, whose province it is to evaluate witness credibility, evaluates the demeanor of the witness and any external inconsistencies with his/her testimony. Where a claimant's testimony is inconsistent with his/her actual behavior and conduct, the Commission has held that an award cannot stand. McDonald v. Industrial Commission, 39 Ill. 2d 396 (1968); Swift v. Industrial Commission, 52 Ill. 2d 490 (1972).

It is the function of the Commission to judge the credibility of the witnesses and to resolve conflicts in the medical evidence and assign weight to witness testimony. O'Dette v. Industrial Commission, 79 Ill.2d 249, 253, 403 N.E.2d 221, 223 (1980); Hosteny v. Workers' Compensation Commission, 397 Ill. App. 3d 665, 674 (2009). Internal inconsistencies in a claimant's testimony, as well as conflicts between the claimant's testimony and medical records, may be taken to indicate unreliability. Gilbert v. Martin & Bayley/Hucks, 08 ILWC 004187 (2010).

In the case at hand, the Arbitrator observed Petitioner during the hearing and finds his testimony to be persuasive. The Arbitrator compared Petitioner's testimony with the totality of the evidence submitted and finds the witness reliable. While the Arbitrator did note some inconsistencies, the Arbitrator recognizes that there was no evidence to contradict his testimony.

With regard to Issue "C", whether an accident occurred that arose out of and in the course of Petitioner's employment, the Arbitrator finds as follows:

For accidental injuries to be compensable under the Workers' Compensation Act, a claimant must show such injuries arose out of and in the course of his or her employment. Navistar Intern. Transp. Corp. v. Industrial Com'n, 315 Ill.App.3d 1197 (2000).

After a careful review of the record, including Petitioner's testimony and the medical evidence available in this case, the Arbitrator finds Petitioner did sustain an "accident" as defined by the Act. Petitioner's description that he slipped on a mixture of water and grease on the floor is consistent throughout the evidence both testimonial and medical.

The Parties dispute whether an accident alleged in the Application occurred. The Arbitrator finds Petitioner met his burden of proof that the accident as described did occur. Petitioner testified credibly,

the initial report of the accident and the initial medical are sufficiently consistent with the testimony given, and Respondent's video does not provide credible rebuttal of the sworn testimony.

Petitioner testified he slipped on a wet floor and that his leg went out from under him. The Arbitrator noted the incident report was filled out the same day and written by Mr. Watson. The report stated Petitioner slipped and fell, stating he went down hit and twisted his right knee. The initial medical records stated he twisted his knee without contact. The Arbitrator notes the minor contradiction but finds the records to be otherwise consistent and credible.

Mr. Watson authenticated Petitioner reported the same accident as described to him, and that he was limping as he approached the security desk. The testimony Petitioner did not limp between the security desk and the HR reporting desk is not sufficient to outright deny accident.

While the Arbitrator reviewed Respondent's Exhibit 3, the video evidence, the Arbitrator finds it lacking in credibility. First the video does not show the garbage room where the accident actually happened. Rather it is a video of one room or the hallway between two different rooms. In addition, the videos are not dated or time stamped to confirm the accuracy. Mr. Watson testified that the door to the left was the garbage room, and no one was seen entering or leaving the garbage room around the incident. The Arbitrator saw an unidentifiable person entering the door to the garbage room in video 1 and approaching it in video 6. These persons appear between one frame and the next, confirming a person was able to enter the field of view of the camera without triggering the motion sensor. In addition, Mr. Watson testified it was possible for a person to enter the room without the motion sensor picking it up. Given the same, the video appears to be a series of non-dated and non-timed videos, interspersed with still images when little motion happened.

In addition, there was no testimony to rebut Petitioner's job duties or whether there was grease or water on the floor in the garbage room. Mr. Watson did not have any firsthand knowledge of the garbage room. He only testified to what he did not see on the video.

Weighing the evidence, the videos are insufficiently credible to outweigh the consistent and credible testimony of the Petitioner, his accident report, and the medical records.

At trial, Petitioner testified that his job duties consisted of picking up garbage from the departments. He would then take a garbage full of meat into the garbage room. Petitioner testified that he was moving a container used to dispose contaminated meats. While he was moving the container, his foot slipped on a wet and greasy floor.

The security incident report and medical records also show Petitioner sustained an injury at work. The Security Incident Report that initial day stated Petitioner was attempting to move a bin in the garbage room when he slipped on the metal drain cover. In addition, the medical records on October 5, 2020 from Adventist Bolingbrook Hospital stated Petitioner presented stating he slipped on a wet floor while at work and felt a popping his right knee.

Given that the purpose of the Respondent's business is to process meats, the Arbitrator finds that the risk of slipping on floors made greasy by meat and made wet by washing those floors, is a risk related to the employment. The risk was an employment risk, and as such compensable.

Based on the foregoing, the Arbitrator finds Petitioner sustained an accident that arose out of and in the course of his employment, mainly he slipped and fell in the garbage room while throwing garbage away.

With regard to Issue "F", whether Petitioner's current condition of ill-being is causally related to the injury and Issue "K" whether Petitioner is entitled to any prospective medical care, the Arbitrator finds as follows:

The Findings of Fact and Conclusions of Law, as stated above, are adopted herein.

To obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in her ensuing injuries. A work-related injury need not be the sole or principal causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. "A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." International Harvester v. Industrial Com., 93 Ill. 2d 59, 63 442 N.E.2d 908 (1982). Prior good health followed by a change immediately following an accident allows an inference that a subsequent condition of ill-being is the result of the accident. Navistar International Transportation Co. v. Industrial Commission, 315 Ill. App. 3d 1197, 1205, 248 Ill. Dec. 609, 734 N.E.2d 900 (2000).

When a preexisting condition is present, a claimant must show that "a work-related accidental injury aggravated or accelerated the preexisting [condition] 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." St. Elizabeth's Hospital v. Workers' Compensation Commission, 864 N.E.2d 266, 272-273 (5th Dist. 2007). Even when a preexisting condition exists, recovery may be had if a claimant's employment is a causative factor in his or her current condition of ill-being. Sisbro, Inc. v. Industrial Commission, 797 N.E.2d 665 (2003). Allowing a claimant to recover under such circumstances is a corollary of the principle that employment need not be the sole or primary cause of a claimant's condition. Land & Lakes Co. v. Industrial Commission, 834 N.E.2d 583 (2d Dist. 2005).

In the instant case, the Arbitrator finds Petitioner's current condition of ill-being is causally related to his work accident. Petitioner testified he never had any prior right knee problems prior to the injury. In addition, Petitioner was working full duty with no known issues.

The Arbitrator further notes that both medical providers do not have a causation dispute. Both, Petitioner's medical provider, Dr. Sompalli, and the Section 12 examiner, Dr. Hennessy opined Petitioner is in need for further medical care. Dr. Hennessy specifically stated Petitioner would benefit from a right total knee arthroplasty. He opined that with regards to causation, if it was determined that an injury took place, the right total knee arthroplasty would be causally related by aggravation of a previously asymptomatic condition. In addition, Dr. Sompalli opined Petitioner had pre-existing severe arthritis that was asymptomatic. This became symptomatic after his twisting injury. As the Arbitrator found an injury did take place, the Arbitrator also finds causation based on both of the doctor's opinions.

Based on the same, the Arbitrator finds Petitioner's accident to be a cause of Petitioner's current condition of ill-being in his right knee.

Regarding the issue of whether Petitioner is entitled to any prospective medical care, following consideration of the testimony and evidence presented, the same is incorporated by reference, it is found Petitioner's condition is causally related to his work accident and has not stabilized or otherwise reached MMI. Petitioner seeks prospective care in the form of a right knee replacement. The Arbitrator finds that as the medical provider and the Section 12 examiner agree Petitioner needs a total arthroplasty, the Arbitrator finds no dispute regarding the causal connection between the accident and the current condition of ill being, and the need for the total knee arthroplasty.

Based on the same the Arbitrator finds Petitioner is entitled to prospective medical care as recommended by Dr. Sompalli, for his right knee to include the right knee total arthroplasty and any sequalae. For the reasons stated above, Respondent shall authorize and pay for this and such other reasonable medical treatment pursuant to the statutory fee schedule.

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

The Arbitrator incorporates by reference the above Findings of Fact and refers to them by reference herein. In reviewing the medical services provided to Petitioner, the Arbitrator finds Respondent has not paid all appropriate charges for all reasonable and necessary medical services. The Arbitrator finds the medical services provided to Petitioner were reasonable and necessary.

Section 8(a) of the Act states a Respondent is responsible … "for all the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter incurred, limited, however, to that which is reasonably required to cure or relieve from the effects of the accidental injury…" A claimant has the burden of proving that the medical services were necessary, and the expenses were reasonable. See Gallentine v. Industrial Comm'n, 201 Ill.App.3d 880, 888 (2nd Dist. 1990).

Given the Arbitrator's finding of causation between Petitioner's October 5, 2020 work accident and his condition of ill-being regarding his right knee, Respondent is liable for reasonable and necessary medical treatment of the causally related condition.

The Arbitrator orders Respondent to pay Petitioner all other reasonable and necessary medical expenses incurred in connection with the care and treatment of his causally related conditions pursuant to Sections 8 and 8.2 of the Act. Respondent shall receive credit for amounts paid.

With respect to Issue "L", what temporary benefits are in dispute, the Arbitrator finds as follows:

In order to prove entitlement to TTD benefits, a claimant must establish not only that he did not work, but that he was unable to work. Sharwarko v. Illinois Workers' Compensation Comm'n, 2015 IL App (1st) 131733WC. An employee is temporarily totally disabled from the time that an injury incapacitates

him from work until such time as he is as far recovered or restored as the permanent character of his injury will permit. Archer Daniels Midland Co. v. Industrial Comm'n, 138 Ill. 2d 107, 118 (1990). Once an injured employee's physical condition stabilizes or he has reached MMI, he is no longer eligible for temporary total disability benefits. Archer Daniels Midland Co., 138 Ill. 2d at 118. A claimant reaches MMI when he is as far recovered or restored as the permanent character of his injury will permit. Nascote Industries v. Industrial Comm'n, 353 Ill. App. 3d 1067, 1072 (2004). Factors to be considered in determining whether a claimant has reached MMI include whether he has been released to return to work, medical evidence, testimony concerning the claimant's injury, the extent of his injury, and whether the injury has stabilized. Nascote Industries, 353 Ill. App. 3d at 1072. The period of time during which a claimant is temporarily and totally disabled is a question of fact to be determined by the Commission, and its resolution of the issue will not be disturbed on appeal unless it is against the manifest weight of the evidence. Archer Daniels Midland, 138 Ill. 2d at 119-20.

Petitioner is claiming TTD benefits beginning on October 5, 2020 through July 25, 2022 as provided in Section 8(b) of the Act. The Arbitrator finds Petitioner has not recovered from his injuries and has not reached Maximum Medical Improvement. The Arbitrator finds Petitioner's physicians have not allowed him to return to unrestricted work since his October 5, 2020 accident.

Based on the same, TTD benefits are awarded at a rate of $376.66 per week for 94 1/7 weeks, commencing October 5, 2020 through July 25, 2022 provided in §8(b) of the Act. Respondent shall receive credit for amounts paid.

With respect to Issue (M), should penalties or fees be imposed upon Respondent, the Arbitrator finds as follows:

Petitioner claims that he is entitled to penalties and fees. The Arbitrator find that Respondent denied this matter based on the video evidence that Petitioner did not enter the garbage room. In addition, Dr. Hennessy opined that based on the video no causation existed. Respondent also argued as to Petitioner's credibility based on Mr. Watson's testimony regarding Petitioner stopped limping and the discrepancy of the accident details in the medical records.

While the Arbitrator does not agree with Respondent's argument, it is the Arbitrator's view that Respondent's position is not objectively unreasonable or vexatious. The denial of this matter based on accident does not rise to the level of being vexatious and unreasonable.

As such, taking the totality of the evidence in the record, specifically that Mr. Watson did not see Petitioner enter the garbage room, the discrepancy in medical records, Petitioner's limp that went away, and Dr. Hennessy's Section 12 report based on the video, Respondent's decision to deny accident and not pay benefits was not objectively unreasonable or vexatious under the circumstances. Petitioner's request for penalties and fees is, therefore, denied.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC019735
Case Name	James Andriaccai v. City of Chicago, Department of Transportation
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0388
Number of Pages of Decision	12
Decision Issued By	Amylee Simonovich, Commissioner

Petitioner Attorney	Gerald Connor
Respondent Attorney	Jeffrey Rusin

DATE FILED: 8/30/2023

/s/Amylee Simonovich, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JAMES ANDRIACCAI,

Petitioner,

vs. NO: 20 WC 19735

CITY OF CHICAGO DEPARTMENT OF TRANSPORTATION,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 9, 2022 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.

Under Section 19(f)(2), no "county, city, town, township, incorporated village, school district, body politic, or municipal corporation" shall be required to file a bond. As such, Respondent is exempt from the bonding requirement.

August 30, 2023
o081523
AHS/ldm
051

/s/*Amylee H. Simonovich*
Amylee H. Simonovich

/s/*Maria E. Portela*
Maria E. Portela

/s/*Kathryn A. Doerries*
Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC019735
Case Name	ANDRIACCAI, JAMES v. CITY OF CHICAGO
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	9
Decision Issued By	Jeffrey Huebsch, Arbitrator

Petitioner Attorney	Gerald Connor
Respondent Attorney	Michael Rusin

DATE FILED: 5/9/2022

THE INTEREST RATE FOR THE WEEK OF MAY 3, 2022 1.42%

/s/ Jeffrey Huebsch, Arbitrator

Signature

J. Andriacchi v. City of Chicago, 20 WC 019735

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

James Andriacchi
Employee/Petitioner

v

City of Chicago
Employer/Respondent

Case # **20** WC **019735**

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 **Jeffrey Huebsch**, Arbitrator of the Commission, in the city of **Chicago**, on **10/14/21**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

J. Andriacchi v. City of Chicago, 20 WC 019735

FINDINGS

On **8/13/20**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**93,600.00**; the average weekly wage was $**1,800.00**.

On the date of accident, Petitioner was **52** years of age, ***married*** with **1** dependent children.

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

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

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

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

ORDER

Claim for compensation denied. Petitioner failed to prove that he sustained accidental injuries which arose out of and in the course of his employment by Respondent on August 13, 2020.

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.

/S/ Jeffrey Huebsch

Signature of Arbitrator

MAY 9, 2022

FINDINGS OF FACT

Petitioner, James Andriacchi, was 53 years old at the time of trial. He testified that on August 13, 2020 he was employed by the City of Chicago, Department of Transportation, Asphalt Division ("Respondent). Petitioner has been working for Respondent for about 30 years. He currently works as an Asphalt Working Foreman, and has worked in that position for 8 to 10 years. His daily job duties include filling potholes in various streets and alleys. He performs all of the job duties of an asphalt worker filling the potholes.

Petitioner testified that his job requires the use of various tools, including rakes and shovels. Petitioner testified that there is a requirement of bending and lifting as part of his job. Petitioner testified that the asphalt that he picks up with a shovel generally weighs between 20 and 30 pounds, but could weigh less.

Petitioner testified that he was performing his normal and customary job activities, filling potholes on Nagle Avenue, on August 13, 2020, when he sustained his alleged accident. He was assisting with filling holes, and, as he turned around to walk back to the vehicle, he had a pain that radiated from his back to his left knee. Petitioner testified that he never had a lower back that radiated to his left knee like this before. Petitioner testified that immediately prior to experiencing this back pain he was filling potholes on Nagle Avenue, using a shovel with asphalt. On cross examination, Petitioner agreed that he sustained a sharp pain while in the process of filling a pothole. Petitioner had been working about 3 hours when this incident occurred at about 10:00 am. (PX 5)

Petitioner testified that the pain was excruciating and he was taken back to Respondent's trailer by "the crew", driver Diaz and Jose Feliciano and Joe Lamontagna, asphalt laborers.

Petitioner testified that he filled out an accident report after this alleged injury. The report was admitted as PX 5. PX 5 was given to Petitioner by Mike Beatty, the office clerk, who signed it at Line 33. Petitioner testified that he filled out the accident report form on August 13, 2020, although it was obviously completed at a later time (it was certified, apparently by Petitioner, on 8/18/20 [Line 34] and it indicates that the first full day off work was 8/14/20 [Line 19]). Petitioner's description of accident was set forth at Line 21:

> While working on Nagle Ave filling potholes a sharp pain radiated from my back down to my left leg. I fell to the grown (sic) due to excruciating pain in my left leg. Got back to the yard and was given form from Mike Beedi (sic) to call workmans (sic) Comp number. They told me to go to the nearest Emergency Room. I was taken to Luthern (sic) General in Park Ridge. (PX 5)

Beatty told Petitioner to call a triage number and Petitioner was instructed to go to the nearest emergency room.

Neither Party called Diaz, Lamontagna, Feliciano or Beatty to testify.

Petitioner testified that he was taken to the ER at Lutheran General Hospital. Petitioner testified that he told the doctor at Lutheran that he was working on the street and had low back pain radiating to the left leg. On cross-examination, Petitioner testified that none of the physicians asked how he sustained his low back and left leg symptoms. He did not believe that he reported a work injury filling potholes when he was at Lutheran General. He did not recall reporting a history of having low back and left leg symptoms for a few days prior to August 13, 2020 to the emergency room. Petitioner testified that while at Lutheran General Hospital, his wife was the individual who provided most of the information to the doctors, because he was in severe pain. Petitioner

testified that while at Lutheran General, he did not report any prior symptoms or complaints of low back or left pain prior to 8/13/20 because he did not have pain prior to 8/13/20. Petitioner also testified that he was not taking any medication for his low back or leg symptoms prior to 8/13/20.

Petitioner testified that he underwent diagnostic tests at Lutheran General and was eventually discharged on 8/16/20, after spending 3 days at the hospital. Petitioner testified that the doctors at Lutheran General told him to remain off of work and follow up with the specialist. Petitioner was given a lumbar epidural injection at Lutheran general on August 17, 2020 by Dr. Candalario.

The records of Lutheran General Hospital were admitted as PX 1. The history to the triage nurse at 12:42 pm on 8/13/2020 was of lower back pain shooting down the left leg since last Monday, was at PMD where they tested "my kidneys, did blood and urine, sent my (sic) home and told me to deal with it." Denies fall/trauma. (PX 1, p. 25)

The ED physician note, of 8/13/2020 at 1:03 pm by Dr. Joseph Peabody, MD, documents the history of severe left low back pain and left thigh pain. The pain has worsened over the last couple of days it started in his low back and then progressed to the anterior left thigh where it is very severe. There is no fall or injury. He went to his physician 2 days ago where he had labs and urine test which were normal. He was advised to continue OTC pain medicine. Pain is getting worse and worse and he presents here. He arrives in extreme pain and was brought back to the treatment area to be assessed immediately. A CT Abdomen/Pelvis was unremarkable for acute pathology. A Lumbar CT was said to show left foraminal soft tissue disc herniations at L2-L3 and L3-L4 that may result in both L2 and L3 radiculopathies. This was said to be consistent with the patient's presentation. The Lumbar MRI results were pending. Petitioner was admitted with a diagnosis of: 1. Sciatica of left side and 2. Intractable back pain. (PX 1, pp. 31-36)

A neurosurgery consult took place on 8/14/20 and a note was authored by Danelle Rose Ranario, PA-C. The history was of a 51 year old male who presented to the ED yesterday with intractable LLE radiculopathy more than lower back pain. States he was at work and felt sudden severe pain to his left thigh, not relieved with OTC pain medications. Reports leg numbness as well which has somewhat improved today. Denies inciting trauma or increased repetitive activity. He works in road construction. Lumbar CT and MRI studies were reviewed and were said to show annular tear and Left L2-L4 foraminal stenosis secondary to herniated disc. Dr. Abusuwwa, a neurosurgeon, examined Petitioner later and agreed that this was not a neurosurgery case at present. Petitioner was set up for the LESI to be performed by Dr. Candelario. (PX 1, pp 26-30)

The records of Lutheran General do not show that Petitioner's wife provided any history to the nurses or physicians that provided care to Petitioner.

On direct examination, Petitioner was asked: "Have you ever had a lower back pain that radiated to your left knee like this before?" and he responded: "Not like this." On cross-examination, Petitioner testified that he did have prior low back pain and left leg pain. Petitioner testified that prior to 8/13/20, he spoke to his primary care physician, Dr. Berman, regarding a "kidney stone or something". Petitioner testified that he did not recall going in for a medical appointment with Dr. Berman on or around 8/11/20. Petitioner testified that he believed he spoke to the doctor over the phone regarding his concerns. Petitioner testified that he spoke with Dr. Berman and asked him the symptoms of a kidney stone. Upon further questioning, Petitioner admitted that he also might have complained about left leg pain when speaking to Dr. Berman over the phone. Petitioner later testified that he speaks with Dr. Berman on a regular basis.

Petitioner testified that he had complaints to the low back and left leg on 8/11/20, but that those complaints went away completely prior to 8/13/20. Petitioner testified that he had zero symptoms in the low back and left leg on 8/12/20. Petitioner testified that he was able to work on Monday, 8/10/2020, Tuesday, 8/11/2020 and Wednesday, 8/12/2020. August 13, 2020 was a Thursday.

The records of Dr. Daniel Berman were admitted as RX 1. The records show that Petitioner was seen by Nichelle J. Pajeau, PA-C on August 11, 2020. "Possible kidney stone-pain started 1½ weeks ago." Petitioner complained of low back/flank pain x past 1½ weeks. Has some numbness on the top of the left thigh. A lab work up for kidney stones was initiated and PA-C Pajeau charted that there would be follow-up after the labs and "Sounds like a pinched nerve with numbness on the thigh." (RX 1, pp 1-3)

Petitioner testified that he then sought treatment with Dr. Aleksandr Goldvekht of AMCI on 8/19/20. He sought treatment with Dr. Goldvekht at the recommendation of a co-worker. Petitioner testified that he was not referred to Dr. Goldvehkt by anyone at Lutheran General. Petitioner testified that he did not know what kind of physician Dr. Goldvehkt was at the time he began treating. Petitioner testified that he told Dr. Goldvehkt about his work accident. Petitioner testified that he gave Dr. Goldvehkt the same history of his work accident that he testified to at trial. Petitioner testified that Dr. Goldvekht recommended physical therapy and to remain off work.

The records of AMCI/Dr. Goldvehkt were admitted as PX 2. On 8/19/20, Dr. Goldvekht noted the following history: "The patient works as a laborer for City of Chicago. He was working on the street for about 3 hours when he started to experience stabbing pain in the low back that radiated to the left leg." Dr. Goldvekht reviewed the CT scan and MRI of the lumbar spine and charted: "Lumbar spine reveals L2-L3 left disc protrusion with foraminal stenosis. There is also an annular tear at this level. L3-L4 disc protrusion with foraminal stenosis." Dr. Goldvekht diagnosed Petitioner with Lumbar Disc Herniation. As to causation, Dr. Goldvekht charted: "MRI findings and diagnoses are causally related to the incident noted above." Dr. Goldvekht prescribed physical therapy 3 times a week and referred Petitioner to Spine Surgeon of his choice. As to work status, the record states, "Off work pending reevaluation at my office on 9/16." Petitioner had therapy and massage at AMCI through 10/9/2020. (PX 2)

Petitioner testified that he began treatment with Dr. Thomas McNally, an orthopedic surgeon, beginning on August 28, 2020. He was referred to Dr. McNally by Dr. Goldvehkt. Petitioner testified that he reported a work related accident to Dr. McNally, and specifically told him that he injured his low back and left leg while filling potholes. Petitioner testified that he treated on a few occasions with Dr. McNally and was released from care and authorized to return to full duty work as of October 13, 2020.

The records of Suburban Orthopaedics/Dr. McNally were admitted as PX 3. On 8/28/20, based on the referral of Dr. Goldvekht, Petitioner presented to Dr. McNally of Suburban Orthopaedics. Matthew Barnes, PA-C charted: "Patient presents for an evaluation of his lower back. He states that he was working, when he suddenly began experiencing pain in his lower back and intense pain and tingling radiating down his left leg." Barnes noted that Petitioner's symptoms had improved following the LESI (significantly reduced back pain and left leg pain, but did not help the numbness and tingling in the left leg). The diagnosis was: Displacement of lumbar disc with radiculopathy and lumbar radiculopathy. Mr. Barnes advised Petitioner to remain off work, continue PT, and to bring his MRI and CT scan films to his next visit on 9/17/21. (PX 3)

On 9/17/21, Petitioner followed up with Dr. McNally and the the CT and MRI images were and discussed. Under Assessment and Plan, the record states, "We discussed that his symptoms are consistent with the MRI report

findings of L2-L3 and L3-L4 disc herniations. These disc displacements, the symptoms from them and the need for treatment are casually related to the work injury of 8/13/20." Dr. McNally advised Petitioner to remain off work and continue pain management and physical therapy with Dr. Goldvekht. (PX 3)

On 10/9/20, Dr. McNally released Petitioner to go back to work full duty as of 10/13/20. (PX 3)

Petitioner testified that he did return to work as of October 13, 2020 and continues to work his full duty job as an Asphalt Foreman. He is able to perform all of the functions of his job. He still has some lumbar spine symptomatology, but he is able to perform his job. He has to take some pills (Ibuprofen) to make it through the day.

Petitioner testified that he has not received any injury related medical treatment since 10/9/20.

Petitioner testified to his attendance at an independent medical examination with Dr. Julie Wehner on June 8, 2021. Petitioner testified that he was honest with Dr. Wehner.

Dr. Wehner's §12 report was admitted as RX 2. Dr. Wehner documented that Petitioner told her that the date of injury was 8/13/20 and he was working and he fell down to his knees when he had an onset of sharp low back pain radiating to his left knee. Dr. Wehner stated that Petitioner reported no specific injury at work that caused the onset of his back pain. He merely had this pain while he was at work. Dr. Wehner's diagnosis was resolved back and leg pain. Dr. Wehner concluded that this was not a work-related injury, stating "it is certainly possible to have spontaneous onset of back pain . . . there is no indication in the present medical records that I have reviewed that there was any work injury that caused the pain." Dr. Wehner lastly opined that Petitioner was capable of working full duty and had reached MMI. Dr. Wehner noted that Petitioner's treatment was reasonable, but has no causal relationship to any alleged work related injury that occurred on 8/13/20. (RX 2)

PX 4 was Petitioner's claimed medical bills. Northside Medical Group: (Dr. Goldvekht, $5,040.00; Mehal Patel, DC $1,768.00); Suburban Othopaedics: $568.00.

CONCLUSIONS OF LAW

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

Section 1(b)3(d) of the Act provides that, in order to obtain compensation under the Act, the employee bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment. 820 ILCS 305/1(b)3(d). To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of his claim. (O'Dette v. Industrial Commission, 79 Ill. 2d 249, 253 (1980)

Decisions of an arbitrator shall be based exclusively on evidence in the record of proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e)

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

Petitioner failed to prove that he sustained accidental injuries which arose out of and in the course of his employment by Respondent on August 13, 2020.

Petitioner noted an onset of excruciating pain radiating from his back to his left knee as he turned to walk back to the vehicle. He had been assisting filling in potholes on Nagle Avenue on August 13, 2020. He had been on duty as an asphalt working foreman for about 3 hours when this event occurred. Clearly the event occurred in the course of Petitioner's employment by Respondent.

The evidence adduced does not support a finding that Petitioner sustained accidental injuries which arose out of Petitioner's employment by Respondent. Merely experiencing pain when one turns and walks toward a vehicle does not constitute an accident arising out of one's employment. First, this is an event, not an accident. It certainly can be considered idiopathic, as there is no nexus between any work activity and Petitioner's radiculopathy condition. As is shown by the records of Dr. Berman, Petitioner presented with radiculopathy on August 11, 2020, two days before the accident date (stating that the pain started 1½ weeks before). As is shown by the records of Lutheran General, Petitioner said that his low back and left thigh pain had worsened over the past couple of days. There is no history of any work activity causing or aggravating the radicular symptoms. "There must be a showing that an injury, to be considered compensable, was due to a cause connected with the employment or incidental to it." Board of Trustees v. Industrial Commission, 44 Ill. 2d 207, 214 (1969) Here, the injury (or the onset of symptoms) was not caused by a risk incidental to Petitioner's employment by Respondent.

As there was a failure of proof on the issue of accident/arising out of, the claim for compensation is denied.

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

Based upon the finding above regarding the issue of accident/arising out of, the Arbitrator needs not decide the issue of causation.

It is noted that Dr. Goldvekht and Dr. McNally charted causation opinions, as set forth above, which the Arbitrator finds to be not persuasive.

Dr. Goldvehkt charted: "MRI findings and diagnoses are causally related to the incident noted above." (PX 2) The incident noted above was the patient was working on the street for about 3 hours when he began to experience stabbing pain. As stated above, there was no accident and there was merely an onset of symptoms. It does not appear that Dr. Goldvekht was aware of Petitioner's prior radiculopathy symptoms. Thus, there is no causation to any work accident.

Dr. McNally charted: "These disc displacements, the symptoms from them and the need for treatment are causally related to the work injury of 8/13/20." (PX 3) There was no work injury, so there can be no causation.

Dr. Wehner opined that Petitioner reported no specific injury or incident at work that caused his alleged low back pain. Dr. Wehner noted that Petitioner merely had pain while at work. Dr. Wehner also pointed out that the PCP

records document pain two days prior to the 8/13/20 date, but Petitioner denied the same. Dr. Wehner documented that based upon the history she obtained and review of all the contemporaneous medical records, Petitioner did not report and/or have any work injury that caused his pain and symptoms. Further, Dr. Wehner noted that since Petitioner denied any prior low back pain, there is no argument that his work activities, whatever they were, aggravated any preexisting low back problem. (RX 2) Dr. Wehner's opinions best comport with the evidence adduced and are persuasive on the issues of accident and causation.

Thus, there has been a failure of proof on the issue of causation.

WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, ISSUE (K), WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY, TEMPORARY PARTIAL DISABILITY AND/OR MAINTENANCE, ISSUE (L), WHAT IS THE NATURE AND EXTENT OF THE INJURY, THE ARBITRATOR FINDS:

Based upon the findings above on the issues of accident and causation, the Arbitrator needs not decide these issues.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC026360
Case Name	Bradley Turner v. Maryan Mining
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0389
Number of Pages of Decision	21
Decision Issued By	Stephen Mathis, Commissioner, Marc Parker, Commissioner

Petitioner Attorney	Keith Short
Respondent Attorney	Gregory Keltner

DATE FILED: 8/30/2023

/s/Stephen Mathis, Commissioner

Signature

/s/Marc Parker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

BRADLEY TURNER,

Petitioner,

vs. NO: 20 WC 026360

MARYAN MINING,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein, and notice given to all parties, the Commission, after considering the issues of accident, notice, causal connection, medical expenses, and prospective medical care, and being advised of the facts and law, corrects, and otherwise affirms and adopts the Decision of the Arbitrator as stated below and which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission corrects the clerical error on page 11, third full paragraph, wherein the Arbitrator erroneously identifies Dr. Matthew D. Collard as a Section 12 witness for Petitioner. Dr. Collard was a Section 12 examiner retained by Respondent. All else is affirmed and adopted.

IT IS THERFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 25, 2022, is hereby corrected as stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired

without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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 $50,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

August 30, 2023

/s/ *Stephen J. Mathis*
Stephen J. Mathis

SM/msb
o-7/26/23
44

/s/ *Deborah L. Simpson*
Deborah L. Simpson

SPECIAL CONCURRING OPINION

This case was scheduled for Oral Arguments on July 26, 2023, before a three-member panel of the Commission including members Stephen Mathis, Deborah L. Simpson, and Deborah J. Baker, at which time Oral Arguments were either heard, waived or denied. Subsequent to Oral Arguments and prior to the departure of Deborah J. Baker on August 18,2023, a majority of the panel members had reached agreement as to the results set forth in this decision and opinion, as evidenced by the internal Decision worksheet initialed by the entire three member panel, but no formal written decision was signed and issued prior to Commissioner Baker's departure.

Although I was not a member of the panel in question at the time Oral Arguments were heard, waived or denied, and I did not participate in the agreement reached by the majority in this case, I have reviewed the Decision worksheet showing how Commissioner Baker voted in this case, as well as the provisions of the Supreme Court in Zeigler v. Industrial Commission, 51 Ill.2d 137, 281 N.E.2d 342 (1972), which authorizes signature of a Decision by a member of the Commission who did not participate in the Decision. Accordingly, I am signing this Decision in order that it may issue.

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC026360
Case Name	Bradley Turner v. Maryan Mining
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	18
Decision Issued By	Dennis OBrien, Arbitrator

Petitioner Attorney	Keith Short
Respondent Attorney	Gregory Keltner

DATE FILED: 8/25/2022

/s/Dennis OBrien, Arbitrator

Signature

INTEREST RATE WEEK OF AUGUST 23, 2022 3.11%

STATE OF ILLINOIS)
)SS.
COUNTY OF **SANGAMON**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

BRADLEY TURNER
Employee/Petitioner

v.

MARYAN MINING
Employer/Respondent

Case # **20** WC **026360**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Dennis O'Brien**, Arbitrator of the Commission, in the city of **Springfield**, on **June 30, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **March 4, 2020**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

In the year preceding the injury, Petitioner earned $**57,180.00**; the average weekly wage was $**990.00**.

On the date of accident, Petitioner was **31** years of age, ***married*** with **2** dependent children.

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

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

Respondent is entitled to a credit of whatever medical has been paid by Respondent's group health insurer under Section 8(j) of the Act.

ORDER

Petitioner suffered an accident on March 4, 2020, which arose out of and in the course of his employment by Respondent.

Petitioner's medical conditions, a left shoulder Type II SLAP lesion, a labral tear at the level where the biceps attaches, with a large cyst close to the labrum, and aggravation of degenerative changes in the AC joint, and a right shoulder Type II SLAP lesion with possible extension into the anterior and inferior area of the labrum, and degenerative changes in the AC joint are causally related to the accident of March 4, 2020.

Petitioner gave Respondent notice of the accident within the time limits stated in the Act.

All of the bills introduced into evidence in Petitioner's Exhibits 6, 7, 8, and 9 are related to Petitioner's left shoulder Type II SLAP lesion, a labral tear at the level where the biceps attaches, with a large cyst close to the labrum, and aggravation of degenerative changes in the AC joint, and right shoulder Type II SLAP lesion with possible extension into the anterior and inferior area of the labrum, and degenerative changes in the AC joint injuries, are reasonable and were necessitated to treat or cure Petitioner's injuries suffered in this accident, and Respondent is ordered to pay said bills pursuant to the Medical Fee Schedule.

The parties stipulated that Respondent is to be awarded credit for any amounts of said bills which have been paid by its group medical insurance carrier pursuant to section 8(j) of the Act.

Petitioner is entitled to prospective medical treatment as recommended by Dr. Solman, to wit, shoulder arthroscopies with labral repairs and AC joint resections for both shoulders.

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

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

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

Signature of Arbitrator **August 25, 2022**

ICArbDec19(b)

FINDINGS OF FACT:

TESTIMONY AT ARBITRATION

Petitioner

Petitioner testified he is a coal miner currently employed by Patton Mining, having previously worked for Respondent, MaRyan Mining. He said he began working for Respondent in 2011, first as a roof bolter and then doing belt maintenance. He said he worked for Respondent until the mine closed down about two years prior to arbitration. He said he was still working for Respondent when he developed the problems that were the subject of the arbitration.

Petitioner said he had previously had workers' compensation claims, for bilateral cubital tunnel and bilateral carpal tunnel, all of which involved surgery, were accepted by Respondent and benefits were paid. He said he had several hobbies, including hunting, fishing, playing softball, and coaching baseball for his two sons. He said coaching was now harder, he did not hunt as often, he went hunting for about four hours twice a month when his shoulder problems developed. He said he hunted using a crossbow. He said he could not draw a compound bow, but he was using a crossbow at the time he developed his arm problems. He said a crossbow has a crank and cocks the bow for him. He said he would fish for about two hours from the bank about three times per month. He said he played softball for only a couple of years before he had shoulder issues. He said he can't throw a baseball when coaching.

Petitioner said he worked 45 to 55 hours per week, five days one week and 6 days the next week, with the extra day being mandatory.

Petitioner testified to the physical demands of his job as a roof bolter, using levers to spin an auger that drilled a hole in the ceiling of the coal mine, inserting glue sticks into the hole, inserting a rebar weighing about five pounds into the hole and then using a lever, have the auger screw that rebar into the roof. Petitioner testified that he installed 300 to 500 roof bolts per shift. He said he worked as a roof bolter for about five years.

Petitioner described the conveyor belt used in the mine in detail, noting the components of the belt were heavy. He noted all of the actions required to splice a belt which included lifting and moving rollers which weighed approximately 150 pounds. He said the splice required cutting of the belt and hammering nails into it, which when completed resembled a zipper. He said the hammer he used weighed 28 ounces and he would swing it between 5,000 to 10,000 times per shift. He said he used both arms to swing the hammer as his right arm would go numb, which was part of his prior carpal tunnel claim, not this claim. He noted he was right handed. He said he worked as a belt maintainer for three or four years, and during that period of time his shoulders bothered him, but it got worse by the end of the shift. He said this pain did not come on suddenly as a result of one event. He said his shoulders by the end of a work day did not feel good, and if he lay down in bed with his arm up the arm would go completely numb. His right arm was symptomatic before his left arm became symptomatic.

Petitioner said these were the only two jobs he performed for Respondent, and that the roof bolter position caused him more problems than the belt maintenance, as with roof bolting his hands were always above his head, the mine was six to eight feet tall, he was six feet tall, and his arms would be above the plane of the

shoulder when roof bolting. He said the tasks which bothered his shoulders when doing belt maintenance involved the heavy lifting and the use of cone-a-longs, which involved cranking a chain to connect the belt. He said the come-a-longs themselves varied in weight from 10 to 15 pounds, and he would use them at least ten times per shift.

Petitioner said he had complained to Dr. Kutnik, the surgeon who performed his elbow and wrist surgeries, about his shoulders, and he had seen Dr. Purves at Springfield Clinic who took x-rays and gave him a cortisone shot, which did not work, and Dr. Purvis referred him to physical therapy, which also did not help. He said there was some concern that his complaints might be due to his neck, so he saw a spinal surgeon who assured him he did not need neck surgery. He then saw Dr. Solman for his shoulders on November 13, 2020. An MRI was performed, and surgery to both shoulders was recommended. He said he had not yet had those surgeries, that he was asking the Commission to award them, as he was still having the same problems with his shoulders. Dr. Solman had not taken him off work at any time, he was continuing to work.

Petitioner said at the new mine he was working at, a longwall mine, he was running the gate box, and he had to take down a monorail, which is large, taking chains out of chain hangers, lowering a structure, and then moving it. He said he had not had any accident or traumatic events involving his shoulders at the new mine.

On cross examination Petitioner said his belt maintenance job involved 25 to 50 percent of his work per week being above shoulder level and the rest below shoulder level.

Petitioner said he had told Dr. Kutnik of his having shoulder problems when he was being seen for his hands and elbows. He said he would have last seen Dr. Kutnik on August 19, 2019, and he discussed his shoulders with the doctor on that date, and he would not have discussed his shoulder in the period between his surgery and that final visit.

Petitioner said he was hired by Respondent on October 11, 2011, and spent about 10 percent of his time in production and 90 percent roof bolting. He agreed that he shifted to the belt maintenance/outby job on June 27, 2016. He then began missing work for his hand and elbow conditions on April 8, 2019, returning to work on July 29, 2019, at which point he went back to belt maintenance. He said he filed an accident report on his shoulders on March 4, 2020 after talking to Dr. Kutnik. He said he did not know if that was also the day that notice went up that the mine was closing. He said he was transferred to equipment recovery at that point, to get all of the equipment out of the mine, as other workers were laid off or transferred to another mine, and he then went to the Patton mine in December, with an official hiring date there of January 4, 2021. At the Patton mine he was classified as a longwall head operator as of March 15, 2021, with that being the job where he would take the monorail, overhead chains and belts down, as he described earlier. He said that work also involved some work on a computer.

Petitioner said he saw Dr. Collard for an IME in June of 2020. He could not remember if he told that doctor that his shoulder problems started two years prior to the examination, but they may have started in early to mid 2018. In regard to the shoulders being worse at the end of a shift, he said he would notice it on the drive home from work, around when he filled out the accident report, but he could not date exactly when the shoulder pain and discomfort at the end of a shift began as it had been a long time, but it was at least two years before June of 2020. He said that, as noted in his history to Dr. Collard, he had hand problems develop at the same time his shoulder problems developed.

Petitioner said he saw a physician's assistant, Ms. Steely, at Springfield Clinic in Taylorville, on January 5, 2017 with a history of a rotator cuff injury and chronic left shoulder pain for six months, which prevented him from using a compound bow, and she gave him a slip to allow him to use a cross bow indefinitely, which meant he'd been having shoulder problems at least as far back as January of 2017.

Petitioner said that at no time did he have any hobbies or activities which involved heavy lifting, gripping or repetitive use.

On redirect examination Petitioner said that when he was having problems with his shoulders in 2017 and 2018, he was at the same time having problems with his hands and arms. He said he filed his accident report after Dr. Kutnik had exhausted all of his treatment for his arms, and a neck problem was ruled out.

Petitioner said the levers he used when roof bolting were hydraulic levers which controlled the chuck which installed the roof bolt, spinning and lifting at the same time.

MEDICAL EVIDENCE

Pre-March 4, 2020 Medical:

Petitioner saw either Dr. Hazard, Dr. Parker, Dr. Sinha, NP Herzberger, PA Steely or NP Hemann on January 5, 2017, May 26, 2017, June 12, 2017, June 27, 2017, October 17, 2017, November 10, 2017, December 20, 2017, January 4, 2018, February 13, 2018, September 14, 2018, January 18, 2019, June 13, 2019, and January 14, 2020 for routine checkups and medication refills, as well as a foreign body in the eye, upper respiratory infections, fatty lipoma removal, incision care, ingrown toenails, hypogonadism, seasonal allergies, and left leg complaints. No shoulder complaints are included in these office notes other than a listing as one of 18 to 29 "Active Problems" on each of those office dates, as well as in the same template on subsequent visits of "tendonitis of left rotator cuff." There is no indication of how long prior to the first visit in this record the finding of tendonitis of the rotator cuff was made or if such a complaint was made on more than one occasion. There are no voiced complaints reference either shoulder on any of these office visits. (RX 4 p.12,13,15,20,23, 28,31,40,41,45,50,54,56-59,62,63)

It is noted that on January 5, 2017, PA Steely authored a note "To Whom It May Concern" at Petitioner's request made during his January 5, 2017 visit, so he could, due to the leg injury she was seeing him for that day, be able to use a four-wheeler while hunting. Inexplicably, there is also a comment in that note requesting that Petitioner also be allowed to use a cross bow indefinitely as he had suffered from a left rotator cuff injury for more than six months. No mention of a rotator cuff complaint is made in that January 5, 2017 office note, nor is there mentioned a request for this crossbow exemption, while left leg injury is the only noted reason for Petitioner's being seen that day, and a request by Petitioner for the 4-wheeler exemption is noted in the office notes. Petitioner did testify at arbitration that he requested the crossbow waiver. No medical records for the preceding six month or 12 months were introduced into evidence. (RX 4 p.61-63)

Post-March 4, 2020 Medical:

Respondent was seen for a second opinion examination by Dr. Collard on June 18, 2020. Dr. Collard received a history from Petitioner of bilateral shoulder pain which had developed two years earlier while working as a belt man splicing belts and using a hammer quite a bit. He had numbness in his hands, even dropping the hammer at time, so he saw Dr. Kutnik who had electrodiagnostic testing performed. He was found

to have bilateral carpal tunnel and cubital tunnel syndromes which were surgically repaired. He had post-surgical physical therapy and returned to full duty work, at which point he still had some numbness, returned to Dr. Kutnik, and subsequently requested a second opinion. Dr. Collard reported that after returning to work Petitioner changed jobs and became an examiner, which Petitioner denied at arbitration, saying he had never been an examiner. Petitioner told Dr. Collard that his shoulder pain continued, as was as based as 9/10 on the left and 6-7/10 on the right. He said he was less concerned about his hands than his shoulders. Petitioner told him he had ceased playing softball as he could neither throw or bat. He said he was having some trouble fishing and hunting with a crossbow. Petitioner said he had shoulder pain prior to his hand and elbow surgeries which did not improve following those surgeries. Dr. Collard reviewed medical records, most of which were in regard to the treatment of Petitioner's hands and elbows, as well as an injury report and an injury investigation report, dealing with shoulder complaints, both dated March 4, 2020. Dr. Collard's physical examination of the shoulders of that date found no atrophy, full passive and active range of motion, with pain at the end points of forward flexion, a positive impingement test, and tenderness over the AC joint and over his trapezium and rhomboid musculature. Petitioner had mild pain with crossover testing. Dr. Collard found Petitioner's pain was reproduced with scaption past 100 degrees, which caused some popping at his AC joints, left worse than right, and happening every time it went past 110 degrees. Other testing was deemed normal, or negative. Testing of Petitioner's hands and elbows revealed no deficits or abnormal findings. X-rays of the shoulders were deemed normal overall. Dr. Collard's impression was bilateral shoulder pain and persistent paresthesias post bilateral carpal tunnel releases and ulnar nerve transpositions. Dr. Collard's opinions will be noted in his deposition summary, below. (RX 1, Exh. 2, p.1-5)

Petitioner saw Physician Assistant (PA) Steely on July 27, 2020 for a routine checkup and medication refill. During this visit he mentioned he had been having shoulder pain for at least two years, was having trouble holding bolt cutters over his head and had dropped the bolt cutters on a couple of occasions. He noted he did a lot of heavy lifting, overhead lifting and would pick up items from the ground. He wanted to be reevaluated for that problem. PA Steely noted she was referring him to an orthopedic specialist in the clinic. (PX 2 p.92; RX 5 p.13)

Petitioner saw PA Purves on August 6, 2020 for evaluation of bilateral shoulder and arm pain, giving a history of problems with his arms for two years, working for seven years as a roof bolter and the last two years as a splicer, with both jobs requiring overhead work and repetitive work. He said his work activities increased his symptoms. Physical examination of the shoulders showed full range of motion, but clicking and popping were felt on the left side with range of motion. Supraspinatus strength was reduced to 4+/5 with some discomfort on the right side and mild discomfort on the left side. Labral testing also increased pain on the left side and minimally on the right side. X-rays of the left and right shoulders on August 6, 2020 were interpreted as unremarkable. Impression at this time was bilateral shoulder pain and bilateral arm numbness and tingling. PA Purves felt Petitioner's problems were work related as a source of his discomfort as he had not had any recent injury or trauma. Physical therapy was recommended, to be followed, if necessary, but an EMG/NCV and possibly more imaging of the shoulders. (PX 2 p.82,83,87,88; RX 5 p.3,4,8,9)

Physical therapy was provided from an initial evaluation on August 18, 2020 through August 31, 2020. Both cervical and shoulder treatment was provided. By August 31, 2020 the therapist was of the opinion that Petitioner was not showing progress in therapy, his range of motion and strength were worse on the fourth visit

than when initially seen, and Petitioner was referred back to his physician for further assessment of the neck and shoulders as the therapist was concerned the shoulder pain and weakness was radicular. (PX 2 p.95-100; PX 3 p.104-110; RX 5 p.16-21)

Petitioner saw PA Purves again on September 3, 2020, complaining of bilateral shoulder pain and bilateral arm numbness and tingling, with the left shoulder bothering him more than the right. He had been receiving physical therapy and they thought it was coming from his neck. On physical examination Petitioner was found to have full active range of motion of both shoulders, with pain on the left side but not on the right. Petitioner had mild tenderness of the AC joint on the left with palpation. PA Purves's impression was left shoulder impingement syndrome with AC joint irritation, right shoulder discomfort of a lesser degree than on the right, and cervical radiculopathy causing bilateral arm numbness and tingling. Petitioner received corticosteroid injections to the left shoulder subacromial space and to the left AC joint. An EMG/NCV was ordered. (PX 2 p.84; RX 5 p.5)

Petitioner continued to have worsening complaints as physical therapy continued in September, with the therapist stating on September 11, 2020 that Petitioner continued to be limited with strengthening due to shaking in both shoulders. He noted mild improvement in his left shoulder after his recent injection. It was noted that Petitioner's symptoms continued to limit his progress. At his eighth and last physical therapy session on September 25, 2020, it was noted that he no longer had any improvement in the left shoulder from his injection, his pain was 3/10 in the morning and at its worst 9/10 in the left shoulder, 7/10 in his right shoulder, and 6/10 in his neck. The therapist had noted no notable change in his symptoms of neck pain, or shoulder range of motion or strength. The therapist felt Petitioner should have further assessment due to his lack of progress in therapy. (PX 3 p.111-116)

Petitioner was seen by Dr. Solman on November 13, 2020, receiving a basic description of Petitioner's work, as including heavy and repetitive work, including swinging a hammer, driving equipment which requires looking right and left, splicing belts by hammering, and lifting large, heavy objects. Petitioner described the neck, shoulder and arm complaints he received over the past few years, saying his left shoulder was a good deal worse than the right, and would pop and click. He described his bass fishing to the doctor, along with his playing softball and hitting ground balls to his children. Petitioner advised him he could not throw normally due to right shoulder pain. Petitioner noted he was a long-time hunter and now had to use a crossbow as he could not pull back on his bow. He said he did not use a rifle or shotgun due to pain and weakness. On physical examination Dr. Solman found decreased cervical extension range of motion due to pain, but all other ranges were normal as were other cervical tests. He had mild tremors with strength testing of the right shoulder, mild tenderness over his bicipital grooves and over the upper trapezius. The left shoulder showed reduced external rotation, and pain with external rotation and internal rotation. He found moderate+ tenderness over the left AC joint, a significantly positive O'Brien's sign, and a positive active compression test. Speed's test was moderately positive and hie had pain with apprehension and internal rotation adduction and flexion. He also had pain with jerk testing and moderate pain with cross-arm adduction in the anterior superior shoulder. X-rays of the shoulders were fairly benign, with only a mild Type II acromion and minimal arthritic changes in the AC joint. Dr. Solman's assessment was cervical spine pain, possible labral tear and biceps tenosynovitis of the right shoulder, and left shoulder pain with likely labral tear, possible biceps subluxation and AC joint arthrosis. Dr. Solman was of the opinion that Petitioner's work in the coal mine certainly could be considered a substantial

contributing factor in the development of the neck pain and the bilateral shoulder pain as it was repetitive and involved heavy lifting. He did not think Petitioner's left shoulder was unstable, he recommended an MRI of the left shoulder. While he did not feel the right shoulder was as bad as the left, he also recommended an MRI for that shoulder as well. He was leaving it to Dr. Raskas to give opinions on any cervical conditions. (PX 4 p.119-122)

Dr. Raskas saw Petitioner due to cervical pain on January 29, 2021. He gave a history of neck neck pain for over two years and of bilateral shoulder pain. He took a very detailed description of Petitioner's work activities in regard to driving in the mine and what happened in regard to his neck while performing certain movements. He noted Petitioner had waited to be seen for his neck for a year to see if symptoms would improve following his hand and elbow surgeries, and these symptoms had not. Dr. Raskas's physical examination found good strength in all locations, point tenderness along the axial region of the cervical spine, especially at C7, difficulty with extension, difficulty with side-to-side bending and lateral motion, good motor strength in the bicep and tricep, and normal sensation in the dermatomal patterns. He did note difficulty with range of motion of the shoulders, especially in abduction of the left shoulder, tenderness of the AC joint bilaterally and limited range of motion there, but worse on the left, and a fairly significant positive O'Brien's test and active compression test. He found the bicep tendon to be tender. His interpretation of the shoulder x-rays was consistent with Dr. Solman. He did not find any definitive problems in the neck but recommended a cervical MRI, with a follow up appointment when that was done. He agreed with Dr. Solman that MRIs of the shoulders were needed. (PX 4 p.124,125,127)

A cervical MRI was performed on April 8, 2021, and it only showed minor cervical spondylotic changes with no high-grade neural foraminal narrowing. Shoulder MRIs were performed that same date, with the left revealing a complex left inferior glenoid labral tear with large paralabral cyst formation, an intact rotator cuff, mild AC joint osteoarthritis, and mild inferior left glenoid chondrosis. The right shoulder MRI was interpreted as showing a likely tear of both the superior and inferior labrum, an intact right rotator cuff, mild AC joint arthritis, and mild subacromial subdeltoid bursitis. (PX 5 p.138-141)

After the MRIs were performed Petitioner was again seen by Dr. Solman on April 23, 2021. Petitioner was continuing to complain of bilateral shoulder pain. Petitioner advised him that he continued to work full duty, and had just worked 12 hours per day for seven straight days, so he was in a lot of pain in the shoulders. Dr. Solman again examined Petitioner, with results similar to his prior examination. Dr. Solman said he personally reviewed the MRIs of the shoulders, and he left shoulder had a Type II SLAP tear and a large paralabral cyst, but no rotator cuff tear. There was also mild AC joint degenerative changes wit osteolysis of the distal clavicle. The right shoulder MRI also showed a Type II SLAP lesion and mild AC joint arthritic changes with distal clavicle osteolysis. Dr. Solman recommended bilateral shoulder arthroscopic surgery with labral repais, a paralabral cyst decompression on the left and bilateral distal clavicle resections due to AC joint inflammation. The shoulder surgeries would be performed six to eight weeks apart. He said Petitioner could continue to work full duty until the time of surgery. (PX 4 p.129-131)

Petitioner was seen by Dr. Raskas on May 21, 2021 to review the cervical MRI images. Dr. Raskas said the cervical discs looked very healthy, with some dehydration at C5/6, but no significant foraminal narrowing whatsoever, that no definitive tear of a disc was seen. He advised Petitioner he did not have an operative

problem, that he should have shoulder surgery, and that his neck be addressed with pain management and physical therapy. (PX 4 p.133,134)

DEPOSITION TESTIMONY OF DR. COREY SOLMAN

Dr. Solman was deposed as a witness for Petitioner on February 22, 2022. He testified that he was a board certified orthopedist who specialized in complicated issues with knee and shoulder pathology, with about 45 percent of his practice involving shoulder pathology, from arthroscopy through replacements. He said he first treated Petitioner on November 13, 2020. His testimony in regard to complaints, history, physical examination findings, and MRI results was consistent with the medical summary of his visits, above. He said Dr. Kutnick limits his practice to upper extremity work, but he did not do shoulder work. Petitioner's description of his work and his hobbies to Dr. Solman was detailed and consistent with his testimony at arbitration. (PX 1 p.5,6,8,9)

Dr. Solman said Petitioner's left shoulder had evidence of a Type 2 slap lesion, a labral tear at the level where the biceps attaches, with a large cyst close to the labrum, as well as degenerative changes in the AC joint. The right shoulder had a slap lesion similar to the left shoulder's with possible extension into the anterior and inferior area of the labrum, and, again, degenerative changes in the AC joint. (PX 1 p.15,16,19)

Dr. Solman said after examinations of Petitioner and obtaining MRIs, he recommended shoulder arthroscopies with labral repairs and AC joint resections for both shoulders. He also allowed Petitioner to remain working. It was his opinion that Petitioner's work activities caused or aggravated the shoulder conditions which required surgery. Dr. Solman said that when a person was putting a significant stress on the shoulder such as heavy lifting, rotational motions of the shoulder with lifting material or with swinging a hammer, torquing or stress or lifting activities, that puts stress on the labrum, especially where he saw Petitioner's tears at the level of the biceps, as those activities are putting stress on the rotator cuff and the biceps, and the biceps can and does pull and put tension on the superior labrum which can eventually lead to tearing, and continued stress on the shoulder can cause the posterior or anterior extensions of the tears as were seen on Petitioner's MRIs. He said after the surgeries Petitioner would not be able to perform full, unrestricted duties in the work he does for four-and-a-half to five months, per shoulder, and the surgeries could be performed about eight weeks apart. (PX 1 p.16,18-21)

Dr. Solman said he agreed with Dr. Raskas, Petitioner was not a good candidate for cervical surgery. He said that it was possible there could be a separate problem going on, but he believed Petitioner had bilateral shoulder issues. He identified Exhibit 3 to Petitioner Exhibit 1 as his bills, which were necessary to evaluate, diagnose or treat Petitioner's conditions. (PX 1 p.22-24)

On cross examination Dr. Solman said he examined Petitioner on two occasions. He said his opinion on causation was based upon the accuracy of Petitioner's descriptions to him of his job duties, though he did not have a specific job description for his work. It was Dr. Solman's thought that Petitioner told him his shoulder symptoms began sometime in 2019, or before that. Petitioner advised him that he had no previous issues with his neck or shoulder pitot to the onset of pain from his work-related activities, and Dr. Solman said he had no information indicating left shoulder problems, symptoms, complaints or medical treatment prior to 2019. He said Petitioner told him his left shoulder problems were more significant than his right. He did not have a definite timeframe for when Petitioner believed his shoulder problems were related to his work, other than he

did when he saw Dr. Kutnik. He believed Petitioner had been having a problem pulling on his compound bow prior to his hand and elbow surgeries by Dr. Kutnik. He said he believed that if Petitioner had not developed carpal and cubital tunnel, he still would have developed his shoulder problems. (PX 1 p.27-32,35)

Dr. Solman said the findings on both of Petitioner's shoulders' MRIs could develop simply as degenerative changes without repetitive trauma, but at 31 Petitioner was a little young for that. He noted he had never restricted Petitioner from work. (PX 1 p.34-36)

On redirect examination Dr. Solman said that a person could have asymptomatic pathology in their shoulders which was made symptomatic with activities such as Petitioner's work. He said he did not believe Petitioner simply had a natural progression of pathology irrespective of work, he said it was possible that Petitioner had asymptomatic pathology before, but the work-related activities either caused the condition or caused it to become asymptomatic. He said Petitioner's work activities put greater stress on the shoulder than activities of daily living, and his work activities put Petitioner at greater risk of injury than the non-work-related activities Petitioner had described. (PX 1 p.36,37)

DEPOSITION TESTIMONY OF DR. MATTHEW D. COLLARD

Dr. Collard was deposed as a witness for Petitioner on March 17, 2022. He testified he is a board certified orthopedic surgeon who treated all orthopedic problems other than the spine and feet. He said he surgically treated shoulders, including labral tears, biceps tenodysis, rotator cuff tears, and total shoulder replacements. He said he also provided non-surgical treatment of the shoulder. Treatment of shoulders constituted 30 to 40 percent of his practice, and he performed about 100 shoulder surgeries per year. (RX 1 p.4-6)

Dr. Collard said he performed an independent medical examination of Petitioner in June of 2020. He said he performed about 100 such IMEs in 2020, the majority of which were at the request of the employer or its insurance carrier. He said he reviewed medical records as part of his examination and a summary of those records was included in his report. Dr. Collard's testimony in regard to history given to him by Petitioner of complaints, treatment, work duties, and physical examination findings was consistent with the summary of his report, above. He again mentioned Petitioner's problems worsened when he was an examiner. (RX 1 p.6-18)

Dr. Collard said that after considering the history given to him by Petitioner, his examination findings, the work duties of Petitioner, and the records he reviewed, he was of the opinion that there was no causal relationship between Petitioner's pain and his work, and that there was no aggravation of an underlying issue with his shoulder relating to his work either as a specific injury or as a repetitive use injury. He said this was based on Petitioner's timeline for developing the pain being somewhat vague, and if he developed it, he did it at the same time he developed his earlier workers' compensation claim, his being off for that and his having no change in his pain pattern after being off work. Dr. Collard said Petitioner had a hard overhead job, but it did not make any sense to him. (RX 1 p.18-21)

Dr. Collard did not believe Petitioner was in need of additional medical treatment for this injury, because it was not causally related. When asked to take causal relationship out of the question, Dr. Collard said Petitioner could benefit from treatment. (RX 1 p.22,23)

Dr. Collard said he generated a second report after reviewing additional medical records and the films of Petitioner's MRIs. He said he summarized those in deposition Exhibit 3. They did not change his earlier opinions significantly. He felt the right shoulder MRI was normal other than some possible tearing of the anterosuperior labrum, which he felt was consistent with a Type I SLAP lesion, some mild arthritic changes, and mild fluid in the AC joint. The rotator cuff was intact, as was the biceps. He did not feel that pathology was due to Petitioner's work activities. He felt the left shoulder MRI showed an anterosuperior labral tear which was grade II in nature and had an inferior labral cyst that was multilobulated, having the appearance of a small bag of grapes. He felt there were mild degenerative changes in the AC joint, but the rotator cuff and biceps were intact. He did not feel any of that pathology was related to Petitioner's work. He then said he "did feel like after the MRIs you have a better clearer picture of the overall health of (Petitioner's) shoulder in that he still had kind of a vague causation repetitive use type issue because he's a hard-working guy," but that these types of labral tears were consistent with subluxation and potential dislocation, which are not issues of repetitive use, they are caused by trauma, large traumatic injuries. (RX 1 p.23-27)

Dr. Collard did not feel Petitioner's using a stair climber of swimming three times a week were the activities of a person with ongoing shoulder issues, that swimming with your arms overhead could arguably be part of the cause of his condition, or at least an aggravating factor. He said swimming would not have caused Petitioner's labral tears, however. (RX 1 p.28,29)

On cross examination Dr. Collard said that while physical therapy would be good to try if a person had labral tears, he did not think swimming was a substitute for formal physical therapy. Dr. Collard said he did not disagree that Petitioner needed surgery, he just didn't feel the surgery would be related to that need for surgery. He said he could agree with Dr. Solman's approach that surgery might be required. (RX 1 p.30,31)

Dr. Collard said he did not question Petitioner's veracity, he appeared forthright and reasonable in his history to him. (RX 1 p.31,32)

When asked why Petitioner was having these bilateral shoulder complaints, Dr. Collard stated that he really thought Petitioner had a perineural cyst at C5-C6 that was causing numbness and tingling down both arms, and he thought Petitioner's chronic shoulder problems would get significantly better if his neck was addressed. He said he did not think the cyst in the neck was aggravated by Petitioner's work. He thought if they cut those cervical cysts out a significant amount of his neck pain would go away. (RX 1 p.33,34)

Dr. Collard said Petitioner had some chronic changes, "(b)ecause every coal miner that you ever MRI their shoulders * * * 25 years old, or 30 years old, that they're going to have some labral changes or biceps tendonitis on every MRI." Dr. Collard said he had seen this type of work, and it was pretty rough work. (RX 1 p.34)

Dr. Collard noted that Petitioner did not complain of his shoulders to Dr. Kutnik, who treated his hands and elbows, but then agreed that Dr. Kutnik was not a "shoulder guy." (RX 1 p.37)

Dr. Collard said that Petitioner had popping of his AC joints when he examined him, and which Dr. Collard could reproduce on examination, but that did not show on the MRI at all, but would be consistent with old AC separations or mild subluxations, and that was just an incidental finding. (RX 1 p.38)

Dr. Collard said that one reason for his not finding causation was the fact Petitioner had not had a specific traumatic event. (RX 1 p.38,39)

DOCUMENTARY EVIDENCE

Petitioner filled out an Injured Employee's Report noting an injury to his shoulders, describing it as feeling like it dislocates, with the entire arm going numb. While the report is dated "3-14-2020," Petitioner testified at arbitration that he reported the accident and filled out the report on March 4, 2020. (RX 2)

Petitioner also signed a Report of Injury investigation on March 4, 2020, noting the same description, that his shoulders felt like they would dislocate when he raised his arms above his head. A supervisor apparently filled out page two of Respondent Exhibit 3, but there are no company signatures on the document. The unknown supervisor marked the cause of the root cause of the injury as "habit," and said there was nothing Petitioner could have done to prevent the incident, that it was not the result of an unsafe act. (RX 3)

ARBITRATOR CREDIBILITY ASSESSMENT

Petitioner appeared to answer all questions from both counsel in a straightforward way. He did not appear to exaggerate his complaints or his job duties. His doctor and Respondent's examining physician did not question his veracity. Petitioner readily admitted to continuing, though reduced, non-work hobbies such as fishing and hunting which would have involved the use of his shoulders. He has continued to work fully duty from the date of his first testing and treatment through the day of arbitration. The Arbitrator finds Petitioner to have been a credible witness.

Both Dr. Solman and Dr. Collard answered questions in a professional manner whether the questions came from Petitioner's attorney or Respondent's attorney. There was no apparent attempt by either to favor one attorney or party over the other. While their opinions differed, that appeared to be more of a personal opinion on causation than a difference in actual medical findings, and the Arbitrator finds both Dr. Solman and Dr. Collard to be credible witnesses.

CONCLUSIONS OF LAW:

In support of the Arbitrator's decision relating to whether an accident occurred which arose out of and in the course of Petitioner's employment by Respondent on March 4, 2020, and whether Petitioner's current conditions of ill-being, a left shoulder Type II SLAP lesion, a labral tear at the level where the biceps attaches, with a large cyst close to the labrum, and aggravation of degenerative changes in the AC joint, and a right shoulder Type II SLAP lesion with possible extension into the anterior and inferior area of the labrum, and degenerative changes in the AC joint, are causally related to the accident of March 4, 2020, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of medical evidence, deposition testimony, and documentary evidence, above, are incorporated herein.

Petitioner testified that his bilateral shoulder pain started when he was a roof bolter and worsened during his time performing belt maintenance. His first five years in the mine were as a roof bolter. It is unrebutted that on a consistent basis Petitioner drilled and installed between 300 and 500 roof bolts per shift, 5 days one week and 6 days the second week. Mathematically, Petitioner would drill and install approximately 2,000 or more roof bolts per week. Petitioner testified that the majority of this work was done overhead, with his arms lowered only to lift materials or operate levers. If he worked 50 weeks a year, he would be required to install 75,000 to 82,500 roof bolts. In a five-year period, he installed 375,000 to 412,500 roof bolts. This testimony is uncontradicted and plainly establishes substantial, repetitive, forceful overhead work.

Using the same analysis, Petitioner's unrebutted testimony is that he swung the 28 oz hammer between 5,000 and 10,000 times a shift. That would be at the minimum 25,000 hammer strikes per week, or approximately 1.25 million per year. Even if Petitioner's recollection unintentionally elevated this activity by 20%, Petitioner would still swing the hammer at least a million times in a year. Again, this testimony was unrebutted.

Petitioner was asked if March 4, 2020 was, in addition to the date that he reported the his shoulder problems to the mine, also the date that the notice was given that the mine was closing. He said he was not sure. But he went on to say that his job changed at that time, subsequent to that time he was no longer performing the work of a belt maintainer, he was transferred to equipment recovery at that point, to get all of the equipment out of the mine, as other workers were laid off or transferred to another mine. It would appear that March 4, 2020 would have been the last date Petitioner worked as a belt maintainer, the job which was repetitive and forceful and which Dr. Salmon stated caused or aggravated his bilateral shoulder conditions. It would therefore be an appropriate manifestation date for his repetitive trauma injuries.

The activities described by Petitioner constitute an accident under Peoria County Belwood Nursing Home v. Industrial Commission, 115 Ill. 2d 524 (1987) and its progeny.

Dr. Solman testified that the work activities were the cause of Petitioner's bilateral shoulder tears. His testimony is more convincing and carried more weight than that of Dr. Collard, particularly when considering that most of Petitioner's work was done above the shoulder plane and required constant lifting, regular vibration, and application of force. Dr Collard concurred that coal mining caused more shoulder tears than the general public. He acknowledged that coal mining is heavy work. More importantly, he acknowledged that there could be enough force in the work activities to aggravate any degenerative tears such that surgery was necessary. His assertion that the kind of injuries Petitioner had are not typically seen in repetitive work is unpersuasive.

The non-work-related activities Petitioner described to his physicians and at arbitration appear to be inconsequential and would not be expected to cause bilateral shoulder injury. Petitioner previously used a compound bow which would put stress on the shoulders, but ceased doing that when having problems with his hands and elbows prior to the shoulder complaints voiced at arbitration, and instead was using a crossbow, which did not cause said stress on the shoulders. Work would appear to be the most significant factor in his shoulder pain, particularly since the cervical cyst has been ruled out as pathological by a spine surgeon.

The Arbitrator finds that Petitioner suffered a repetitive trauma accident on March 4, 2020, which arose out of and in the course of his employment by Respondent.

The Arbitrator further finds that Petitioner's medical conditions, a left shoulder Type II SLAP lesion, a labral tear at the level where the biceps attaches, with a large cyst close to the labrum, and aggravation of degenerative changes in the AC joint, and a right shoulder Type II SLAP lesion with possible extension into the anterior and inferior area of the labrum, and degenerative changes in the AC joint, are causally related to the accident of March 4, 2020. This finding is based upon the testimony of Petitioner, the medical records admitted at arbitration, the documentary evidence admitted at arbitration, and the opinions testified to by Dr. Sloman. The opinions of Dr. Collard are given less weight in part as those opinions stand in sharp contrast to his testimony that "(b)ecause every coal miner that you ever MRI their shoulders * * * 25 years old, or 30 years old, that they're going to have some labral changes or biceps tendonitis on every MRI" noting that he had seen this type of work, and it was pretty rough work.

In support of the Arbitrator's decision relating to whether notice of the accident was given to Respondent within the time limits stated in the Act, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of medical evidence, deposition testimony, and documentary evidence, above, are incorporated herein.

The findings in regard to accident and causal connection, above, are incorporated herein.

Notice must be given as soon as practicable, but no later than 45 days after the accident. 820 ILCS 305/6(c). The notice requirement applies to employees who suffer repetitive trauma injuries as well as those who suffer traumatic injuries sustained on a specific date and time. White vs. Workers' Compensation Commission, 374 Ill. App. 3d 907,910 (2007). "No defect or inaccuracy of such notice shall be a bar to the maintenance of proceedings on arbitration or otherwise by the employee unless the employer proves that he is unduly prejudiced in such proceedings by such defect or inaccuracy." 820 ILCS 305/6(c). Respondent has introduced no evidence showing it was unduly prejudiced by any defect or inaccuracy in the notice provided, and indeed introduced exhibits acknowledging that Petitioner gave notice of this accident on March 4, 2020.

Here Petitioner changed work assignments on or about March 4, 2020, ceasing to perform the duties of a belt maintainer, the duties alleged to have caused or aggravated his bilateral shoulder injuries, and he reported his injuries on that date. Petitioner filled out accident reports on that date.

The Arbitrator finds that Petitioner gave Respondent notice of the accident within the time limits stated in the Act. This finding is based upon the testimony of the Petitioner and the documentary evidence admitted at arbitration.

In support of the Arbitrator's decision relating to whether the medical services that were provided to Petitioner were reasonable and necessary as a result of the Accident of March 4, 2020, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of medical evidence, deposition testimony, and documentary evidence, above, are incorporated herein.

The findings in regard to accident and causal connection, above, are incorporated herein.

Petitioner Exhibit 6 includes the medical bills for services rendered by PA Steely and PA Purves on July 27, 2020, August 6, 2020, and September 3, 2020, which were for medical services to treat the injuries sustained in this accident.

Petitioner Exhibit 7 includes the medical bills of Taylorville Memorial Hospital from August 18, 2020 though September 25, 2020, which were for physical therapy services to treat the injuries sustained in this accident.

Petitioner Exhibit 8 includes the medical bills of Orthopedic and Spine Institute of St. Louis, LLC from November 13, 2020, January 29, 2021, April 23, 2021, and May 21, 2021, which were for medical services rendered by Dr. Solman and Dr. Raskas to treat the injuries sustained in this accident.

Petitioner Exhibit 9 includes the medical bills of Taylorville Memorial Hospital from April 8, 2021 for MRIs conducted on that date to help diagnose Petitioner's injuries sustained in this accident.

The Arbitrator finds that all of the bills introduced into evidence in Petitioner's Exhibits 6,7,8, and 9 are related to Petitioner's left shoulder Type II SLAP lesion, a labral tear at the level where the biceps attaches, with a large cyst close to the labrum, and aggravation of degenerative changes in the AC joint, and right shoulder Type II SLAP lesion with possible extension into the anterior and inferior area of the labrum, and degenerative changes in the AC joint injuries, are reasonable and were necessitated to treat or cure Petitioner's injuries suffered in this accident, and Respondent is ordered to paid said bills pursuant to the Medical Fee Schedule. The parties stipulated that Respondent is to be awarded credit for any amounts of said bills which have been paid by its group medical insurance carrier pursuant to section 8(j) of the Act. This finding is based upon the medical records introduced into evidence and the testimony of Petitioner and Dr. Solman.

In support of the Arbitrator's decision relating to whether Petitioner is entitled to any prospective medical treatment, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of medical evidence, deposition testimony, and documentary evidence, above, are incorporated herein.

The findings in regard to accident, causal connection, and medical bills, above, are incorporated herein.

Dr. Solman, Dr. Raskas, and Dr. Collard all agreed that the surgeries recommended by Dr. Solman, shoulder arthroscopies with labral repairs and AC joint resections for both shoulders, were reasonable for the treatment of Petitioner's injuries, injuries which were found causally related to this accident, as noted above.

Petitioner testified that s of the date of arbitration he was still having the symptoms he had been experiencing when seen by Dr. Solman, and that he still desired to have the surgeries recommended by Dr. Solman.

The Arbitrator finds that Petitioner is entitled to prospective medical treatment as recommended by Dr. Solman and Dr. Raskas, to wit, shoulder arthroscopies with labral repairs and AC joint resections for both shoulders. This finding is based upon the treating medical records summarized above, the testimony of Dr. Solman, and that portion of Dr. Collard's testimony where he agreed these surgeries were reasonable to repair Petitioner's injuries.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC028641
Case Name	Jesse Mata v. Local Roofing Company, Inc.
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0390
Number of Pages of Decision	25
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Randall Manoyan
Respondent Attorney	Marcy Singer Ruiz

DATE FILED: 8/30/2023

/s/Christopher Harris, Commissioner

Signature

23IWCC0390

STATE OF ILLINOIS)	☐ Affirm and adopt (no changes)
) SS.	☐ Affirm with changes
COUNTY OF LAKE)	☐ Reverse
	☒ Modify up
	☐ 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

JESSE MATA,
Petitioner,

vs. NO: 18 WC 28641

LOCAL ROOFING COMPANY, INC.,
Respondent.

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 benefit rates, causal connection, the reasonableness and necessity of the medical treatment and charges, prospective medical treatment, temporary total disability benefits ("TTD"), permanent partial disability benefits ("PPD"), penalties, and credit, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Petitioner established he was temporarily and totally disabled from April 11, 2018 through July 15, 2018 and October 15, 2018 through January 19, 2021. For reasons stated below, the Commission finds that the Petitioner has failed to demonstrate that he was temporarily and totally disabled from July 16, 2018 through October 14, 2018.

An employee is temporarily totally disabled from the time an injury incapacitates him until such time as he is as far recovered as the permanent character of the injury will permit. *Archer Daniels Midland Co. v. Industrial Comm'n*, 138 Ill. 2d 107, 118, 561 N.E.2d 623, 149 Ill. Dec. 253 (1990); *Westin Hotel*, 372 Ill. App. 3d at 542. To be entitled to TTD benefits, the employee must establish not only that he did not work, but also that he is unable to work and the duration of that inability to work. *Pietrzak v. Industrial Comm'n*, 329 Ill. App. 3d 828, 832, 769 N.E.2d 66, 263 Ill. Dec. 864 (2002); see also *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n*, 236 Ill.2d 132, 142, 923 n.E.2d 266, 337 Ill. Dec. 707 (2010). ("[W]hen determining whether an employee is entitled to TTD benefits, the test is whether the employee remains temporarily totally disabled as a result of a work-related injury and whether the employee is capable of returning to the work force.").

The Petitioner provided general testimony only as to the period during which he worked after the accident and before his left leg was amputated on September 18, 2019. When questioned whether he worked between July 16, 2018 and October 14, 2018, the Petitioner testified that he knew he returned work at some point before his left leg was amputated. (T.150–152.) No payroll records were introduced by either party establishing whether the Petitioner worked between July 16, 2018 and October 14, 2018. However, the medical records from Athletico, AMG-Lincolnshire Orthopedics, and Dr. Susan Cohn ("Dr. Cohn") demonstrate that the Petitioner was working during this period. The Athletico physical therapy record, dated August 1, 2018, indicated that Petitioner had returned to work part-time working with restrictions. (PX.3.) Further, the medical record from AMG-Lincolnshire Orthopedics, dated August 6, 2018, indicated that the Petitioner may continue to perform sitting work. (PX.10). Finally, Dr. Cohn's medical record, dated October 19, 2018, indicated that the Petitioner was well until he left work early on October 10, 2018. (*Id.)* Therefore, the Commission finds that the Petitioner failed to prove he was temporarily and totally disabled between July 16, 2018 and October 14, 2018 as the medical records and Petitioner's testimony establish that he was working during this period.

The Commission further finds that the evidence supports an increase in the PPD award relating to Petitioner's injury. Based upon his injuries, the Commission finds that Petitioner sustained 35% loss of use of the person-as-a-whole pursuant to Section 8(d)(2) of the Act. The Commission has considered the five factors under Section 8.1b of the Act:

(i) Impairment Rating: Neither party submitted an impairment rating. As such, the Commission assigns no weight to this factor and will assess Petitioner's permanent disability based upon the remaining enumerated factors.

(ii) Occupation of Injured Employee: The Commission assigns significant weight to this factor. The Petitioner worked as a roofer. His left leg was amputated below the knee due to the work-related injury. Dr. Terrance Peabody ("Dr. Peabody") and Dr. Matthew Jimenez ("Dr. Jimenez") both stated that the Petitioner could not return to work as a roofer given the amputation.

(iii) Petitioner's Age: The Commission assigns moderate weight to this factor. The Petitioner was 60-years old at the time of the injury. While the Petitioner is precluded from returning to work as a roofer, he has only a few work years remaining in which to encounter the effects of the injury.

(iv) Petitioner's Future Earning Capacity: The Commission assigns some weight to this factor. The Commission has adopted the Arbitrator's finding that the job offered by the Respondent to the Petitioner was a legitimate job offer. The Petitioner was offered a job at his pre-injury wage but chose not to accept the position.

(v) Evidence of Disability: The Commission assigns significant weight to this factor. The Petitioner underwent multiple surgeries before his left leg was amputated below the knee. While he was paid the statutory benefits for the amputation, the injury has had a profound impact on his life. He received permanent restrictions following the amputation. Dr. Peabody and Dr. Jimenez both stated that the Petitioner could not

return to work as a roofer given the amputation. He will also have to have his prosthetic leg reprogrammed every five years and have to undergo adjustments as needed.

In light of the foregoing, with no single enumerated factor being the sole determinant of disability, the Commission modifies the Decision of the Arbitrator and awards Petitioner 35% loss of use of the person-as-a-whole pursuant to Section 8(d)(2) of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed August 1, 2022, is hereby modified as stated above and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $718.28 per week for a period of 132 weeks, April 11, 2018 through July 15, 2018 and October 15, 2018 through January 19, 2021, 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 $646.47 per week for a period of 175 weeks, as provided in §8(d)(2) of the Act, for the reason that the injuries sustained caused 35% loss of use of the person-as-a-whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $5,694.95 for medical expenses under §8(a) of the Act and subject to the medical fee schedule.

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

August 30, 2023

O: 08/24/23
CAH/tdm
052

/s/ *Christopher A. Harris*
Christopher A. Harris

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC028641
Case Name	Jesse Mata v. Local Roofing Company, Inc.
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	21
Decision Issued By	Gerald Napleton, Arbitrator

Petitioner Attorney	Randall Manoyan
Respondent Attorney	Marcy Singer-Ruiz

DATE FILED: 8/1/2022

THE INTEREST RATE FOR THE WEEK OF JULY 26, 2022 2.92%

/s/Gerald Napleton, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTIES OF **WINNEBAGO/MCHENRY**)

☐ 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

Jesse Mata
Employee/Petitioner

v.

Local Roofing Company, Inc
Employer/Respondent

Case # **18** WC **028641**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Napleton** , Arbitrator of the Commission, in the cities of **Rockford and Woodstock**, on June 1, 2022. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **April 10, 2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $56,027.40; the average weekly wage was $1077.45.

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

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

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

ORDER

Respondent shall pay the outstanding medical bills from Athletico ($880.00), Podiatry of Arlington Heights ($196.93) and Stellar Orthotics ($2,231.10) pursuant to Sections 8(a), 8.2, and the Medical Fee Schedule. Respondent shall pay for the vocational rehabilitation services from Vocamotive in the amount of $2,386.92.

Respondent shall be given a credit for all medical benefits that have been paid. Respondent shall hold Petitioner harmless from any group lien asserted against Petitioner for group health benefits paid as a result of Petitioner's injuries for reasonable and necessary medical services received.

Respondent shall pay Temporary Total Disability Benefits in the amount of $718.28 for 145 weeks reflecting a period of April 11, 2018 through January 19, 2021. Respondent shall be given a credit for temporary total disability benefits paid.

Respondent shall pay Permanent Partial Disability Benefits in the amount of $646.47/week for a period of 100 weeks as Petitioner suffered a 20% loss of the Person as a Whole pursuant to Section 8(d)2 of the Act.

Petitioner's Petition for Penalties is denied.

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

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

/s/ Gerald W. Napleton **AUGUST 1, 2022**

Signature of Arbitrator

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jesse Mata,		
Petitioner		
v.		Case No.: 18WC028641
Local Roofing Company,		
Respondent		

ARBITRATOR'S FINDINGS OF FACT AND CONLCUSIONS OF LAW

FINDINGS OF FACT

It was stipulated that Petitioner, Jesse Mata, was 60 years old and worked for Respondent, Local Roofing Company where on April 10, 2018 he suffered an accidental injury that arose out of and in the course of his employment. Petitioner injured his left lower extremity as a result of a fall sustained on an icy surface on a roof of a building at Six Flags Great America. Petitioner eventually underwent a below-the-knee amputation of his left lower extremity that the parties have stipulated was causally related to his accidental injury. This case was initially heard in Rockford on May 20, 2022, bifurcated, and proofs were closed in Woodstock on June 1, 2022.

Petitioner testified that he has worked as a roofer since he was 18 years old and had worked for Respondent for approximately 14 years. He testified that he "did basically everything" and "wore a lot of hats." TX98. He testified that he worked as a roofer for about 25 years and was then moved to the office to help and would then go into the field. He testified he would work in the office until he was called out to the field. TX99. Petitioner testified he was paid hourly at the rate of $29.00 per hour and worked an average of 40 hours per week. TX146. Petitioner worked overtime as needed but was never asked to work overtime. TX147. He would work overtime based on the various tasks he would perform. TX147.

Petitioner testified that on April 10, 2018 he was in the office doing "computer stuff" and was called to a job at Six Flags Great America in Gurnee. He was asked by an owner of Respondent to help move equipment and clean debris as it was a rainy day, and no crews were working. While he was on the roof at Six Flags he reached for a piece of paper and slipped on a patch of ice behind an AC unit and fell, breaking his left ankle. Tom Stauffer, an owner of Respondent at the time, first saw Petitioner after his injury. The fire department was called but fencing was in the way of the vehicles which required fences to be cut before Petitioner was rescued via cherry picker. Petitioner remained on the roof for about 45 minutes in a puddle of water waiting for emergency help.

Petitioner's Medical Care

Petitioner was taken via Ambulance to Advocate Condell Hospital and provided a history of his accident. He was admitted to the hospital where Dr. Gregory Caronis performed an open reduction/internal fixation surgery of a comminuted fracture of Petitioner's distal tibia and

fibula. He was discharged on April 12, 2018 and advised to follow up with his primary care physician and Dr. Caronis for orthopedic care.

On May 10, 2018 Petitioner saw Dr. Caronis at Advocate Condell where Petitioner was admitted to the hospital due to vascular necrosis at the site of the ORIF. Petitioner underwent a left-sided femoral-popliteal bypass by Dr. Robert Kummerer on May 14, 2018. He was discharged on May 17, 2018 and sent to Northwestern Medicine for a plastic surgery and vascular surgery evaluation.

On May 22, 2018 Petitioner sought further treatment with Northwestern and was diagnosed with left lower extremity atherosclerotic peripheral arterial disease with nonhealing wounds. Surgery consisting of a left popliteal to posterior tibial artery bypass using a vein from the right lower extremity was performed. Petitioner began to heal after this procedure. Petitioner continued to follow up with his doctors at Northwestern. PX6. He required use of a PICC line to treat his infections which was eventually removed on July 6, 2018 when Petitioner followed up with Dr. Andrew Hoel at Northwestern. Dr. Hoel noted Petitioner was returning after a complex left lower extremity revascularization in May. An arterial flow study and graft duplex was performed. He was assessed with continued healing of complex left lower extremity wound and that a repeat arterial graft was recommended in five months. PX6, 1418.

In October of 2018 Petitioner developed a fever and his wound opened, bleeding profusely, as an infection had set in. He reported to Glenbrook Hospital and was transferred to Northwestern Hospital where he began treating with Dr. Terrance Peabody. Dr. Peabody eventually recommended that Petitioner's leg be amputated below the knee as a result of his complicated recovery. Dr. Stover of Northwestern Medicine transferred care to Dr. Peabody and noted Petitioner may not be able to return to his routine. PX6, p958.

Petitioner's left leg was amputated below his knee on September 18, 2019 by Dr. Peabody. On October 24, 2019 Petitioner reported to Stellar Orthotics and Prosthetics for a consultation and placement of a temporary prosthetic leg.

Dr. Peabody kept Petitioner off work through June 9, 2020 when he released Petitioner to light duty or alternative work of sit-down work only. The Arbitrator did not see this record in the Northwestern Records submitted by Petitioner, but it appears in Respondent's Exhibit 5. Petitioner testified that Dr. Peabody's assistant wrote this note. TX188. On July 1, 2020, Dr. Peabody clarified his restrictions to state the Petitioner requires a permanent prosthetic and training in its use before he can return to any work and that any future work he performs will need to be sedentary in nature. PX6, p2290.

Petitioner received his permanent prosthetic on August 11, 2020 and was sent for more physical therapy on August 12, 2020 for gait training and strengthening. PX6, p2293. The Northwestern records end with that note. Petitioner doesn't return to see Dr. Peabody after this.

To summarize his physical therapy, Petitioner underwent a course of physical therapy starting in July of 2018 through October 2018, December 2019 and February 2020, and August 2020 and January 2021. PX3. Petitioner's September 10, 2020 PT records note Petitioner began PT again on August 17, 2020 and was making steady progress but had continued impairments and functional limitations that limit his ability to complete ADLs, household activities, and work-related tasks. His therapist recommended additional PT to maximize strength and mobility to get him to optimal function. PX3, p79. Petitioner's last PT note states he has made good progress and has improved range of motion and strength but continues to have limitations in prolonged walking, standing, stair negotiation, and balance. Further PT was recommended. PX3, p269-270.

Petitioner underwent a Functional Capacity Evaluation on November 3, 2020. The FCE noted consistent performance and a valid representation of Petitioner's Functional abilities. PX3, 43-55. The FCE placed Petitioner at the light physical demand level. No functional limitations with sitting were noted. PX3, 55. The FCE therapist noted that a job description was not provided for Petitioner's position at work (PX3, 43) and the limitations were based on Petitioner's self-reported job duties including walking, walking uneven surfaces, climbing, and lifting and carrying materials. PX3, 45, 53.

Petitioner testified that he still experiences pain and discomfort that affects his daily living activities. He is no longer able to help with household chores. He suffers from issues with his balance and requires the use of a cane. He cannot stand up while taking a shower due to his prosthetic leg. His house now has a ramp. He is unable to shovel is driveway and is nervous about falls in inclement weather. He is unable to bowl, throw darts, and bike around the neighborhood with his grandchildren. TX 125-129.

Respondent's Section 12 Examination

On September 8, 2020, Petitioner reported to Dr. Matthew Jimenez for a Section 12 examination. Dr. Jimenez's took a history from Petitioner, reviewed medical records, and performed an examination. Dr. Jimenez opined that Petitioner does not need further physical therapy as his prosthesis fits well, though over time, the prosthesis may malfunction or deteriorate, and he will need a replacement. He further stated that Petitioner can return to sedentary duty and cannot work full duty as a roofer. He placed Petitioner at MMI. RX3.

Dr. Jimenez provided testimony via evidence deposition on June 3, 2021 where he reiterated his opinions. On cross-examination, Dr. Jimenez acknowledged that he did not recall reviewing any medical records from Stellar Orthotics and Prosthetics. He further acknowledged that patients that lose a leg and require a prosthetic more times than not require physical therapy to become adjusted. RX3, p64. Dr. Jimenez was not aware of Petitioner performing physical therapy after receiving his permanent prosthetic. Dr. Jimenez answered numerous questions during his deposition with "I don't recall." RX3.

Respondent refused to authorize further physical therapy after Dr. Jimenez offered his opinions. Petitioner, nevertheless, continued a course of physical therapy through January 2021.

Petitioner's Job duties and Offers to Return to Work

Petitioner initially testified, as mentioned above, that he would work in the office and would then wait to be called to perform other tasks. He testified that his job duties with Respondent required him to sweep, mop, dispose garbage, load propane tanks, load kettles of bitumen, cut and carry sheetrock, carry shingles on occasion, repair roofs, tear off roofs, tar roofs, remove shingles, and replace shingles. He testified that he would perform office work in the mornings and then do whatever was needed. He testified that he would enter prices on invoices of materials ordered after looking them up.

Petitioner acknowledged that he had an office with a computer and printer. TX162, RX6. He testified that he is no longer able to work on roofs anymore as it is too physical. He testified to using computers at work but is a "one-finger" typist and states he is not computer proficient, even "computer illiterate." He testified that he is the only roofer at Respondent with a computer.

TX174. He testified that he was not hired in 2004 as roofer but was a partner at Respondent company (TX175) until he sold his interest in 2009. TX231.

Petitioner received a job offer letter from Respondent (RX4) dated June 17, 2020 offering "light sit down work only" that can accommodate his restrictions from Dr. Peabody. The letter stated he was to start work on July 8, 2020. He testified that when he received this job offer, he thought Respondent was protecting itself. He acknowledged that he performed job costing but had never done credit card reconciliation. He testified that he had ordered garbage pickups, propane, and fire extinguishers before. He stated that the job duties listed would take only a half hour to two hours per day and wasn't a "bona fide" job offer. TX142. He testified that he would, however, try. TX140. He testified that upon receipt of this job offer he called his attorney but did not contact anyone at Respondent or report to work. He received additional letters offering work within his restrictions dated August 11, 2020, September 25, 2020, and February 12, 2021. Petitioner did not contact Respondent after receipt of any of these letters. TX179-181.

Respondent authored and sent to Petitioner four letters. RX4. The letters are dated June 17, 2020, August 11, 2020, September 25, 2020, and February 12, 2021. These were sent by a Ms. Nikki Noelte, Director of Operations, and directed Petitioner to contact her or Kevin Thompson via email addresses or telephone numbers provided. RX4.

Petitioner's Vocational Consultation

Laura Belmonte of Vocamotive testified on behalf of the Petitioner. Laura Belmonte is a certified rehabilitation counselor. Petitioner and Ms. Belmonte met via telephone on June 11, 2020 due to ongoing COVID-19 safety concerns. Ms. Belmonte reviewed medical records and noted that Petitioner was 62 years of age, approaching retirement age, did not have a high school education or GED, worked for 44 years as a roofer, and that he had "no meaningful clerical, administrative, sales, supervisory, marketing, or any other skills outside of simply roofing." TX14. She noted Petitioner was only capable of sedentary work and stated that he did not have any transferable skills. She noted that he had no computer skills, no job seeking skills, and has never completed a job application.

Ms. Belmonte testified that she asked Petitioner about his computer skills during the first meeting but at the second meeting she administered computer testing via a typing test and noted that Petitioner typed three words per minute and required significant help from Ms. Belmonte. TX16. He would hunt and peck at keys and when asked to type a simple sentence he did not use the space bar and would look at the screen after every letter. TX17. He was unable to locate a Microsoft word icon visually and when instructed to open a specific icon he single-clicked rather than double-clicked. She believed his computer skills would prevent him from finding sedentary work as "99 percent of sedentary jobs are in an office or in an office type environment where you need computers."

The job offer letters were reviewed by Ms. Belmonte. She testified that the job descriptions were very vague, consisting of only six bullet points with just two or three words after and that it was difficult to assess that job description as it was written. She testified that in her experience job descriptions range from vague to very detailed, but the majority include additional details which was lacking from the offer from Respondent. TX22. The title of this job was gleaned to be "warehouse manager" but that these job duties did not describe what she believed to be congruent with warehouse managerial work. Ms. Belmonte testified that after speaking with Petitioner she didn't believe the job activities described would fill an entire day's

work. She noted that he had performed some of the listed duties but not all of them. When asked about whether Petitioner had performed job costing, Ms. Belmonte testified that Petitioner wasn't entirely sure about the job costing but that it could be a task that required him to enter the type of materials needed for a job and that it would take 10 to 15 minutes per day. TX28. She did not believe that performing inventory at the warehouse would be sedentary based on her conversations with Petitioner. Ms. Belmonte testified that the dictionary of Occupational Titles defines roofing as medium duty work but can get from medium to very heavy.

Ms. Belmonte testified that she had no way of knowing the intent of Respondent in providing the job offer but could only testify as to how Petitioner would manage such a job. TX31-32. She testified that the job of "warehouse manager" is not a sedentary position and that Petitioner did not match with current employers looking for warehouse managers.

Ms. Belmonte used the following words to describe Petitioner's work activities that he performed for 44 years: "gluing, cementing, pasting, stapling, spreading, pointing, wrapping, rolling." TX33-34. She stated that there is nothing in Petitioner's work experience that shows he's capable of the job offered. TX34. She again referred to his inability to use a computer. TX35.

An area of concern for Ms. Belmonte was whether Petitioner would be employable if Respondent were to go under or if management were replaced. TX35. She was concerned that if Petitioner were forced to look for a different job he would not easily transition and apply his skills to another job based on the job description provided. TX35-36. She testified that the job description would result in minimum wage work elsewhere. TX36. It was Ms. Belmonte's opinion that the job description provided described not a warehouse manager but an "entry-level, unskilled-like support job of some kind." TX36.

Ms. Belmonte did not recommend a vocational rehabilitation program as his advanced age, lack of education, lack of computer skills, and his sedentary work restrictions would take a long time to improve and would be expensive. TX38-39. Ms. Belmonte testified that a stable labor market does not exist for Petitioner based on his age, lack of education, 44 years as a roofer, no transferable skills, lack of computer skills, and sedentary work restrictions. TX39-40.

On cross-examination, Ms. Belmonte acknowledged that part of her job as a rehabilitation counselor is to contact potential employers to inquire about jobs and that Petitioners are counseled to be honest about their restrictions. TX42-43. She testified that she reaches out to potential employers to make sure she makes correct decisions for her rehab clients. TX47. She testified that when a job offer is made, she makes sure the employer is aware of the restrictions, whether the position is permanent, what the wages are, who the supervisor is, and what the job duties are. TX48. She acknowledged that she advises the client to reach out to the employer for this various information and acknowledge the job offer. TX48-49.

On cross-examination, Ms. Belmonte acknowledged that she relies on and bases her report on the information she is given and that information that is incorrect may result in incorrect opinions. TX59-60. She further acknowledged that Petitioner was unaware of his permanent restrictions during their first conversation as Petitioner was waiting on his permanent prosthesis but that his restrictions of sedentary work did not change between their meeting. TX62-63. She testified that Petitioner did not have any restrictions limiting his ability to drive. TX65. Petitioner was also not restricted to working from home. TX92.

On cross-examination, Ms. Belmonte acknowledged that she did not test his ability to type numbers on a computer. TX65. She testified that Petitioner advised her that his typical day at Respondent consisted of checking the weather forecast, checked roofing materials, loading his

truck with his materials, meeting with a crew to review a job, setting up ladders, tearing off shingles, removing lose material, laying insulation, and installing new roofs. TX66-67. Ms. Belmonte acknowledged that she learned that Petitioner was an owner in 2004 but did not mention it in her report. TX68. She acknowledged that if an employee is qualified to perform essential job functions and there is no undue hardship to the employer than reasonable accommodations can be made. TX72. Further, she acknowledged that to effectuate a reasonable accommodation contact with the employer must be made. TX72-73. Ms. Belmonte did not contact respondent after her conversation with Petitioner in June prior to writing her September 2020 report. TX73. She stated it would be "out of bounds" to contact Respondent and that she was doubtful they would speak with her. TX74. Ms. Belmonte was unaware of the job offer letters when she wrote her initial report. TX75. She testified that a "sham" job offer is a job that doesn't exist anywhere else in the labor market, provides no skills to the employer or to the petitioner, and provides wages not comparable to others in the labor market. TX81-82. Ms. Belmonte did not call Respondent to clarify the vague description of the job provided. TX81-82. She did not advise Petitioner to call Respondent to clarify. TX83. She did not call Respondent to discuss Petitioner's pre-injury job. TX84. She stated it was not part of her assessment to call Respondent. TX85. Ms. Belmonte did not call Respondent's counsel to clarify or ask for permission to contact Respondent. TX85. She did not advise Petitioner to contact Respondent to discuss other job duties he would be performing. TX90. She did not contact Respondent to ascertain what percentage of Petitioner's pre-injury job was sedentary. TX91. She did not ask Petitioner what percentage of his preinjury job was sedentary because Petitioner advised her he was out all day working on roofs. TX91.

On re-direct, Ms. Belmonte testified that she believed there were indications that the job offer from Respondent was a sham job, not a legitimate job offer. TX95.

Testimony of Nikke Noelte

Nikke Noelte testified on behalf of Respondent. She is currently vice president of operations at Respondent company and was previously director of operations. She has worked for Respondent since 2015. She testified that Petitioner's job involved warehouse work at a desk and that he spent 90% of his time at a desk. TX199. She worked with Petitioner for three years prior to his accident. She stated he would work on a computer entering job costing data into it. TX201. She testified Petitioner would take sheets given to him for materials that he made sure were taken out of the warehouse, loaded on trucks (though not loaded by Petitioner), contact production crews for their hours, log those hours, order materials, retrieve materials, pick up materials from suppliers, and delivery materials to locations. TX201. She testified he was on the phone a lot and that his work on the phone consisted of contacting vendors and suppliers, ordering materials, verifying whether orders were ready, and ordering porta potties. She stated he would perform these duties every day. TX202. Ms. Noelte was shown RX7 and identified it as a job costing sheet and that the highlighted sections are what Petitioner would enter. TX202. She was shown RX8 which she identified as a document that shows database information entered by Petitioner. He would input words and numbers. TX205.

Ms. Noelte testified that she wrote the four letters to Petitioner in RX4 requesting his return to work. TX206. She testified that warehouse inventory is done daily to see what materials need to be ordered as well as monthly for insurance purposes. She stated that inventory can be done while seated as the inventory process involves using paper and excel spreadsheets. She

testified that Petitioner performed these duties prior to his accident. TX207. She testified that Petitioner had employees under his direction and could direct an employee to help with inventory if needed. TX208. She stated that the jobs listed in the letters written were a representation of the Petitioner's potential job duties and was not exhaustive. TX208-209. She testified that there were other jobs Petitioner could have done. TX209.

Ms. Noelte continued to testify that there is enough work at Respondent to keep him busy for 8 hours a day, 5 days a week. She based that opinion on her testimony that Petitioner had been doing most of this work before his accident which comprised 90 to 95% of his day. TX210. Ms. Noelte testified she was never contacted by Petitioner after any of her letters. TX211-212

On cross-examination, Ms. Noelte stated that Petitioner's title of "warehouse manager" was not written on his door and Petitioner did not have an email address. She acknowledged she was not aware how often Petitioner performed warehouse inventory and that Kevin Thompson would be a better source for that question. She stated that the letters were written with the help of Kevin Thompson. TX215. Ms. Noelte stated that Petitioner's position of warehouse manager has not been fulfilled. She confirmed that picking up and delivering materials only comprised about 10% of Petitioner's workday. TX218-219.

Testimony of Kevin Thompson

Kevin Thompson testified on behalf of Respondent. Mr. Thompson is the owner at Respondent and testified that Petitioner's job title at Respondent was "warehouse manager/assistant superintendent." He stated that Petitioner and he were partners when Respondent company started in 2005 and has worked with Petitioner for over 25 years. TX225. He stated that Petitioner worked as assistant superintended at his job with Maco Roofing prior to starting with Respondent. He testified that assistant superintendent and warehouse manager was an administrative and mostly desk-oriented job and he performed similar duties at Maco and with Respondent. TX226. He stated that Petitioner's job at Maco prior to joining respondent was a desk job for between 5 and 7 years. TX228. Mr. Thompson testified that Petitioner asked to be bought out of his equity position after a cancer diagnosis around 2009 or 2010.

Mr. Thompson testified that Petitioner was his "right hand arm" and his assistant in many ways. He testified Petitioner's Day would start at 5:30am in the office where he had a desk and a computer overlooking the warehouse. TX229-230. He testified Petitioner makes sure distribution trucks are loaded with the prior materials for that day which was discussed in a meeting the afternoon prior. He stated that he and Petitioner would write a list of things to be on each truck for each stop. He stated Petitioner was responsible for dispatching and that trucks were loaded accordingly. He stated Petitioner oversaw two distribution trucks, a warehouse guy, and a roof mechanic. TX230. He stated that Petitioner's job while an owner from 2005 to 2009 was 100% administrative and his job duties did not change except for review of financials. TX231.

Respondent's counsel stated that Petitioner's Vocational Rehab Counselor, Ms. Belmonte, was told by Petitioner that a typical day involved checking the weather forecast, collecting materials, loading his truck, meeting with crews, setting up ladders, tearing off shingles, and installing new roofs with a six-man crew. Mr. Thompsons testified that the description given was "absolutely not" his job. TX231-232. He explained that Petitioner was not considered a daily laborer in any sense, that as an owner he oversaw 55 employees, and he was charged with managing the warehouse guy, the mechanic, two distribution trucks, three service crews, and four to five commercial/industrial crews. TX232. He continued that shingle work was

subcontracted out to the project manager and as assistant superintendent it was not his job to be on the roof doing physical labor on a daily basis. TX232-233. He testified there was more than enough desk work for Petitioner to fill his day. Mr. Thompson testified that he, himself, was out in the field overseeing foremen and Petitioner would have to oversee that materials would get delivered to avoid down time for crews which costs money. TX233. Mr. Thompson continued that Respondent company relied on Petitioner's expertise as a roofer and familiarity with materials to ensure that materials went to the right place. TX233-234.

Mr. Thompson continued to describe Petitioner's work duties during a day stating they had three service crews come in the morning that would be dispatched to handle roof repairs and maintenance throughout the Chicagoland area. Respondent used manual service tickets so it was required to meet with service technicians to review their stops, give them paperwork, and get them out the door. TX234. He stated Petitioner was also responsible for the mechanic when things at the shop needed repair. TX234. He would keep his eye on the weather throughout the day to monitor for thunderstorms. He would radio crews to advise them of incoming weather and to get things watertight. TX235. Mr. Thompsons stated he was constantly on the radio with Petitioner coordinating the yard. Petitioner was also responsible for payroll as he received radio calls from crews to receive their hours and record them. TX235-236. Payroll was done by hand then. There are about 50 employees to handle for daily payroll that Petitioner would turn into the front office. Mr. Thompson continued that Petitioner handled job costing which required data entry. Petitioner would handle all delivery receipts for pickups and deliveries to the job sites. TX236-237. He would review the receipts, correct P.O. numbers, and give them to the front office. TX237. Individual job costing information would be loaded into a database which required Petitioner to do a lot of data entry.

Mr. Thompson stated that nobody has been as good as Petitioner at this work because of his roofing background as he understands the material and the job. TX237-238. People that do his job now for Respondent are strictly administrative and were not former roofers, so mistakes are being made. TX238. Petitioner had a company pick up truck to pick up miscellaneous materials or tools that may be needed.

Mr. Thompson testified that 90% of Petitioner's day was in the office. He stated that the business has grown since Petitioner's accident, and they have about 78 employees now which require a lot of management and supervision. TX240. He has had to spread out Petitioner's job duties to several different people. Mr. Thompson stated that he misses having Petitioner on the job. TX240-241.

Mr. Thompson testified that the letters in RX4 did not reflect "made up jobs" and that they "probably left off a bunch." TX243. He continued that if he knew this was to serve as a document outlining all of his duties he would have expounded on it. TX243. He stated that Petitioner performed all the duties listed in the letters before his accident except credit card reconciliation. TX244. He believed Petitioner was capable of performing that job duty and that it can be a lot of work to reconcile credit card receipts with jobs.

When given a copy of RX7, Mr. Thompson testified that job costing sheets are the most important documents in the company other than financial documents. TX245. It reveals profit margins and would give inaccurate financial information if wrong. TX246. There was no doubt in Mr. Thompson's mind that Respondent had enough work for Petitioner to do for 8 hours a day, 5 days a week. TX246-247.

Mr. Thompson testified that Petitioner never contacted him about returning to work after the job offer letters were sent. He stated that "every nail, screw, tube of caulk, truckloads of

material, labor hour, man hour, coordination, everything documented on that job costing form with the inputted data information in there, and everything went across Jesse's desk so he can make a copy of it or document it in our job costing to be broken down in each individual job." TX250. He reiterated that the only new duty they would want Petitioner to perform would be credit card reconciliation. TX251.

On cross-examination, Mr. Thompson was asked why Petitioner was on a roof when he was injured and explained that the other owner, Tom Stauffer, was in the office and asked Petitioner to move materials out of the way so that mechanical contractors at Six Flags could access equipment. TX252. He stated that Petitioner did fix roof leaks on occasion. He stated they have gone through three guys trying to fill Petitioner's role. TX254. He stated he believes there is paperwork showing Petitioner was a warehouse manager, but that Nikke Noelte would have it. TX255. He testified that inventory is done monthly, not daily. TX259. Mr. Thompson stated that there are many other things that aren't listed on the job offer letters that Petitioner would be responsible for. TX260. Mr. Thompson denied helping prepare the letter but reviewed it before it went out. TX261.

On re-direct, Mr. Thompson reiterated that the list of duties on the job offer letters was not exhaustive. TX262. He believed they could accommodate Petitioner's restrictions. TX263. He knew Petitioner was only capable of sit-down work. TX265.

The Arbitrator notes that Petitioner's Exhibit 20, an Illinois Form 25 Injury Report, that Petitioner's job title was listed as "Assistant superintendent." Further, the records from Athletico note Petitioner's job title as "Assistant Superintendent." PX3, p43.

Petitioner's Testimony in Rebuttal

Petitioner denied that 90% of his job prior to his accident was administrative. TX267. He elaborated that it was 20% administrative and 80% "out on the roof or, you know, sweeping or mopping." TX167. He testified that on a given week he would be performing roofing work two days out of the week doing repairs and inspections. He continued to state that Kevin Thompson was making things up as he was never in the office, but they did talk on the phone and prepare schedules. Petitioner acknowledged making schedules with Mr. Thompson. He stated that the superintendent ordered all materials, and that Petitioner would pick things up. He further testified that Nikke Noelte had no clue what he was doing as he saw her for "maybe 20 minutes tops" in the morning. TX269. He testified that the title of "warehouse manager" was totally fabricated. TX270. On cross-examination, Petitioner reiterated that upon receipt of the job offer letters he did not contact Respondent.

CONCLUSIONS OF LAW

Regarding Issue "G," the Petitioner's Earnings, the Arbitrator finds as follows:

Petitioner testified that he earned $29.00 per hour and worked an average of 40 hours per week. Wage records were submitted into evidence by Petitioner (PX1, PX2) and Respondent (RX10). Beginning with a check date of April 12, 2017 and ending with a check date of April 4, 2018, the records show Petitioner worked a total of 50.2 weeks with gross wages totaling $54,087.75. During this period, Petitioner earned overtime pay of 116.50 hours for an additional $3,145.50 along with a bonus of $3,000.00 on December 12, 2017.

Petitioner testified that he worked overtime "whenever the occasion arose" and was never asked to work overtime. When asked if he worked overtime consistently, Petitioner stated that he would spend the time necessary to "wear many hats," and that he would have to inspect roofs, check on his coworkers, and drive from point A to point B. The wage records note that Petitioner would work anywhere between zero, 1.5, 2.5, 3, 9 and 12 hours of overtime per pay period.

The Illinois Appellate Court in its *Tower Automotive v. Illinois Workers' Compensation Comm'n* decision (citing its ruling in *Airborne Express v. Illinois Workers' Compensation Comm'n,* 372 Ill. App. 3d 549, 554 (1st Dist. 2007)) stated the hours an employee works in excess of his regular weekly hours are not considered overtime within the meaning of Section 10 of the Act and are only to be included if the excess number of hours worked is consistent or if the employee is required to work the excess hours as a condition of employment. 407 Ill.App.2d 427 (1st Dist. 2011).

Petitioner's testimony of working overtime "whenever the occasion arose," his testimony that he was not asked to work overtime, and the varying hours of overtime worked in the year preceding his date of accident (PX1, PX2) do not support a finding that Petitioner's overtime was mandatory or consistently worked. The Arbitrator bases the calculation of Petitioners average weekly wage on the 50.20 weeks worked with gross wages of $54,087.75 which equals $1,077.45. Petitioner's bonus is excluded based on the plain language of Section 10 of the Act.

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

There is no dispute that Petitioner suffered a work-related injury that eventually resulted in the amputation of his left lower extremity on September 18, 2019 which required Petitioner to use a prosthetic device. Petitioner has undergone several hospitalizations and surgeries. The Arbitrator finds that the medical services entered into evidence and rendered to Petitioner were reasonable and necessary.

Petitioner submitted into evidence medical bills (PX1) from Athletico totaling $880.00 and Podiatry of Arlington Heights dated November 20, 2018 totaling $196.93 and several bills from Stellar Orthotics and Prosthetics. The Arbitrator also notes payments to Stellar Orthotics from Aetna in PX1.

The November 20, 2018 Podiatry of Arlington Heights records (PX12) note that Petitioner reported for ingrown toenail to the left foot. He gave a history of his work accident and subsequent infections to his left leg and ankle along with his need to consistently dress his leg for wound care. He had never suffered from ingrown toenails in the past. The invoice for the November 20, 2018 date of service notes drainage of skin abscess, surgical trays, and an office visit. Further, the August 10, 2018 record from Northwestern (PX6, p1403) noted that the home health nurse reported to his home for a dressing change and noticed that his nail looked infected and swollen.

The Arbitrator finds that this medical treatment was necessary and related to his injury as Petitioner has persistent and credible history of discomfort in his left lower extremity due to severe infections which later caused the lower leg to be amputated. It is reasonable that the persistent dressing, chronic infection, and disuse of the leg along with concern of causing further pain in his foot could reasonably result in this type of issue. Respondent shall pay this bill pursuant to the fee schedule.

The Arbitrator finds that the services rendered to Petitioner by Stellar Orthotics after Petitioner's left lower extremity was amputated to be reasonable and necessary. There is no question that Petitioner required a prosthetic after his amputation. The evidence shows Petitioner routinely and consistently followed up with Stellar Orthotics as required. PX1 demonstrates two invoices totaling $2,231.10 from Stellar Orthotics. Respondent shall pay for the treatment with Stellar Orthotics pursuant to the medical fee schedule. Respondent shall hold Petitioner harmless from any group lien asserted against Petitioner for group health benefits paid as a result of Petitioner's injuries for reasonable and necessary medical services received.

The bills from Athletico with a balance of $880.00 note dates of service from July 6, 2018 through January 19, 2021. The January 20, 2021 note states that "physical therapy treatment began on 12/08/2020 at the request of Mr. Mata's attorney, Mr. Manoyan" which is peculiar, however, there is little medical evidence in the record to dispute the reasonableness or necessity of this treatment except for Respondent's Section 12 examiner. Petitioner suffered a traumatic injury to his left lower extremity which resulted in eventual amputation and prosthesis. The same January 20, 2021 note notes Petitioner has made progress but still favors his right leg and continues to require cues for posture and increased weight distribution through the left leg during lifting and carrying tasks and was approaching maximum therapeutic benefit. The note suggests that Petitioner's treatment with Athletico was helpful.

Respondent's Section 12 examiner, Dr. Jimenez, stated on September 8, 2020 that Petitioner did not require any further physical therapy at that time as his prosthetic was well-fitting. The Arbitrator does not find the opinion of Dr. Jimenez to carry enough weight to absolve Respondent from payment of the therapy bills in this situation as Petitioner sought further therapy to address mobility issues evidenced in the Athletico records mentioned above. Further, Dr. Peabody had ordered further physical therapy. The Arbitrator does not find the testimony of Dr. Jimenez compelling as it was unclear which records Dr. Jimenez used to come to his conclusions. Petitioner underwent therapy for four additional months after Dr. Jimenez's opinion was given. The Athletico records speak for themselves that Petitioner continued to progress but still had some ambulatory issues. Petitioner's injury was not a trivial soft-tissue injury but resulted in the amputation of his leg and a life-long need for a prosthetic device which reasonably required therapeutic intervention and training in its use. Accordingly, the Arbitrator finds the treatment rendered by Athletico was reasonable and necessary and Respondent shall pay for the outstanding balance of $880.00 pursuant to the medical fee schedule.

Lastly, the Vocamotive invoices from March 5, 2021 and September 16, 2020 were admitted into evidence by Petitioner (PX11) totaling $2,436.92. The invoices reflect attorney and client calls starting May 12, 2020, an initial evaluation on June 11, 2020, subsequent review, and a vocation evaluation report dated September 16, 2020. The second invoice is for client calls on February 10 and 11, 2021, a client meeting on February 17, 2021 and an addendum report on March 5, 2021. PX11 pp 106-107.

Section 8(a) of the Illinois Workers' Compensation Act requires an employer to pay for treatment, instruction, and training necessary for the physical, mental, and vocational rehabilitation of the employee. 820 ILCS 305 (2013). A vocational rehabilitation assessment is required when it can be reasonably determined that the injured worker will, as a result of the injury, be unable to resume the regular duties in which he or she was engaged at the time of injury. 50 Ill. Admin Code §9110.10(a).

The evidence in the record supports a finding that Petitioner's injury resulted in amputation of his left lower extremity and prevented him from returning to his regular, pre-

injury duties. There is a question whether how much of Petitioner's pre-injury duties were administrative versus labor-intensive, but the fact remains that Petitioner's amputation prevented him from performing some aspects of his pre-injury work - whether it's 5%, 10%, 20%, or 80% of his job and whether Respondent could accommodate his sedentary is a factor that will be discussed later. Petitioner was injured while he was cleaning on a roof. Even if Petitioner only spent a minor portion of his day as a roofer, or on roofs for any work-related purpose, Petitioner was unable to resume the regular duties in which he was engaged at the time of his injury as he also testified to loading trucks, mopping, painting, and setting up ladders.

Accordingly, the Arbitrator finds Respondent liable for the payment of Vocamotive' s vocational evaluations and consultations under Section 8(a) and the Rules of Practice before the Illinois Workers' Compensation Commission.

Regarding issue "K," what TTD/TPD benefits are in dispute, and issue "L," the nature and extent of Petitioner's injury, the Arbitrator finds as follows:

Respondent has paid TTD benefits for the following periods: April 11, 2018 to July 15, 2018; and October 15, 2018 to October 5, 2020. TTD benefits were not paid for the period of July 16, 2018 to October 14, 2018 and October 6, 2020 and beyond. Petitioner is alleging entitlement to TTD for the period of April 11, 2018 through the date of the hearing.

It is a well-settled principle that the dispositive inquiry concerning entitlement to TTD benefits is whether a Petitioner's condition has reached maximum medical improvement. See *Interstate Scaffolding v. Illinois Workers' Compensation Comm'n,* 236 Ill. 3d, 132, 143 (2010). Factors to be considered in determining whether a Petitioner has reached MMI include whether he has been released to return to work, medical evidence, testimony concerning his injury, the extent of the injury and whether the injury has stabilized. *Nascote Industries v. Industrial Comm'n,* 352, Ill. App. 3d 1067, 1072 (2004).

Regarding the period of July 16, 2018 through October 14, 2018, the Arbitrator notes that Petitioner was still following up with his vascular surgeons at Northwestern and still required the aid of a home health care nurse to change his dressings. The Arbitrator notes a lack of specific language keeping him off work but similarly does not see from the records that he was returned to work. The Arbitrator finds that Petitioner's injury had not yet stabilized and that his injury remained severe as he required ongoing treatment. Accordingly, the Arbitrator awards TTD for this period of July 16, 2018 through October 14, 2018.

Respondent restarted TTD on October 15, 2018 when Petitioner developed an infection causing his wound to burst open and bleed purulent blood. TTD was continued through October 5, 2020. As of October 5, 2020, Respondent's Section 12 examiner had released Petitioner to sedentary duty and stated he was at MMI effective September 8, 2020 and Respondent had issued three letters offering Petitioner work within his restrictions. There is some question regarding Dr. Peabody's release of Petitioner to light duty in June of 2020. Dr. Peabody clarified his position on Petitioner's work on July 1, 2020 stating that Petitioner is to be off work until he receives and is trained in the use of his permanent prosthesis. Petitioner received his permanent prosthesis on August 11, 2020 and was sent for physical therapy by Dr. Peabody on August 12, 2020. He started physical therapy again on August 17, 2020, an FCE was performed on November 3, 2020 and on January 20, 2021 his therapist stated Petitioner was approaching maximum therapeutic benefit and was discharged with to a home exercise program. Petitioner had post-permanent prosthesis encounters in the year 2020 with his PT on August 17, 20, 25, 27,

September 2, 3, 8, 10, 15, 30, October 2, 8, 9, 13, 16, 20, 22, November 3, December 8, 10, 15, 17, 22, 24, 29, 31. In the year 2021 he attended sessions on January 5, 7, 12, 14, and 19. PX3, p294-301.

Petitioner was finished with his post-permanent prosthesis physical therapy on January 19, 2021. The records note that PT after December 8, 2020 was started at the request of Petitioner's counsel, however the reports are still addressed to Dr. Peabody. The Athletico treatment administered immediately prior to December 8, 2020 was Petitioner's FCE.

The December 8, 2020 record notes Petitioner has been performing home exercise consistently over the past 5-6 weeks and that his walking tolerance is improving. PX3, 41. The note further states Petitioner "continued to progress LE strengthening and functional lifting, carrying tasks. Pt continues to require min-mod cues for posture, body mechanics, lifting mechanics. Plan: The frequency is 2 times per week for 1 week." PX3, 42. Petitioner's counsel is not mentioned in the note. The December 17, 2020 note reflects that Petitioner's walking tolerance remains limited. The ongoing notes reflect that Petitioner's leg strength and function continued to improve. PX3, 29. The January notes reflect that Petitioner was performing home exercises daily and his walking was improving. PX3, 21. The January 19, 2021 notes Petitioner has made significant progress with leg strength, balance, gait mechanics, posture, and lifting mechanics. He has improved functional ability but tends to favor his right leg and continues to require cues for posture and weight distribution. Maximum therapeutic benefit was approached as of this date. PX3, 17.

The Arbitrator finds that Petitioner reached maximum medical improvement on January 19, 2021. This is consistent with the Arbitrator's findings above that Petitioner's physical therapy was reasonable and necessary as the Petitioner suffered a traumatic injury to his leg which required a prosthesis. Dr. Peabody recommended a course of physical therapy after his permanent prosthetic was installed. The physical therapy records do not otherwise state that Petitioner had reached a level of maximum therapeutic benefit until January 19, 2021.

Petitioner received a fourth and final job offer letter from Respondent dated February 12, 2021 asking him to return to work on Tuesday, March 2nd, 2021. Petitioner had been released to sedentary duty by Dr. Peabody on July 1, 2020. Petitioner did not return to see Dr. Peabody after August 12, 2020. Dr. Peabody's July 1, 2020 note stated that Petitioner may not return to work until after he receives his permanent prosthesis and is trained in its use. Dr. Peabody did not clarify or expound on his opinions via testimony, unfortunately.

Respondent contends that Petitioner's physical therapy after his permanent prosthesis was not for training in his prosthesis but for addressing mobility issues. The Arbitrator does not find this argument convincing. Dr. Jimenez's opinion that because Petitioner's prosthetic was well-fitting that he no longer required physical therapy is unpersuasive. Dr. Peabody and Petitioner's physical therapists were in better position to ascertain Petitioner's need for further rehabilitative care.

Accordingly, the Arbitrator finds that Petitioner is entitled to temporary total disability benefits from April 11, 2018 through January 19, 2021.

The record is clear that Petitioner underwent a traumatic injury that resulted in the loss of his lower left leg which required a permanent prosthesis and permanent sedentary duty. That said, the issue of whether Petitioner is entitled to PTD, TTD or maintenance after January 19, 2021 (as Petitioner had undergone an initial vocational assessment that the Arbitrator believed

was reasonable and necessary on June 11, 2020 and again in February with a final report issued on March 5, 2021) is complicated and disputed.

To prove entitlement to TTD benefits, Petitioner must establish not only that he did not work but that he was unable to work. *Sharwarko v. Illinois Workers' Compensation Comm'n,* 205 IL App (1st) 131733WC, 49 (2015). TTD benefits may be suspended before an employee reaches MMI if he: (1) refuses to submit to medical, surgical, or hospital treatment essential to his recovery; (2) refuses to cooperate in good faith with rehabilitation efforts; or (3) refuses work within the physical restrictions prescribed by his doctor. *Interstate Scaffolding,* 236 Ill. 3d. at 146-47.

The Arbitrator finds that Petitioner failed to respond to Respondent's job offers in any manner after work within his restrictions was offered. This is especially troubling once Petitioner had received his permanent prosthesis and had finished his therapy in January of 2021. As a result, the Arbitrator finds that Petitioner is not entitled to TTD or maintenance benefits after January 19, 2021 as petitioner was at MMI, fully trained in the use of his prosthetic, and refused to work within the physical restrictions prescribed by his doctor.

Regarding the nature and extent of Petitioner's injury, the Arbitrator finds as follows:

Petitioner is claiming to be permanent and totally disabled. A Petitioner is permanently and totally disabled when he is unable to make some contribution to industry sufficient to justify payment to him of wage. *A.M.T.C. of Illinois, Inc., v. Industrial Comm'n,* 77 Ill. 2d 482, 487 (1979). If an employee can take up some form of employment without seriously endangering his health or life he is not entitled to total and permanent disability compensation. *Id.* at 487.

If a claimant's disability is of such a nature that he is not obviously unemployable, or there is no medical evidence to support a claim of total disability, the burden is upon the claimant to prove by a preponderance of the evidence that he fits into an "odd lot" category; that being an individual who, although not altogether incapacitated, is so handicapped that he is not regularly employable in any well-known branch of the labor market. *Valley Mould & Iron Co. v. Industrial Comm'n*, 84 Ill. 2d 538, 546-47 (1981). A claimant ordinarily satisfies his burden in one of two ways: (1) by showing diligent but unsuccessful attempts to find work, or (2) by showing that, because of his age, skills, training, and work history, he will not be regularly employed in a well-known branch of the labor market. *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 544 (2007). Once a claimant establishes that he falls within an "odd lot" category, the burden shifts to the employer to prove that the claimant is employable in a stable labor market and that such a market exists. *Id*

It is axiomatic that a vocational report is only as good as the information provided. If a vocational counselor relies on incorrect or incomplete information the report that counselor creates is not correct or reliable. Petitioner's vocational rehabilitation counselor, Ms. Belmonte, stated this herself. Ms. Belmonte testified that Petitioner described his typical day as follows: Petitioner arrives at work, checks the weather forecast, loads his truck with his materials, meets with the crew to review the job, sets up ladders, tears off shingles, removes loose materials, lays insulation, and installs new roofs. She testified that Petitioner had abysmal computer skills. She further testified that Petitioner had "no meaningful clerical, administrative, sales, supervisory, marketing, or any other skills outside of simply roofing."

The Arbitrator finds that the Petitioner was not accurate with Ms. Belmonte in terms of the administrative and sedentary "non-roofing" duties the record shows he was previously

responsible for and potentially capable of performing. The Arbitrator notes that Petitioner testified that he was primarily a roofer during his direct examination. Petitioner denied being both a warehouse manager/supervisor and further denied being assistant superintendent. His testimony repeatedly mentioned "wearing a lot of hats" and focused on his painting, sweeping, mopping, and repairing and inspecting roof work. During his rebuttal testimony he adjusted his testimony to reflect that his job is about 20% administrative and that he is in the field 2 of 5 days. Petitioner acknowledged that he had an office with a computer and further acknowledged that he would enter job costing data via computer. Ms. Belmonte spoke at length about Petitioner's abysmal computer skills but the evidence in the record shows that Petitioner was capable of entering considerable information into job costing sheets. Ms. Belmonte did not test Petitioner's capacity to enter numbers on a computer.

Having heard and reviewed the testimony of Petitioner, Lisa Belmonte, Nikke Noelte, and Kevin Thompson, the Arbitrator finds it more likely true than not true that Petitioner had performed some level of administrative duties for Respondent before his accident. Petitioner's testimony concerning his level of administrative duties vacillates between the minimal duties told to Ms. Belmonte to 20% when he testified on redirect. Respondent's witnesses said that Petitioner's pre-injury job was 90% to 100% administrative. Witnesses for Respondent gave a litany of job duties that Petitioner performed and could perform within his restrictions, including making lists of materials for trucks, making sure material is loaded in trucks, reviewing deliveries, radio contact with Kevin Thompson and the crews, job costing, supervising the warehouse, payroll, credit card reconciliation, etc. Petitioner did not testify that he was unable to perform those duties. In fact, he testified that he would try but his actions show that he did not.

Further, Ms. Belmonte testified that the job described in the four offer letters received was "vague." Neither Ms. Belmonte nor Petitioner contacted Respondent after receipt of these letters to acknowledge the letter. Neither Ms. Belmonte nor Petitioner contacted the Respondent after receiving the letters to question or clarify the job being offered and its hours or duties. Ms. Belmonte testified that employers could make a reasonable accommodation for injured workers but contact with an employer must happen to effectuate it. No contact with the Respondent was made after Respondent issued its job offer letters.

The Arbitrator is not convinced that Respondent's job offer was a sham job offer. Petitioner has a long history with Kevin Thompson, owner of Respondent, spanning several decades. Petitioner worked with Mr. Thompson at Maca roofing, became partners with him in 2005, and continued to work for him after selling his interest in 2009 until his injury in 2018. Mr. Thompson spoke very highly of Petitioner as his former "right hand" and testified to Petitioner's knowledge of the roofing industry and its administrative processes. The testimony of Mr. Thompson is persuasive for several reasons. The Arbitrator believes that the job duties described at hearing are duties Petitioner had performed and could perform, there is likely enough work to keep Petitioner busy as the business has grown and become busier, and that the wage offered by Respondent was commensurate with his former job duties and the ongoing job duties that would serve the interests of Respondent's business.

The Arbitrator finds that the record (with emphasis on Petitioner's, Ms. Belmonte's, and Mr. Thompson's testimony) does not sufficiently prove that Petitioner is permanently and totally disabled. Ms. Belmonte's report and testimony were based on inaccurate and incomplete information. The evidence does not demonstrate Petitioner made a diligent but unsuccessful attempt to find work. Without complete and accurate information the Arbitrator cannot find that

Ms. Belmonte's opinion is persuasive. Accordingly, the Arbitrator does not find that the Petitioner is permanently and totally disabled.

Petitioner is, however, entitled to further permanent partial disability benefits. There is no question that Petitioner sustained a serious injury to his leg which required amputation and eventual sedentary duties. The record shows that Petitioner is now unable to return to the roofing aspects of his pre-injury employment. Section 8(d)2 of the Act states, in pertinent part, "[i]f as a result of the accident, the employee sustains serious and permanent injuries … covered by the aforesaid paragraphs (c) and (e), … which have otherwise resulted in physical impairment; or if such injuries partially incapacitate him from pursuing the duties of his usual and customary line of employment but do not result in an impairment of earning capacity, or having resulted in an impairment of earning capacity, he shall receive … compensation at the rate provided in subparagraph 2.1 of paragraph (b) of this Section for that percentage of 500 weeks that the partial disability resulting from the injures covered by this paragraph bears to total disability."

The Arbitrator finds that Petitioner is entitled to permanent partial disability based on his inability to pursue the duties of his usual and customary line of employment. The evidence demonstrates that Petitioner performed a portion of his time in the field as a roofer or performing other non-sedentary tasks. The record is clear that he can no longer perform non-sedentary functions of his preinjury job. The Arbitrator finds that petitioner has sustained permanent partial disability consisting of 20% loss of use of the Person as a Whole.

Regarding issue "M" whether Penalties should be imposed upon Respondent, the Arbitrator finds as follows:

Petitioner argues that penalties should be imposed upon Respondent under Sections 16, 19(k) and 19(l) for several reasons: 1) failure to authorize treatment for Petitioner's physical therapy based on the opinions of Respondent's Section 12 examiner, Dr. Jimenez; 2) failure to pay TTD benefits after October 5, 2020; and 3) failure to pay for a vocational assessment. The intent of penalties is to expedite the compensation of workers and to penalize employers who unreasonably, or in bad faith, delay or withhold compensation due an employee. *Pisano v. Ill. Workers' Compensation Comm'n,* 2018 Ill.App. (1st) 172712WC (2018).

Regarding Respondent's failure to authorize and pay for Petitioner's physical therapy, the Arbitrator finds that Respondent reasonably relied on the opinions of their Section 12 physician, Dr. Jimenez, regarding Petitioner's need for further physical therapy. While the Arbitrator does not find the testimony of Dr. Jimenez to be persuasive and convincing evidence and has found above that Petitioner's physical therapy was reasonable and necessary, the Arbitrator finds that Respondent's reliance on their Section 12 examining physician was not unreasonable, vexatious, or in bad faith. Further, the Commission lacks statutory authority to impose penalties under Section 19(l) for delay in authorizing medical treatment. See *Hollywood Casino-Aurora, Inc., v. Illinois Workers' Compensation Comm'n,* 2012 IL App (2d) 110426WC (2nd Dist., 2012).

Regarding Respondent's failure to pay TTD after October 5, 2020, the Arbitrator finds that Petitioner was at MMI on January 19, 2021 and capable of performing sedentary duty thereafter. Respondent had offered work within Petitioner's restrictions since its first letter in June of 2020 but continued to pay TTD through October 5, 2020. Despite the Arbitrator finding in Petitioner's favor that TTD was payable after October 5, 2020, the Arbitrator does not find Respondent's failure to pay to be unreasonable, in bad faith, or vexatious. The Arbitrator notes Respondent's Section 12 examiner placed Petitioner at MMI with sedentary restrictions on

September 25, 2020. This is after two letters had been sent to Petitioner offering sedentary work. Petitioner did not contact Respondent regarding any sedentary duty work received.

The Arbitrator similarly finds Respondent's failure to pay for vocational rehab to not rise to the level of unreasonable or vexatious. The record shows that Respondent has offered sedentary work since June of 2020. The Arbitrator notes that June of 2020 was the first time the medical records *possibly* note that Petitioner will be restricted to sedentary work only as there is argument over the authenticity of the June 9, 2020 work note from Dr. Peabody or his PA. Petitioner met with Ms. Belmonte on June 11, 2020. On July 1, 2020 Dr. Peabody clarified the restriction issue and stated Petitioner will be able to work sedentary duty after he receives his permanent prosthesis. Petitioner received his permanent prosthesis on August 11, 2020, underwent a Functional Capacity Evaluation on November 3, 2020, and finished physical therapy the following January of 2021. Ms. Belmonte met with Petitioner again in February of 2021 and issued her report the next month in March. Respondent issued four letters offering sedentary work within Petitioner's restrictions. Petitioner argues the job was a sham and had little to nothing to do with his previous employment. The Arbitrator remains unconvinced of this and believes Petitioner worked some level of administrative duties and would potentially be capable of performing the sedentary work for Respondent which consisted of several administrative duties that Petitioner either had performed prior to his accident or could perform subsequently. The Arbitrator finds that Respondent's reliance on its Section 12 examiner in September 2020, the job offers within sedentary duty, Respondent's offer of sedentary duty based on various aspects of Petitioner's pre-injury duties, and Petitioner's failure to respond to job offers are not unreasonable, vexatious, or bad faith reasons for nonpayment of TTD.

Regarding issue "N" concerning credit due Respondent, the Arbitrator finds as follows:

Respondent is entitled to a credit for Medical and Temporary Total Disability benefits paid. AX1, RX9. The Arbitrator notes Respondent paid statutory amputation benefits in the amount of $138,991.10. Respondent is not entitled to a credit for statutory amputation benefits paid against the Permanent Partial Disability award made in this decision.

The Arbitrator has awarded permanent partial benefits under Section 8(d)2. Section 8(d)2 in pertinent part reads "[c]ompensation awarded under this subparagraph 2 shall not take into consideration injuries covered under paragraphs (c) and (e) of this Section and the compensation provided in this paragraph shall not affect the employee's right to compensation payable under paragraphs (b), (c), and (e) of this Section for the disabilities therein covered.

The Arbitrator is also guided by the Illinois Supreme Court's decision in *Beelman Trucking v. Illinois Workers' Compensation Comm'n,* 233 Ill. 2d 364 (2009). The Petitioner in *Beelman* was awarded statutory permanent total benefits under 8(e)18 along with a PPD award for loss of an arm under 8(e)10. The Court stated the Act permits a worker to recover for the loss of two members under 8(e)18 as well as additional scheduled losses beyond the 8(e)18 losses.

Accordingly, the Respondent is not entitled to a credit for its payment of statutory amputation losses under Section 8(e) against the permanent partial disability award under 8(d)2 rendered above.

Regarding issue "O" whether there was an underpayment of statutory amputation benefits, the Arbitrator finds as follows:

The Arbitrator references his findings above in Section G noting that the Petitioner's earnings demonstrate an average weekly wage of $1,077.45. The Petitioner's left lower extremity was amputated on September 18, 2019. Loss of a leg above the knee under Section 8(e) of the Act requires payment of 215 weeks of benefits at 60% of the employee's average weekly wage or $646.47 in the present case. This amounts to $138,991.05. The Arbitrator notes that Petitioner was issued a check on September 26, 2019 for $134,078.30 based on Respondent's calculation of Petitioner's average weekly wage. A second check for $4,912.75 was issued on October 3, 2019 after Respondent increased their AWW calculation to $1077.45. Respondent has paid a total of $138,991.05 as required under the Act. No further statutory amputation benefits are owed.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC031352
Case Name	Michael Eddy v. Pulling Freight, Inc.
Consolidated Cases	21WC002952;
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	23IWCC0391
Number of Pages of Decision	34
Decision Issued By	Stephen Mathis, Commissioner, Marc Parker, Commissioner

Petitioner Attorney	Shane Mahoney
Respondent Attorney	Michael Scully

DATE FILED: 8/30/2023

/s/Stephen Mathis, Commissioner

Signature

/s/Marc Parker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Michael Eddy,

Petitioner,

vs. NO. 19 WC 31352
21WC 02952

Pulling Freight, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, prospective medical care, notice, evidentiary issues, 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 October 14, 2022, 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 party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

August 30, 2023

/s/ *Stephen J. Mathis*
Stephen J. Mathis

SJM/sj
o-8/9/2023
44

/s/ *Deborah L. Simpson*
Deborah L. Simpson

SPECIAL CONCURRING OPINION

This case was scheduled for Oral Arguments on August 9, 2023, before a three-member panel of the Commission including members Stephen Mathis, Deborah L. Simpson, and Deborah J. Baker, at which time Oral Arguments were either heard, waived or denied. Subsequent to Oral Arguments and prior to the departure of Deborah J. Baker on August 18,2023, a majority of the panel members had reached agreement as to the results set forth in this decision and opinion, as evidenced by the internal Decision worksheet initialed by the entire three-member panel, but no formal written decision was signed and issued prior to Commissioner Baker's departure.

Although I was not a member of the panel in question at the time Oral Arguments were heard, waived or denied, and I did not participate in the agreement reached by the majority in this case, I have reviewed the Decision worksheet showing how Commissioner Baker voted in this case, as well as the provisions of the Supreme Court in Zeigler v. Industrial Commission, 51 Ill.2d 137, 281 N.E.2d 342 (1972), which authorizes signature of a Decision by a member of the Commission who did not participate in the Decision. Accordingly, I am signing this Decision in order that it may issue.

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC031352
Case Name	Michael Eddy v. Pulling Freight, Inc.
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	31
Decision Issued By	Rachael Sinnen, Arbitrator

Petitioner Attorney	Shane Mahoney
Respondent Attorney	Michael Scully

DATE FILED: 10/14/2022

THE INTEREST RATE FOR THE WEEK OF OCTOBER 12, 2022 4.03%

/s/ Rachael Sinnen, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF **Cook**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Michael Eddy
Employee/Petitioner

v.

Pulling Freight, Inc.
Employer/Respondent

Case # **19** WC **031352**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Rachael Sinnen**, Arbitrator of the Commission, in the city of **Chicago**, on **8.19.22**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **9.15.19**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**20,346.24 over 16 weeks**; the average weekly wage was $**1,271.64**.

On the date of accident, Petitioner was **57** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of $**19,515.28** for TTD, $**0** for TPD, $**0** for maintenance, and $**6,365.92** for other benefits, for a total credit of $**25,881.20**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner directly for the outstanding medical services contained within Petitioner's Exhibit 10, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act. Respondent is entitled to a credit under Section 8(j) of the Act for medical paid in the amount of $6,365.92.

Respondent shall approve and pay for a spinal fusion and an interbody fusion with laminectomy of L5-S1 and necessary pre- and post-operative care as prescribed by Dr. Mulconrey as provided in Section 8(a) and 8.2 of the Act.

See also Arbitration Decision for Case No. 21WC002952, which is consolidated with the case at hand.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

OCTOBER 14, 2022

Signature of Arbitrator

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

Michael Eddy,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	Case No. 19WC31352
	)	*Consolidated with*
	)	Case No. 21WC2952
Pulling Freight, Inc.	)	
	)	
	)	
Respondent.	)	

FINDINGS OF FACT

This matter proceeded to hearing on August 19, 2022 in Chicago, Illinois before Arbitrator Rachael Sinnen on Petitioner's 8(a) petition. Issues in dispute include accident, causal connection, medical bills, and future medical. The parties agreed that if future medical was denied, then an award for nature and extent would be rendered. (Arbitrator's Exhibit "AX" 1 and 2).

PETITIONER'S TESTIMONY

Petitioner testified that he resides in Peoria, Illinois and currently works at Pulling Freight, Inc. in Morton, Illinois. He testified that he drives a semi-truck for Pulling Freight and has been employed with them since May 2019. Petitioner testified that in September 2019 he traveled from Morton, Illinois to Chicago, Illinois to obtain FedEx trailers and take them back to Morton, Illinois. He testified that his shifts in September 2019 were from approximately 10:00 p.m. to 5:00 a.m., five days a week. He testified that he would sit for approximately two-thirds of his shift or approximately, seven to eight hours.

Petitioner testified that on September 16, 2019, he was backing his semi-truck underneath the trailer that was in a dock. When he got out of his semi-truck, the trailer was 8 to 10 inches above the fifth wheel. He testified that the fifth wheel connects the semi-truck and trailer. Petitioner testified that the fifth wheel is an apparatus on the back of the truck with a slot that catches a kingpin that drops out of the front of the trailer. He testified that when you back the semi-truck's fifth wheel under the trailer, it latches to the trailer's kingpin. He testified that he began cranking the trailer using the dolly cranks on the side of the trailer. Petitioner testified that when the trailer touched the fifth wheel, there was pressure against the trailer and dock which caused the trailer to surge forward when he was on the upswing of the crank. He testified that the crank went into free-fly and picked him up off his feet, brushed him off the trailer, and caused him to land back onto

his feet in a position similar to a baseball catcher's position. He testified that he was jolted when he landed.

At the time of arbitration, a video depicting a gentleman using a crank to attach a trailer to a fifth wheel listed as Petitioner's Exhibit 12 was viewed for demonstrative purposes only. Petitioner testified that the Exhibit 12 showed a man bringing the landing gear off the ground to finish connecting to the truck. He testified that Exhibit 12 depicted what he was doing on September 16, 2019 when he was injured. He testified that Exhibit 12 truly and accurately depicted the same body mechanics and motions that he was doing on September 16, 2019. Petitioner testified that the main difference in Exhibit 12 and the September 16, 2019 accident was that he was facing the trailer with both hands on the dolly crank when it went into "free-fly." He testified that instead of the crank getting knocked out of his hands, the crank picked him up off the ground and pushed him against the trailer.

Petitioner testified that immediately after the occurrence, he experienced sharp pain in the middle of his back at his belt line. He testified that when he refers to belt line pain, he is referring to right above the buttocks. He testified that after the accident, he finished the process of hooking the trailer up, got his paperwork, and proceeded to drive back to Morton, Illinois. He testified that he reported the accident to his employer, Ben Pulling, via text message.

Petitioner testified that on September 20, 2019, he sought treatment for his low back pain. He testified his pain had gotten a little worse. He testified that he saw Dr. Ausfahl and reported that his low back was bothering him with stiffness. He testified that quick movements and bending over aggravated his pain. He testified that Dr. Ausfahl recommended over the counter medication and gave him a work restriction of no pushing, pulling, or lifting over 25 pounds.

Petitioner testified that he followed up with Dr. Ausfahl on September 27, 2019 and reported that his pain level hadn't changed but that the pain was going into his left hip. He testified that his left hip would get agitated and swell. He testified that Dr. Ausfahl gave him Naproxen and maintained his work restrictions. He testified that he continued to work and followed up with Dr. Ausfahl on October 4, 2019. He testified that his pain was also in his right hip but wasn't as bad. He testified Dr. Ausfahl lifted his restrictions and told him to follow up one more time on October 29, 2019. Petitioner testified that on that October 29, 2019, he informed Dr. Ausfahl that his pain returned along his belt line and his left hip would swell up when agitated. He also testified that his pain would go into his right hip as well. He testified that Dr. Ausfahl recommended physical therapy.

Petitioner testified that he first saw the physical therapist on November 6, 2019, and at that time his pain was still in his belt line and in his left hip. He testified that when his symptoms got really bad, the pain would move into his right hip. He also testified that his pain radiated down his left leg to just above the knee. He testified that he ended up going to six physical therapy sessions, but they were not very helpful. He testified that the therapist recommended aquatic therapy because it relieved pressure on his body and allowed him to move more freely. He testified that he attended thirteen aquatic therapy sessions. He testified that during this time period he was working, but that Dr. Ausfahl had put him back on his original work restriction of no twisting, turning, or lifting 25 pounds.

Petitioner testified that he did not believe that Respondent was honoring his work restrictions. He testified that due to federal regulations of trucking, you have to pre-trip your semi- truck and trailer which entailed opening your hood to check your oil. Petitioner testified that all of Respondent's trucks have a cattleguard that wraps around the nose of the hood. He testified that the cattleguard is on pins and in order to check the oil, he had to bend down, pull the cattleguard's pins and then reach up and pull the cattleguard down. He testified that once the cattleguard is down, you have to reach up and pull the hood open.

At the time of arbitration, a photograph of the cattleguard and hood were entered into evidence as Exhibit 15. Petitioner testified that the photograph truly and accurately depicted the truck that Petitioner drives every day for Respondent. He also testified that the photograph depicts the cattleguard that's on the front of Respondent's semi-trucks. Petitioner testified that the cattleguard weighed more than 25lbs and was made of steel. Petitioner also testified that he had to work with dollies during his work restrictions. He testified that a dolly is an apparatus that is used to connect two trailers. He testified that he would have to hook up the first trailer to the truck, and then hook the dolly up to the back of the first trailer using a pintle hitch. He testified that then the second trailer is connected to the dolly.

At the time of arbitration, a FedEx video of hooking up a dolly was identified as Petitioner's Exhibit 14 and was viewed for demonstrative purposes only. Petitioner testified that Petitioner's Exhibit 14 was a FedEx training video that demonstrated how to attach a dolly. Petitioner testified that the video depicted a man pulling a dolly. Petitioner testified that the dollies weigh approximately 3,000 to 4,000 pounds. He testified that you have to lift the tongue of the dolly off of the ground and then pull it to the trailer.

Petitioner testified that he was experiencing pain while engaged in these duties and driving over the road. He testified that after sitting a while, his back would start bothering him at the belt line and would produce an internal swelling sensation in his left hip. He testified that he had to start "seat dancing" which he described as moving all over the place and a constant repositioning of his legs. He testified if he did not do this the pain would go into his left leg and cause it to get numb.

Petitioner testified that Dr. Ausfahl eventually ordered an MRI of the lumbar spine. Petitioner testified that Dr. Ausfahl told him that the MRI showed that he had pinched nerves in his lower back. He testified that Dr. Ausfahl referred him to Daniel Mulconrey, M.D. of Midwest Orthopaedics.

Petitioner testified that on February 7, 2020, he reinjured himself while pulling his fifth wheel's lever. He testified that the fifth wheel has a lever on the driver's side toward the front of the wheel that you have to pull to unlatch the truck and trailer.

At the time of arbitration, a video of pulling a fifth wheel lever was identified as Petitioner's Exhibit 16 and viewed for demonstrative purposes only. Petitioner testified that Exhibit 16 depicted a man pulling a lever which releases the fifth wheel and allows the truck and trailer to separate. He testified that in the video, the man was able to pull out the lever smoothly, but when he pulled the lever on February 7, 2020, it got stuck and jarred his whole body. Petitioner testified that he reported this accident to his employer.

Petitioner testified that he reported the February 7, 2020 accident to Dr. Mulconrey and further reported that it had reaggravated and made his symptoms worse. Petitioner testified that he told Dr. Mulconrey that he had pain in his belt line mainly into his left hip and down his left leg to his knee. Petitioner testified that Dr. Mulconrey recommended that he undergo additional physical therapy and an injection with Dr. Carmichael. He also testified that Dr. Mulconrey placed him on work restrictions of no lifting 10 lbs., no over the road driving, or riding in a truck. Petitioner testified that at this time, Respondent took Petitioner off of work. Petitioner testified that he underwent physical therapy at Midwest Orthopaedics and underwent three or four injections with Dr. Carmichael. He testified that injections only provided temporary relief and that physical therapy only provided minimal relief.

Petitioner testified that Dr. Mulconrey discussed the option of surgery because it was the only treatment option left. Petitioner testified that he wanted to have the surgery to be able to get back to things that he did before he got hurt, such as martial arts and riding his motorcycle.

He testified that the surgery was not authorized, and he was sent to an independent medical examination with Dr. Mather. Petitioner testified that he took issue with Dr. Mather's testimony and reports. Petitioner testified that Dr. Mather stated in his deposition that he gave Petitioner the option to stop and correct Dr. Mather's dictation while he was dictating into his recorder during the exam. Petitioner testified that Dr. Mather never told him that he could correct his dictations. Petitioner testified that Dr. Mather instructed him to touch his toes, but he was only able to get down to his knees. He testified that it was inaccurate when Dr. Mather stated that he was able to touch his toes freely and stand right back up during Dr. Mather's examination.

Petitioner testified that Dr. Mather lifted Petitioner's left leg to 80 degrees. Petitioner testified that he complained of pain when his left leg got 4 or 5 inches off the examination table, but that Dr. Mather inaccurately stated in his report that Petitioner's leg went to a full 80 degrees without Petitioner complaining of pain. Petitioner testified that after Dr. Mather issued his report, temporary total disability and medical benefits were discontinued, and he was required to go back to work. Petitioner testified that he still has the symptoms in his back, and they are more severe and constant. Petitioner testified that his average pain range is between 5-7/10. Petitioner testified that he ended up undergoing injections with Dr. Carmichael through his Veteran's Affairs' benefits. However, he testified that Dr. Carmichael told him that injections where just a temporary relief and informed him that surgery was the only other treatment modality that could be offered to him.

Petitioner testified that his current daily work schedule is about eleven to thirteen hours long with approximately eight to nine hours spent sitting in the cab of his semi-truck. He testified that sitting still for so long aggravated his pain and caused radiculopathy all the way down to his feet in both legs. He testified that the only way he can get relief is if he positions himself in his recliner in a way that relieves pressure off his back. Petitioner testified that he wants to have the lumbar fusion as recommended by Dr. Mulconrey.

On cross examination, Petitioner testified that he had always been honest and truthful with his medical professionals and provided them with complete answers. He testified that he was honest

for the purpose of getting better. He also testified that he gave his providers a truthful history of how the accidents occurred. He testified that he did this because he wanted to be diagnosed properly in order to help him get better. Petitioner testified that he first sought treatment four days after the September 16, 2019 accident and never went to the emergency department or any clinics on the date of the accident. He testified that Dr. Ausfahl removed restrictions on October 4, 2019 but placed him back on restrictions on October 29, 2019. Petitioner testified that throughout his direct examination he was alternating between sitting and standing.

Petitioner testified that following his February 7, 2020 accident, he called Dr. Ausfahl's office who informed him that he did not need to set up an appointment in their clinic but to instead wait for an appointment with Dr. Mulconrey on February 24, 2020. Petitioner testified that his pain after the second accident was the same as his pain after the first accident. He testified that he was having flare ups in the days leading up to February 7, 2020. He also followed up with Veteran Affairs on January 14, 2021 to discuss his ongoing lower back pain. Petitioner testified that he believed that he inquired whether alternative treatment could be done as an alternative to the fusion surgery.

Petitioner testified that if he wanted to get the disputed surgery on his own, he could have obtained it through Veteran Affairs. However, Petitioner testified that he couldn't sustain himself financially. Petitioner testified that since July 2020, he had been working as a truck driver, working 11-to-13-hour shifts, six days a week. He testified that his work had not been interrupted since that time. He testified that he had not missed any work from July 2020 through present due to pain or alleged injuries. He testified that he just deals with the pain and works. Petitioner testified that he did not know the number of times he saw Dr. Mulconrey or the exact dates. However, Petitioner testified that he last saw Dr. Carmichael on August 23, 2021 and had not had any updated medical treatment since that time. He further testified that he did not have any current restrictions from either Dr. Carmichael or Dr. Mulconrey. Petitioner testified that the independent medical examination took away his restrictions.

Petitioner testified that each of his shifts since July 2020 required him to pull out the fifth wheel lever. He testified that this requires him to reach under the trailer with one arm to grab the lever's handle. Petitioner testified that this sometimes takes a bit of strength. Petitioner testified that he has to do this between two to five times per shift. Petitioner testified that there is no one with him to help with this task. He also testified that since July 2020, he has been required to crank a trailer during each shift. He testified that some trailers are easier to crank than others. He testified that there is no one to help him with this task and that the task must be done on a daily basis. He testified that he also climbs in and out of his cab multiple times during a shift. Petitioner further testified that he had to spend quite a bit of time in a seated position and that there were sometimes vibrations in the semi-cab while driving the truck. However, Petitioner testified that he drove with all of the air out of his seat to avoid bouncing in the cab. He testified that all of these activities were examples of duties that he performed 11-to-13 hours per day for six days a week since July 2020.

Petitioner testified that he did not know when the photograph marked as Exhibit 15 was taken. Petitioner testified that he took the photograph so that it could be used at trial. Petitioner testified that he was able to open the hood of the semi-truck to take the photograph. Petitioner testified that

he believed that he told Dr. Mulconrey that he returned to work in July 2020. Petitioner testified that Dr. Carmichael was also aware that he was back at work. He testified that Dr. Carmichael did not give him any work restrictions because he was an associate of Dr. Mulconrey.

Petitioner testified that he injured his back a bunch of years prior to September 2019. Petitioner testified that he had prior worker's compensations claims that had settled. He testified that he could not remember if the claims were for his low back. Petitioner testified that he had been in motor vehicle accidents prior to September 2019. However, Petitioner testified that he could not remember how many or when. Petitioner testified that he could not remember if he was involved in an accident in Mukwonago, Wisconsin in 1998. He testified that he could not remember an auto collision on August 12, 2008, on Jefferson Street in Peoria, Illinois.

Petitioner testified that he couldn't remember if he once lived at 4418 Crabtree Court, Peoria, Illinois. He testified that his son's name is also Michael Eddy. Petitioner testified that he was not good at remembering dates and during direct examination, when he was asked if dates were accurate for treatment and posed as a question; He accepted them as the accurate dates. Petitioner testified that he was in a motorcycle accident and was required to have three brain surgeries. Petitioner testified that he was driving down a road in Peoria and when he went around a corner, his tire blew out and his bike hit a concrete culvert causing him to do flips with the bike. Petitioner believed that it occurred in 2007 but was not certain. Petitioner testified he injured his right foot and head during the motorcycle accident. He testified that he did not injure his low back. Petitioner testified that he did not treat for his low back for the motorcycle accident.

Petitioner did testify that he had back treatment around 2009 or 2010 but did not recall treating for five years prior to September 2019 or what the extent of the treatment was. Petitioner testified that he was also involved in an accident where he fell out of a semi-trailer and had to have left elbow surgery to reattach tendons. He testified that he did not injure his low back in that accident.

Petitioner testified that he only watches martial arts and has not practiced martial arts in the last two to three years. He testified that no doctor has ever told him that he cannot do martial arts. Petitioner also testified that he enjoys riding motorcycles but only very rarely rides them currently. However, he testified that he had just bought a new motorcycle a month prior to arbitration. He testified that he is not medically restricted from driving a motorcycle. He testified that he bought a new motorcycle for nostalgia because it was similar to an old bike that he once owned. He testified that he probably rides his motorcycle once a month or once every couple of months.

Petitioner testified that he did not dispute that Dr. Mather was dictating into a recorder when he was doing his independent medical examination. However, Petitioner testified that he did not interrupt Dr. Mather to correct him because he was raised not to disrespect people. Petitioner testified that he tries to maintain his home exercise program but is unable to do it on a daily basis due to his work hours.

Petitioner testified that he forwarded an email between his employer and himself to his counsel. He testified that the email referenced an accident where Petitioner slipped and aggravated his injury when he was fixing a windshield wiper. Petitioner testified that he did not file a new claim for this injury and did not seek treatment as a result. However, he testified that he informed Dr.

Carmichael of this accident. Petitioner testified that he intends to continue working and was scheduled for a shift during the coming Sunday. He also testified that he did not have any current plans to return to Dr. Mulconrey or the Veteran Affairs.

On re-direct, Petitioner testified that he had not had treatment for low back pain or leg issues in the three years prior to September 2019. He testified that prior to September 2019, no physician had ever recommended a lumbar fusion. Petitioner testified that Dr. Mulconrey never indicated that he could go back to work without restrictions. He testified that Dr. Mather stated that he could go back to work without restrictions. He testified that his temporary total disability was terminated. He testified that he was not married and that the only way he can support himself is through work. He testified that Dr. Mulconrey indicated that if he underwent the lumber fusion, he would have at least three to six months of recovery time where he could not work. Petitioner testified that if he was awarded the ability to have the lumbar fusion, he would proceed with the procedure.

On re-cross, Petitioner testified that Dr. Mulconrey placed him on restrictions of no over the road driving and no riding in a truck. Petitioner agreed that since July 2020, he had been driving trucks six days a week for 11 to 13 hours a day. However, Petitioner testified that he didn't have a choice but to work. He testified that he was able to do more than Dr. Mulconrey's restrictions but had constant pain when working. He testified that he is still in constant pain when he works.

MEDICAL RECORDS

The medical records of UnityPoint Health- James Ausfahl, M.D. were entered into evidence at the time of arbitration as Petitioner's Exhibit 1. The records reflect that on September 20 ,2019, Petitioner presented to James Ausfahl, M.D. of UnityPoint Health Clinic with complaints of low back pain. It was noted that Petitioner reported that he was thrown forward while cranking up the trailer of a truck when the trailer hit the fifth wheel, resulting in Petitioner being thrown forward and sideways. It was noted that Petitioner reported that he did not fall but had an onset of low back pain. It was noted that Petitioner described the pain as being in his left paralumbar area. He noted that he experienced some stiffness for a few days, but now the stiffness was annoying but not devastating. It was noted Petitioner reported that his pain was aggravated by quick movement, sometimes bending, and getting back up after bending. It was noted that physical examination revealed a positive left Patrick's test. Dr. Ausfahl diagnosed Petitioner with low back pain. Dr Ausfahl recommended that Petitioner continue to take over the counter ibuprofen as needed. (Petitioner's Exhibit "PX" 1, 0005-0009).

The medical records of Dr. Ausfahl reflect that on September 27, 2019, Petitioner complained of left low back pain and reported that his pain level was unchanged since his last visit, but that the pain had "moved" from the midline spine to the left low back, left of his spine. It was noted that Petitioner described his pain as being in the lumbar area, just about the top of the sacrum. It was noted that physical examination revealed a positive left Patrick's test and pain on palpation of the left sacroiliac joint. It was noted that Dr. Ausfahl diagnosed Petitioner with left lower back pain and possible sacroiliitis. It was also noted that Dr. Ausfahl placed Petitioner on a return-to-work restriction and recommended that Petitioner continued to use naproxen. (PX1, 0009-0014).

The medical records of Dr. Ausfahl reflect that on October 4, 2019, Petitioner reported that the pain was getting better but that the pain had begun to involve the right side as well as the left. It was noted that Dr. Ausfahl removed Petitioner's work restrictions and advised him to return in two weeks for a recheck. (PX1, 0016-0019).

The medical records of Dr. Ausfahl reflect that on October 29, 2019, Petitioner complained of left hip pain and reported low back pain going to the left hip and occasionally into the right hip as well. It was noted that Petitioner reported that he had been functioning but with pain. It was noted that physical examination revealed pain upon palpation of the left sacroiliac joint area and lower paralumbar area. It was noted that Dr. Ausfahl diagnosed Petitioner with low back pain, returned Petitioner's work restrictions, and referred him to physical therapy. (PX1, 0019-0024).

The medical records of UnityPoint Health Methodist Outpatient Therapy were entered into evidence at the time of arbitration as Petitioner's Exhibit 2. The records reflect that on November 6, 2019, Petitioner presented to Janel Culbertson, P.T. for an initial physical therapy evaluation. It was noted that Petitioner reported that he injured his low back while at work on September 16, 2019. It was noted that Petitioner reported that a force from a trailer threw him, and he tweaked his back upon landing. It was noted that Petitioner reported that he had pain immediately but a few days later it became severe. It was noted that Petitioner reported a low back and "swelling" sensation which radiated across the back along the belt line and into the left and right hip. It was also noted that Petitioner described pulling down the back of the left leg to the knee and rated his pain at 3/10. It was noted that P.T. Culbertson found that Petitioner was significantly limited in his spine and hip range of motion with bending and rotation. It was noted that P.T. Culbertson recommended that Petitioner attend skilled physical therapy two times a week for eight weeks to address his pain, mobility, and strength deficits. (PX2, 0081-0087).

The medical records of UnityPoint Health Methodist Outpatient Therapy indicated that Petitioner attended physical therapy from November 12, 2019 through December 12, 2019 for seven (7) visits. (PX2, 0085-0100). The records indicate that on November 12, 2019, Petitioner noted swelling and described his pain as burning. (PX2, 0088). The records indicate that on November 14, 2019, Petitioner reported that he had to maneuver dollies for attaching a double trailer and that his work was making him work through this which he felt was breaking his work restrictions. The record further indicates that this task was setting him back from gains he made in therapy. (PX2, 0090). The records also indicate that on November 21, 2019, Petitioner reported that he felt like he was unable to bend and lift. The record also indicated that he reported that sitting remained bothersome and he felt like he had to move a lot to get into a position to make himself more comfortable. (PX2, 0094).

The medical records indicate that on December 6, 2019, Petitioner reported that his back felt "swelled up". It was noted that Petitioner also noticed that when he sat and rode in his truck, he had a swelling and tightness sensation. The records note that he was unable to keep his pants buckled when sitting in the truck. The records further note that Petitioner was experiencing radicular symptoms across his entire low back into the left lower extremity to about the knee. It was noted that since Petitioner was having increased symptoms, that a trial of aquatic therapy would be beneficial and provide improved buoyancy, strengthening with resistance of water, and

warm water temperature to manage symptoms. (PX2, 0096-0098). The medical records indicate that Petitioner attended aquatic therapy sessions on December 10 and 12, 2019. (PX2,0099-0100).

The medical records of Dr. Ausfahl indicted that Petitioner followed up with him on December 19, 2019. The notes indicate that Petitioner reported that he was still having pain and that a couple of maneuvers done in physical therapy caused him major pain. The notes indicate that Petitioner believed he was not making any progress. It was noted that he still had morning stiffness and still described his pain being in the left lower back with radiation into his left buttock. At this time, it is also noted that Petitioner complained of occasional radiation to the posterior thigh but noted that it never went below his knee. The records indicate that Dr. Ausfahl diagnosed Petitioner with persistent low back pain and referred him for MRI imaging of the lumbar spine. (PX1, 0025-0029).

The medical records of UnityPoint Health Methodist Outpatient Therapy indicated that Petitioner attended aquatic therapy on December 26, 2019 and January 2, 2020. (PX2, 0101-0102). The notes indicted that on December 26, 2019, Petitioner noted that he had a lot of discomfort in his low back but that his work was finally honoring his restrictions. It is noted that Petitioner rated his pain at 4/10. (PX2, 0101). The notes indicate that on January 2, 2020, Petitioner rated his left low back pain at 3-4/10. The notes also indicated that Petitioner did not currently have left leg pain and noted that he received relief after therapy but then when he went to work, his pain increased. The records reflect that Petitioner noted that he had a flare up on New Year's Eve which lasted for a day. The records further note that Petitioner reported that when his back pain worsened, his leg pain would usually worsen too. (PX2, 0102).

The medical records of UnityPoint Health Methodist Medical Center Hospital were entered into evidence at the time of arbitration as Petitioner's Exhibit 3. The records reflect that on January 9, 2020, Petitioner underwent an MRI of the lumbar spine which revealed multilevel degenerative change, severe bilateral neuroforaminal stenosis, right greater than left at L5-S1. (PX3, 0142-0145).

The medical records of UnityPoint Health Methodist Outpatient Therapy indicate that Petitioner continued aquatic therapy on January 14, 2020, through February 13, 2020 for a total of ten (10) visits. (PX2, 0104-0118). The records indicated that on January 16, 2020, Petitioner reported that he was not doing well as he drove a truck the following night that required a lot of work to maintain in the lane properly, gave increased perturbations sitting in the chair, and was overall very rough. The records further indicate that Petitioner reported that aquatic therapy had given him a couple of hours of relief, but with his work schedule, he was right back to work after his therapy sessions. The records indicate that Petitioner reported that he had intermittent pain into the left foot and that the radicular pain into the foot had been happening the past week. (PX2, 0105-0107). The records indicate that on January 21, 2020, Petitioner rated his low back pain at 3-4/10. (PX2, 0108). The records indicate that on January 23, 2020, Petitioner reported that his back was swelling and that his back was so much worse after a 12–14-hour shift. (PX2, 0109). The medical records indicate that on January 28, 2020, Petitioner reported that he did feel better after therapy, but he worked so much that it reversed his progress. (PX2, 0110). On January 30, 2020, the notes indicate that Petitioner reported that therapy gave him relief, but he was back in his truck for work two hours after treatment. It noted that Petitioner reported that work aggravated his back and was inhibiting his progress. (PX2, 0111).

The medical records of UnityPoint Health Methodist Outpatient Therapy dated February 11, 2020, indicate that Petitioner reported that he may have re-injured his back at work Friday. The records indicate that Petitioner was pulling pins and unloading his trailer when he experienced a sharp shooting pain across the low back near the belt line. The records indicate that Petitioner reported that he notified his employer, and he was taken off work. (PX2, 0115). The record indicates that on February 13, 2020, P.T. Foster recommended that Petitioner's physical therapy be put on hold until his appointment with the orthopedic surgeon. (PX2, 0116-0117).

The medical records of Midwest Orthopaedic Center were entered into evidence at the time of arbitration as Petitioner's Exhibit 4. The medical records indicate that on February 24, 2020, Petitioner presented to Daniel S. Mulconrey, M.D. of Midwest Orthopaedic Center with complaints of lumbar and lower extremity pain. The records indicate that Petitioner reported that he was working on a trailer at a dock, he bent down over his truck on the fifth wheel and when he was bent over, adjusting his cattle pins, he had significant increase in lumbar based pain as well as lower extremity pain. The records indicate that Petitioner rated his lumbar spine pain at 2/10 and his lumbar based pain at 7/10. The records further indicate that Petitioner reported pain in both buttocks, posterior aspect of the thigh, left leg, calf, and foot. The records indicate that Petitioner also noted weakness in the thigh and numbness in both thighs, calf, and foot. The records indicate that Dr. Mulconrey diagnosed Petitioner with lumbar degenerative disk disease and neurogenic claudication with spinal stenosis and recommended that Petitioner continue with physical therapy for the next six weeks and undergo a bilateral L5-S1 transforaminal injection with Dr. Carmichael. The record indicates that Dr. Mulconrey placed Petitioner on a work restriction of 10 pounds, with no lifting or over the road/local driving or riding in a tractor/trailer. (PX4, 0150-0160). The records note that on March 2, 2020, Petitioner underwent consult for a bilateral L5 transforaminal epidural steroid injection with Dr. Carmichael as recommended by Dr. Mulconrey. (PX4, 0161-0165).

The medical records of the Department of Veteran Affairs were entered into evidence at the time of arbitration as Petitioner's Exhibit 5. The records indicate that on March 6, 2020, Petitioner presented to Tracie Peterson of the VA for a routine visit and reported that he was seeing Dr. Mulconrey for his back pain. The notes further indicate that Petitioner rated his pain 5/10 and was prescribed Tylenol No. 3 for pain. (PX5, 0258-0259).

The medical records of Midwest Orthopaedic Center indicate that Petitioner attended physical therapy with Tracey Reimer, P.T. from March 9, 2020 through April 16, 2020 for a total of twelve (12) visits. (PX4, 0166-0191). The records indicate that on March 9, 2020, Petitioner rated his pain at 4-5/10 in his low back and 6-7/10 in his left hip. The records also indicate that Petitioner reported that he could get pain in his left posterior thigh which could also radiate into his left heel. He also noted that his left hip was a lot more irritable since wearing the brace. The records note that Petitioner reported that he injured himself even more when he lifted the hood or maybe unlatching trailers, thus he felt that the pain was even more intensified. The record further indicates that Petitioner noted that his left lower extremity had given out two times. The record notes that Petitioner also reported that he had back pain ten years ago and was managed with epidurals until this incident and that he did martial arts and would like to get back on his motorcycle. The notes indicate that P.T. Reimer recommended that Petitioner be seen two times a week for eight weeks. (PX4, 0166-0168).

The notes also indicate that on March 17, 2020, Petitioner noted that his discomfort was only in the left leg with nerve pain going down to the knee. (PX4, 0171). The record dated March 19, 2020 indicated that Petitioner reported that he was getting a little stronger in the left leg but noted that he still gets a little "taxed" after therapy. The record also noted that Petitioner's pain going down the back of his leg was still there and was causing discomfort, but that it was not as strong as before. (PX4, 0172). The record dated March 24, 2020 indicated that Petitioner had been experiencing some more nerve pain and was questioning why he also felt weakness as if his leg wanted to give out. (PX4, 0175). The record dated March 27, 2020 indicates that Petitioner reported that his left leg felt weak and rated his pain at 6/10. (PX4, 0177). The record dated March 31, 2020 indicates that Petitioner reported that he had been doing a little more walking and was currently a little sorer from it. The record also noted an increase in Petitioner's left hip tingling sensation and some right leg numbness going down into the knee. (PX4, 00179). The record dated April 2, 2020 indicates that Petitioner was rating his pain at 5/10 and reported that his left knee was bothering him a little. (PX4, 0180). The record dated April 7, 2020 indicates that Petitioner was frustrated that he still had some left knee pain, that his back muscle felt tired, and also felt that he should have been stronger by now. (PX4, 0182). The records indicate that on April 9, 2020, Petitioner reported a little tingling in his left lower extremity after lying in prone position for manual therapy and further noted that his pain was still present but that he had better left lower extremity strength over the past week. (PX4, 0183). The record dated April 13, 2020 indicates that Petitioner reported that he was just walking when he felt like his back was going to give out on him as well as a sharp "knifing" pain going through the middle of the spine. (PX4, 0184).

The Midwest Orthopaedic Center record dated April 15, 2020 notes that Petitioner returned to Dr. Mulconrey and reported severe lumbar based pain with intermittent lower extremity pain. The notes indicate that Petitioner reported that he had pain in his bilateral lower extremities with the left being worse than the right. The notes also indicate that Petitioner reported increased lower extremity radiculopathy which caused him to have buckling and weakness which caused him to fall. The record indicates that physical examination revealed a mildly positive FABER sign, as well as pain and tenderness over the Fortin point. The record indicates that X-ray imaging revealed severe degenerative disk disease at L5-S1, and MRI imaging revealed bilateral foraminal narrowing with severe facet arthropathy, L5-S1 as well as mild central canal stenosis associated with this segment. (PX4, 0185-0186).

The record indicates that Dr. Mulconrey noted that Petitioner failed physical therapy as well as a structured home exercises program for his left lower extremity weakness, lumbar-based pain, and lower extremity radiculopathy. The record notes that Dr. Mulconrey recommended that Petitioner proceed with operative intervention. The records noted that Dr. Mulconrey opined that Petitioner would need a resection of the facet joint for complete decompression of the spinal canal and left exiting nerve root. The record indicates that Dr. Mulconrey noted that this would require instrumented spinal fusion and interbody fusion at the L5-S1 segment as well to address lumbar spondylosis. (PX4, 0185-0186).

The record dated April 16, 2020 indicates that Petitioner returned to P.T. Reimer for continued physical therapy and reported that he saw Dr. Mulconrey, and they discussed an injection or surgery. The notes indicate that Petitioner reported that he was considering surgery and that Dr.

Mulconrey was putting in the paperwork for verification. The notes also indicate that Petitioner noted that he was nervous but wanted to be more active without pain. The record noted that Petitioner felt that he was stronger but that something did not feel right in his left lower extremity and rated his pain at 5/10. The notes indicate that P.T. Reimer noted that she would discuss recommendation regarding physical therapy with Dr. Mulconrey while Petitioner was waiting for surgical approval. The notes indicate that P.T. Reimer recommended that Petitioner continue with his home exercise program until new physical therapy recommendations were issued. (PX4, 0189-0191).

The record dated May 15, 2020 indicates that Petitioner returned to Dr. Mulconrey and noted that he continued to deal with severe lumbar based pain as well as bilateral lower extremity pain with the left being greater than the right. The notes indicate that Petitioner reported that he had a difficult time with sitting and standing and that his tolerance was slowly decreasing, and he was having progressive right lower extremity weakness as well. The notes indicate that Petitioner rated his pain at 6/10. The notes indicate Dr. Mulconrey diagnosed Petitioner with lumbar degenerative changes and neurogenic claudication with lateral recess and foraminal spinal stenosis. The notes indicated that Dr. Mulconrey provided Petitioner with the same work note as the last office appointment pending surgery. The record indicated that Dr. Mulconrey believed that Petitioner would return to work in 3 to 6 months with light duty and possibly full duty in approximately 8 months. The records further indicated that Dr. Mulconrey would wait for authorization from Respondent before proceeding with surgical intervention. (PX4, 0192-0196).

The Midwest Orthopedic Center record dated July 31, 2020 indicates that Petitioner returned to Dr. Mulconrey and reported that he had an IME and the IME doctor determined that his current medical condition was not work related. The notes indicate that Dr. Mulconrey opted to see what occurs in Petitioner's litigated case prior to surgery. (PX4, 0198-0199).

The Department of Veteran Affairs record dated January 14, 2021 indicates that Petitioner presented to Dr. Chittivelu and reported chronic low back pain which radiated to his bilateral lower extremities more on the left. The record indicates that Petitioner reported that he had tingling on his left lower extremity down to his feet. The note indicates that Petitioner has tried NSAIDS and Tramadol in the past but since he was a truck driver he wanted to see if they could do something without interfering with his driving. The notes indicate that Petitioner rated his pain at 7/10 and reported his pain as sharp, dull, achy, and stabbing. The records indicate that physical examination revealed that straight leg rising test was positive for back pain and lateral left thigh pain. The note indicates that Dr. Chittivelu recommended that Petitioner start Mobic, lyrical for one month and to report in 3-4 weeks for follow up and referral to orthopedic. (PX5, 0249-0252).

The Midwest Orthopedic Center record dated March 22, 2021 indicates that Petitioner presented to Dr. Carmichael with complaints of low back pain. The note indicates that Petitioner reported that more than ten years ago he had some back issues but then he did very well for over five years until 2019. The notes indicate that Petitioner reported that in September 2019, he was working at a dock and was working with a 5th wheel trailer and the trailer suddenly shifted putting a lot of force on the crank that he was cranking causing it to jerk him and throw him into the trailer. The notes indicate that Petitioner stated that this caused him to injure his back and develop an onset of back and leg pain that has since persisted. (PX4, 0200-0211).

The record indicates that Petitioner reported symptoms including left foot numbness and tingling in the left back as well as leg pain which he rated at a 6/10. The notes indicate that Dr. Carmichael recommended a left L5/S1 transforaminal steroid injection. The Midwest Orthopaedic Center record dated April 6, 2021 indicates that Petitioner underwent a L5/S1 transforaminal epidural steroid injection. (PX4, 0211-0215).

The record indicates that on April 19, 2021, Petitioner followed up with Dr. Carmichael and complained of left foot numbness and tingling in the left back as well as leg pain which he rated at 6/10. (PX4, 0216-0220). The record indicates that on May 25, 2022, Petitioner underwent another L5/S1 transforaminal epidural steroid injection with Dr. Carmichael. (PX4, 0224-0225). The record dated June 28, 2021 indicates that Petitioner continued to complain of left foot numbness and tingling in the left back as well as leg pain which he rated at a 6/10. (PX4, 0227-0228). The record dated July 13, 2021 indicates that Petitioner underwent a third L5/S1 transforaminal epidural steroid injection with Dr. Carmichael. (PX4, 0233-0234).

The Midwest Orthopaedic Center records dated July 23, 2021 and August 2, 2021 indicates that Petitioner presented to Dr. Carmichael for a two week follow up after an epidural steroid injection on July 13, 2021. The record indicates that Petitioner noted mild weakness and instability in the left leg since his epidural steroid injection on July 13, 2021. The notes indicate that Petitioner reported that his pain had dramatically improved since the transforaminal epidural. The note also indicates that Petitioner noted some pain in the left low back that he described as a baseball sensation that had been moving around from his midline to his left upper buttocks. Petitioner noted that if he was seated for a long time and then stands or walks, he felt like his left leg could give out. (PX4, 0235-0239).

The notes indicate that Dr. Carmichael diagnosed Petitioner with intervertebral thoracic disc disorder with radiculopathy and noted that it appeared that a mild sensory ataxia in the left leg could be due to anesthetic affecting the dorsal root ganglion of the left L5 nerve root. The notes indicate that Dr. Carmichael recommended an updated MRI and increased Petitioner's prescription for Lyrica from 75 to 150 mg. The notes indicate that an MRI dated August 16, 2021 revealed mild L4-5 central spinal stenosis secondary to concentric bulging disc, ligamentous hypertrophy, facet arthropathy, moderate bilateral L4-5 and moderate bilateral L5-S1 foraminal stenosis, and lumbar spondylosis with no other sites of lumbar disc herniation, or conus or cauda equina compression. (PX4, 0235-0239).

The Midwest Orthopaedic Center record dated August 23, 2021 noted that Petitioner had an L5/S1 transforaminal epidural steroid injection on the right on April 6, 2021 that helped. The record noted that Petitioner had a L5/S1 transforaminal epidural steroid injection on the left on May 25, 2021 and did well until June 5, 2021 when Petitioner's symptoms returned while washing a windshield. The record noted that Petitioner had a left L5/S1 transforaminal epidural injection which did not seem to work. The record noted that Petitioner's current symptoms were pain in the left back and leg to the lateral calf. The record states that Petitioner's pain was reduced in his right side since the first epidural steroid injection. However, he noted that it was coming back a little to the right proximal anterolateral hip. Petitioner also complained of left foot numbness and tingling. He also noted that his left leg gave out at times. Petitioner noted that this had happened three times

without warning, but it did not lead to a fall. He noted that his aggravating factors included increased activity, bending, sitting, and standing. He noted that laying down helped alleviate his pain. (PX4, 0244-0246).

The record indicates Dr. Carmichael noted that MRI imaging of the lumbar spine taken on January 9, 2020 showed multilevel disc changes with significant foraminal stenosis right greater than left at the L5-S1. The record also indicates that Dr. Carmichael also noted that an MRI taken on August 16, 2021 showed left L4/5 lateral and foraminal herniation, right L5/1 foraminal herniation, facet hypertrophy from L3-S1, and bilateral severe L5 foraminal stenosis. The record indicates that Dr. Carmichael diagnosed Petitioner with intervertebral thoracic disc disorder with radiculopathy. The record noted that Petitioner would like to have surgery with Dr. Mulconrey but that it had been put on hold by insurance. The notes indicate that Petitioner was to continue his home exercise program and engage in activity modification. (PX4, 0240-0241; 0244-0246).

TESTIMONY OF DANIEL SCOTT MULCONREY, M.D.

The transcript of the deposition of Daniel Scott Mulconrey, M.D. was entered into evidence at the time of arbitration as Petitioner's Exhibit 6. Dr. Mulconrey testified that attended medical school at the University of Illinois College of Medicine and graduated in 2001. He testified that he completed an orthopedic surgery residency program at University of Nebraska, Creighton University in 2006 and went on to complete an orthopedic spine fellowship surgery program at Washington University in St. Louis in 2007. He testified that he has been practicing at Midwest Orthopaedic Center in Peoria, Illinois since 2007. He testified that his practice focuses on both adult and pediatric surgeries of the spine. (PX6, 0265-0266).

Dr. Mulconrey testified he first saw Petitioner on February 24, 2020 for lumbar-based pain and lower extremity pain. He testified that Petitioner informed him that since September 2019 he had been working with restrictions up until February 7, 2020 when Petitioner informed him that he was working on a dock on a trailer, was bent down over his truck at the fifth wheel and was adjusting the cattle pin when he had a significant increase in his back pain as well as leg pain. Dr. Mulconrey testified that since that time Petitioner reported that he had pain in both of the buttocks, back of the left calf, leg, and foot as well as weakness in his left thigh. (PX6, 0268-0269).

Dr. Mulconrey testified that Petitioner had missed work since February 7, 2020 and had done massage, tractions, some medications for pain relief and some physical therapy. Dr. Mulconrey testified that Petitioner filled out a new patient questionnaire. Dr. Mulconrey testified that Petitioner filled out the pain section of the questionnaire consistent with the history Petitioner gave him. (PX6, 0269-0271).

Dr. Mulconrey testified that he took X-ray imaging at his office which indicated that Petitioner had degenerative disc disease at L5-S1. He also testified that he reviewed an MRI that was performed at UnityPoint Medical Center on January 9, 2020 that revealed multi-level degenerative disc disease and neuroforaminal stenosis right greater than left at L5-S1. He testified that in layman's terms he had degeneration of his bottom disc and there was impingement on the nerve roots. (PX6, 0272-0273).

Dr. Mulconrey testified that he diagnosed Petitioner with lumbar degenerative disc disease, neurogenic claudication with spinal stenosis, and a history of work reported injuries. Dr. Mulconrey testified that he recommended that Petitioner return to him in six weeks after continuing a physical therapy program and provided him with a back brace. (PX6, 0273-0274). He also testified that he discussed a possible epidural cortisone injection at the L5-S1 level and placed him on a work restriction of 10- pound lifting, no bending, lift, twist and no over-the-road or local driving or riding in a tractor trailer. (PX6, 0273-0274). Dr. Mulconrey testified that he next saw Petitioner on April 15, 2020. (PX6, 0274). Dr. Mulconrey testified that it appeared that Petitioner had worsened since the last office appointment and was having increased left leg pains. Dr. Mulconrey also noted that Petitioner reported buckling and weakness of the left lower extremity which caused him to fall. Dr. Mulconrey testified that his assessment now added lower extremity weakness which was supported by physical examination. (PX6, 0275).

Dr. Mulconrey testified that by April 15, 2020, Petitioner had completed the physical therapy program, but his condition had worsened. He noted that Petitioner had not received the injection that he had discussed in the previous appointment, but that Petitioner was becoming very concerned as he was falling, and he had developed leg weakness. (PX6, 0275) He noted that Petitioner was not eager to undergo the injection due to his decline in his functional status. (PX6, 0276). Dr. Mulconrey testified that he thought this was very reasonable in the fact that he had now had approximately several months of conservative care and his condition had worsened. (PX6, 0276). Dr. Mulconrey testified that due to Petitioner's weakness, his pain, the change in his condition, and his inability to return to work, they discussed surgery. (PX6, 0275). Dr. Mulconrey testified that due to the compression of the nerve root and the degeneration of the disc at L5-S1, he recommended a spinal fusion and an interbody fusion with laminectomy of L5-S1. Dr. Mulconrey testified that the surgery would have removed compression off the nerve roots to improve Petitioner's lower extremity function and strength. Dr. Mulconrey testified that Petitioner would return to work in three to six months with light duty, and possible full duty in approximately eight months. (PX6, 0276-0277).

Dr. Mulconrey testified that Petitioner had not underwent the surgery due to lack of insurance approval. Dr. Mulconrey testified that he next saw Petitioner on July 31, 2020 after he underwent an independent medical examination. Dr. Mulconrey testified that he disagreed with a diagnosis of lumbar strain and psychogenic pain with functional overlay. Dr. Mulconrey also disagreed that Petitioner was a maximum medical improvement. (PX6, 0278-0279).

Dr. Mulconrey testified that his review of the X-rays revealed some overgrowth of bone associated with degeneration of the L5-S1 disc but in his opinion, it was still a mobile disc. Dr. Mulconrey testified that the disc at L5-S1 was not auto fused. Dr. Mulconrey testified that Petitioner's injury occurring with a work-related injury was consistent with the history that Petitioner provided him. (PX6, 0280-0282).

On cross examination, Dr. Mulconrey testified that he performs three to four spinal surgeries a week and one hundred and fifty a year. Dr. Mulconrey testified that he did not know when Petitioner was working or not working during his restrictions. (PX6, 0284-0285). Dr. Mulconrey could only describe Petitioner as bent over or flexed at the waist when he injured himself pulling pins. Dr. Mulconrey could not testify whether Petitioner was pulling horizontally or vertically. Dr.

Mulconrey could not testify regarding the direction of force, or the amount of force required to pull the pins. He could not testify whether Petitioner was pulling multiple pins or a single pin. Dr. Mulconrey testified that Petitioner never conveyed to him those lifting activities were part of Petitioner's job duties. (PX6, 0286- 0288).

Dr. Mulconrey testified that the radiologist's interpretation of the January 9, 2020 lumbar MRI was similar to his own. He further testified that there was nothing on the MRI that he could create a temporal relationship to the date of the accident described by Petitioner. Dr. Mulconrey testified that he did not believe that the L5-S1 was auto fused prior to Petitioner's work accident. He also testified that he agreed with Dr. Mather's interpretation of the X-ray with the exception of the auto fusion. Dr. Mulconrey testified that it would be speculation to assume that Petitioner would need the proposed surgery absent the workplace injury. (PX6, 0289-0291).

On cross examination, Dr. Mulconrey testified that his surgical recommendation was based on Petitioner's subjective pain complaints. Dr. Mulconrey testified in the absence of Petitioner's complaints, the MRI and X-rays finding didn't warrant surgery. Dr. Mulconrey testified that he had patients with similar MRIs who were able to carry on their daily lives without requiring a spinal fusion. (PX6, 0294).

On re-direct, Dr. Mulconrey testified that his surgical recommendation was based on Petitioner's complaints of pain as well as imaging that he reviewed. Dr. Mulconrey testified that MRI dated January 9, 2020 revealed bilateral neuroforaminal stenosis. Dr. Mulconrey testified that Petitioner's complaints were consistent with imaging which revealed bilateral neuroforaminal stenosis which is why he recommended surgery. Dr. Mulconrey testified that he had no reason to believe that Petitioner was a malinger. Dr. Mulconrey testified that he believed that the Petitioner would want to treat conservatively as possible without the need for surgery if possible. (PX6, 0295-0296).

TESTIMONY OF DAVID NATHAN, M.D.

The transcript of the deposition David Nathan M.D. was entered into evidence at the time of arbitration as Petitioner's Exhibit 7. Dr. Nathan testified that he graduated from Northwestern University in 1999. He testified that he did his internship in Chicago at St. Joseph's Hospital for a year and then did diagnostic radiology for four years at the University of Wisconsin. He testified that he did a one-year musculoskeletal imaging fellowship at the University of Wisconsin. He testified that he was licensed to practice in Illinois in 1999 and in Wisconsin in 2000. He also testified that he is licensed in Florida. Dr. Nathan testified that he is board certified by the American Board of Radiology. Dr. Nathan testified that after he finished his fellowship, he moved to Peoria, Illinois and began working for Central Illinois Radiological Associates. He testified that he worked for Central Illinois Radiological Associates from 2005 through 2015. Dr. Nathan testified that he now works for Specialists in Medical Imaging. (PX7, 0387-0389).

Dr. Nathan testified that he reads lumbar MRIs and X-rays quite frequently. He testified that he authored the narrative of Petitioner's January 9, 2020 lumbar MRI. Dr. Nathan testified that L5-S1 disk was abnormal and there was height loss that didn't have the normal degree of hydration for a healthy disk. He testified that there was a bulging of the disks diffusely, and then there was

a focal disk protrusion that was extending into the right neural foramen. He further testified that there was mild facet arthropathy and ligamentum flavum hypertrophy. Dr. Nathan testified that these findings were causing severe bilateral neural foraminal stenosis, more on the right side where the disk protrusion was, than on the left. Dr. Nathan testified "the nerve roots that exit the central canal from the spinal cord then go out to supply parts of the body. He testified that the way the exit is through the neural foramen and if the neural foramen are narrowed or stenosed, then there is risk that that is causing injury, inflammation, or irritation to the nerve roots that are exiting at that level, and that can cause symptoms in patients". Dr. Nathan testified that his impression of the MRI was multi-level degenerative changes and severe bilateral neural foraminal stenosis at L5-S1 more so on the right side than the left side. (PX7, 0389-0393).

Dr. Nathan testified that he did not see findings of auto fusion in the lumbar MRI. He testified that based on his review of the MRI, it was his opinion that the L5-S1 disk was not calcified. He testified that he did not see calcification of the disk space to suggest that the disk was fused. (PX7, 0394-0398).

On cross examination, Dr. Nathan testified that he was not a surgeon and was not an interventional radiologist. He testified that he never saw Petitioner in person. He testified that he reviews more than 2,000 images a day. He testified that his opinions are based entirely on the MRI report and images dated January 9, 2020. Dr. Nathan testified that it would be speculative to say whether his opinions would change if he saw an X-ray of Petitioner. However, he testified that he found it highly unlikely that he would see something that would change his mind but couldn't be dogmatic about it. Lastly, Dr. Nathan testified that it is possible for the L5-S1 level to fuse over time due to degenerative changes. On redirect, Dr. Nathan testified that his finding revealed a structural abnormality at the L5-S1 level. (PX7, 0398-0402).

DEPOSITION OF STEVEN MATHER, M.D.

The transcript of the deposition Steven Mather, M.D. was entered into evidence at the time of arbitration as Respondent's Exhibit 5. Dr. Mather testified that he became a medical doctor in 1985 and was licensed to practice in Illinois in 1992. He testified that he is board certified in orthopedic surgery since 1994. He testified that he had to complete a certified residency in orthopedic surgery, a board examination, and be in practice for two years prior. Dr. Mather testified that he has an office and surgical practice which sees 80 patients a week. He testified that his practice is an exclusively spinal oriented practice. Dr. Mather testified that he does three hundred to three hundred and fifty spinal surgeries a year. (Respondent's Exhibit "RX" 5, Pg 7-8).

Dr. Mather testified that about ten percent of his practice is independent medical examinations. He testified that he has been an examining physician since 1999. He testified that twenty five percent of his practice is treating worker's compensation claims. He testified that in his ordinary course of his practice he reviews medical treatment records, medical and diagnostic reports, and medical and diagnostic imaging as well as in person observation in order to render a diagnosis. He testified that he renders opinions regarding whether his diagnoses are medically causally related to an alleged accident. (RX5, Pg. 9-10).

Dr. Mather testified that the request of Respondent, he reviewed materials and conducted a physical examination of the Petitioner. He testified that he offered multiple reports in which he rendered findings and opinions. He testified that he prepared a report dated June 26, 2020, an addendum dated July 31, 2020, and a second addendum dated May 27, 2021. (RX5, Pg. 11-12).

Dr. Mather testified that Petitioner told him that he was working for FedEx as a driver and was with them for approximately a year before the injury but was driving semis before that. He testified that Petitioner told him that on September 16, he was adjusting the fifth wheel under a trailer. He noted that the fifth wheel was basically a pivot system where the trailer hooks up to the vehicle itself. He noted that as the trailer came down to the fifth wheel and he was cranking it, the trailer lurched forward, and this caused him to be thrown forward and hit his head on the trailer. He noted that this was about two o'clock in the morning. Petitioner had to drive back from Chicago to Morton Illinois, which is about a three-hour drive. He noted that he went to work the next day and told them about the back pain and stiffness. He texted his employer and went to see Proctor First Care in Peoria Heights for back pain and then he started physical therapy. (RX5, Pg. 14-15).

Dr. Mather testified that Petitioner informed him that he worked with light duty and that physical therapy helped him a bit but then he started having pain down the left leg about five months after the injury. Dr. Mather testified that Petitioner saw Dr. Montgomery [sic], who was a spine specialist who put in some more physical therapy. He testified that Petitioner told him that he was told by Respondent to do things that were in excess of his restrictions so Dr. Montgomery [sic] put him on a ten-pound lifting restriction. Dr. Mather further testified that Petitioner had an oral history of back problems from ten years prior, but nothing recent. He testified that Petitioner had a major motorcycle accident, which required three brain surgeries, and a right foot surgery but did not injure his spine in the accident. Petitioner described his current symptoms as bilateral low back pain, numbness and tingling in the back of the right leg and calf. (RX5, Pg. 15-16).

Dr. Mather testified that for the first five months, Petitioner didn't have anything that suggested any radicular pain, which would indicate that there really was no nerve involvement, so he ruled out anything like spinal stenosis or nerve compression as the source of Petitioner's subjective complaints. Dr. Mather testified that he believed that Petitioner was dealing with low back pain which in his opinion was a very common complaint after some sort of mechanical injury. (RX5, Pg.17).

Dr. Mather testified that he would have expected that Petitioner would have reported hitting his head during the accident to Dr. Ausfahl during his first date of service. He also testified that Petitioner had no radicular complaints and no objective findings on September 27, 2019. He also noted that Petitioner reported that his symptoms were nothing major. Dr. Mather also testified regarding his review of the initial physical therapy report dated November 6, 2019. He noted that Petitioner did not have radicular complaints and also denied hitting his head from the work injury. He testified that this was not consistent with Petitioner's report to him. (RX5, Pg. 17-18).
With regard to the MRI dated January 9, 2020, Dr. Mather testified that Petitioner had no foraminal stenosis at L5-S1 and that his MRI was unremarkable for Petitioner's age. Dr. Mather testified that his review of the February 24, 2020 visit with Dr. Mulconrey revealed that Petitioner had a sudden appearance of numbness, tingling, and pain down the left leg all the way down the foot but had normal sensation. (RX5, Pg. 19).

Dr. Mather testified that he performed a physical examination of Petitioner. He testified that Petitioner did not complain of any of back discomfort when he got out of the chair. He testified that Petitioner was not taking pain medication, had no back tenderness, no spasms, normal gait, and full range of motion of the lumbar spine. He testified Petitioner could almost touch his toes with knee straights and never complained of discomfort when getting up from the bent-over position. He testified that Petitioner had minimal discomfort with lateral bending and had no pain with the Waddell's maneuver. Dr. Mather testified that he had some back discomfort with straight leg raising at 80 degrees but that it was an irrelevant and subjective finding. He also testified that the straight leg test was negative because a positive straight leg raise was supposed to reproduce pain before 70 degrees. (RX5, Pg. 20-21).

With regard to X-ray imaging, Dr. Mather testified that the X-ray imaging revealed a collapsed disc at L5-S1 with large anterior osteophytes on the front of the disc and basically the osteophytes connecting L5 and S1 to fuse it. Dr. Mather testified that MRIs are not good for showing calcification at L5-S1 because bone, especially very dense bone such as osteophytes do not have a signal because there is absence of signal on MRI, it's not very good for showing calcification. Dr. Mather testified that the best view of the calcification at L5-S1 would be X-ray or CT. (RX5, Pg. 22-24).

Dr. Mather testified that his final diagnoses for Petitioner was lumbar strain on the day of the injury but that the strain had resolved. Dr. Mather testified that Petitioner's symptoms would have resolved itself in approximately four weeks with or without treatment. Dr. Mather testified that no additional treatment necessary. Dr. Mather testified that the basis for forming the diagnosis was that there was no nerve root compression shown on the MRI. He further testified that a sudden complaint of numbness and tingling and pain down the left leg below the knee didn't make any sense since it occurred five months after the injury. Dr. Mather further testified that the L5-S1 level had auto fused making it immobile and impervious to trauma. Dr. Mather believed that only ten visits of physical therapy were necessary for Petitioner and that Petitioner did not meet the criteria for epidural steroid injections. (RX5, Pg. 24-26).

Dr. Mather testified that he believed that Petitioner could return to full duty because the disc at L5-S1 was impervious to trauma and could not be injured. Dr. Mather testified that for his first addendum to his report, he reviewed an X-ray dated February 24, 2020 and June, 17, 2013. He testified that the February X-ray showed an auto fusion between L5-S1 and the June 17, 2013 X-ray did not. He testified that he agreed with Dr. Ausfahl's reading of the MRI with no nerve root compression. (RX5. Pg. 29-30).

With regard to his interpretation of the radiologist's interpretation of the MRI, Dr. Mather testified that there were some diffuse degenerative changes throughout most of the lumbar spine from L2-S1 as well as some disc bulging on the right side, which was opposite of Petitioner's left leg symptoms. Dr. Mather testified that this was significant because right-side bulges do not cause left sided symptoms. (RX5, Pg. 32).

Dr. Mather testified that the additional records did not change his diagnosis of lumbar strain. He also testified that Petitioner current complaints were not related to the work accidents and that the

ongoing complaints could not be explained on the basis of the physical examination and MRI. Dr. Mather testified that a L5-S1 laminectomy and fusion with decompression of the L5 nerve root would be inappropriate because Petitioner was complaining of S1 symptoms, there was no clinic findings that suggest the L5 nerve root is entrapped, and his straight leg test was negative because Petitioner's complaints didn't start until five months post injury. (RX5, Pg 36-37).

On cross examination, Dr. Mather testified that he had been involved with medicolegal consulting since 1999. He testified that he charges $1,200 per hour for the review of records, $1,200 for independent medical examinations, $1,500.00 per hour for depositions, and $4,800 for a half day of trial. He testified that he does approximately 200-210 independent medical examinations with 100 percent being for respondents. He testified that twenty percent of his income is from medicolegal works. (RX5, Pg. 49-50). He also testified that he is not board certified in radiology. He further testified that he does one independent medical examination every three weeks for Respondent's law firm. (RX5, Pg.51). Dr. Mather testified that he dictated Petitioner's employer as Ben Dulling and Petitioner's orthopedic surgeon as Dr. Montgomery. (RX5, Pg. 57)

On cross examination, Dr. Mather testified that he agreed that Petitioner was having numbness and pain down the left leg to the knee as of November 2019. Dr. Mather testified that he agreed that Petitioner was having pain into the left and right hip by October 29, 2019. Dr. Mather testified that pain was not radicular unless it went below the knee. Dr. Mather based this opinion on the Hoppenfeld Physical Exam. However, he did not cite a specific section or read an exert to support his theory. He testified that one hundred percent of the time, pain will at least go below the knee. (RX5, Pg. 58-59).

Dr. Mather testified that his report stated that Radiologist, Dr. David Nathan indicated that there was no foraminal stenosis at L5-S1. He testified that his report was inaccurate in terms of the interpretation of what Dr. Nathan said. He further testified that he did not review the MRI films when he wrote that portion of his report. He testified that he incorrectly reported the radiologist's opinion and did not know how it had happened. Dr. Mather agreed that two radiologists indicated that there was moderate to severe foraminal stenosis at L5-S1. (RX5, Page 66-67). Dr. Mather further testified that he was unaware that Petitioner had reinjured himself on February 7, 2020 and never saw it in his review of Petitioner's records. (RX5, Pg 70).

On re-direct, Dr. Mather testified that with regard to the reference to "Dr. Montgomery", it was possible that something may have just been lost in translation during the oral history he took from Petitioner. He testified that it could have been his interpretation or Petitioner's misunderstanding. (RX5, Pg. 73-74).

DEPOSITION OF TRACEY REIMER, P.T.

The transcript of the deposition of Tracey Reimer, P.T. was entered into evidence at the time of arbitration as Petitioner's Exhibit 9. P.T. Reimer testified that prior to treating Petitioner, she reviewed Dr. Mulconrey's notes in the regular course of business in order to treat Petitioner. (PX9, 0629). She testified that she treats patients with neural foraminal stenosis at L5-S1 and neurogenic claudication with spinal stenosis. (PX9, 0630).

She testified that she first saw Petitioner on March 9, 2020. She testified that she performed a physical examination which included straight leg raise test and Faber test which were both positive. (PX9, 0635-0637).

She further testified that when obtaining a history from Petitioner she assumed that Petitioner injured himself in September and then his symptoms intensified after the February accident. (PX9, 0639). She testified that her findings from her range of motion testing and specials tests were consistent with prior patients that she had treated with neural foraminal stenosis at L5-S1. (PX9, 0641). P.T. Reimer testified that on March 12, 2020, Petitioner was complaining of nerve pain traveling down both of his legs. (PX9, 0644). P.T. Reimer testified that she has had patients complain about nerve pain going into their hip one day and then all the way into their foot the next day. (PX9,0646-0647).

DEPOSITION OF CRAIG CARMICHAEL, M.D.

The transcript of the deposition of Craig Carmichael, M.D. was entered into evidence at the time of arbitration as Petitioner's Exhibit 8. Dr. Carmichael testified that attended medical school at Washington University School of Medicine until 1996 and did a residency in physical medicine and rehabilitation at Mayo Clinic until 2000. He testified that he then went to practice at McLean County Orthopedics in 2000 until 2019. He testified that his area of specialty is mostly spine, interventional pain medicine, spine injections, spine diagnosis, and comprehensive treatment of the spine. He testified that in 2019 he went to Midwest Orthopaedic Center in Peoria, Illinois for interventional pain management. He further testified that he left Midwest Orthopaedic Center in 2021 to start his own practice. (PX8, 0415-0416).

Dr. Carmichael testified that he treats patient with lumbar spine and lumbar radiculopathy issues. He testified that he is board certified in physical medicine and rehabilitation and electrodiagnostic medicine. He testified that he had the opportunity to treat Petitioner on March 2, 2020. He testified that Petitioner was complaining of pain across the back and into the legs. Specifically, he noted that Petitioner reported pain across the low back bilaterally and in the left posterior thigh to the knee and occasionally to the foot. (PX8, 0416-417).

He testified that Petitioner informed him that he had some initial back pain ten years prior but did well for over five years until September 2019 when he had an injury at work. Dr. Carmichael testified that Petitioner told him that he was working on a trailer at the dock and was working with a fifth wheel when the trailer suddenly shifted putting a lot of force on the crank as he was cranking it, and that jerked him and threw him into the trailer injuring his back. (PX8, 0417-0418).

Dr. Carmichael testified that when he first saw Petitioner, he had already obtained an MRI. Dr. Carmichael testified that he reviewed both the MRI report and MRI film. He testified that his review of the MRI report and MRI film revealed significant foraminal stenosis, right greater than left at L5-S1. (PX8, 0418-0419). Dr. Carmichael diagnosed Petitioner with significant foraminal stenosis and proceeded with a bilateral L5 transforaminal epidural injection as recommended by Dr. Mulconrey. (PX8, 0420-0421).

Dr. Carmichael testified that he saw Petitioner for a follow up on March 22, 2021. Dr. Carmichael testified that during that visit Petitioner complained of pain in the low back bilaterally and bilateral posterior thigh to the knee and occasionally to the foot, worse with increased activity, bending, sitting, and standing. (PX8, 0421). Dr. Carmichael testified that Petitioner filled out a new patient document which indicated that his symptoms had worsened on February 7, 2020 when he was bending over to pull pins on a cattleguard. Dr. Carmichael testified that Petitioner indicated that his pain was present in the right and left buttock, in the back of the left leg, calf, foot, and further described weakness in the left thigh and some numbness and tingling throughout the legs. (PX8,0422-0423).

Dr. Carmichael defined radiculopathy as an impingement or disruption in a particular nerve root exiting the spine. Dr. Carmichael testified that the clearest way to determine impingement would be some change on muscle activity such as diminished reflex or weakness in the muscle. He testified that radiculitis is more inflammation of the nerve root where you still have pain radiating in the pattern of that nerve, but you don't necessarily have a focal deficit of weakness. He testified that then there's referred pain in which you have an object that irritated the back or other part of the body, but the pain is felt somewhere else. (PX8, 0423-0424).

Dr. Carmichael testified he would consider pain going to just the knee as well as pain going below the knee to both be radiculopathy. Dr. Carmichael testified that there is generally not a difference whether someone is experiencing pain to their knee versus down to their foot. He testified that it may just indicate a different nerve that's involved, and there are some nerves that can be pinched that only go to the very top of the thigh with very severe radiculopathy. (PX8, 0424)

Dr. Carmichael testified that he next saw Petitioner on April 6, 2021 for a right L5-1 transforaminal epidural injection and again on May 25, 2021 for a left L5-1 transforaminal epidural injection. (PX8, 0426-0427). Dr. Carmichael testified that Petitioner followed up with him on June 28, 2021 and reported that he was doing great until June 5, 2021 when he was washing a windshield and had some return of symptoms. Dr. Carmichael testified that he recommended a repeat left transforaminal epidural that was performed on July 13, 2021. (PX8, 0427-0428).

Dr. Carmichael testified that on July 23, 2021, Petitioner returned to him and reported that he had mild weakness and instability to the left leg since July 13, 2021. Dr. Carmichael noted that Petitioner reported that his pain had dramatically improved since the injection but that he still had some pain in the left low back that he described at times like a baseball sensation that had been moving around from the midline to the left upper buttock. He also testified that Petitioner informed him that if he had been seated a long time and then goes to stand or walk, it felt like his left leg could give out although it didn't. (PX8, 0428-0429)

Dr. Carmichael testified that physical examination revealed very slight weakness in the left quadriceps. He testified that the significance of this finding was that the underlying impingement was progressing and the radiculopathy in the left leg was progressing, or it could be that Petitioner has some anesthetic effect from the injection on July 13, 2021. (PX8, 0429)

Dr. Carmichael testified that at this time, his diagnoses were intervertebral thoracic disc disorder with radiculopathy and foraminal stenosis at L5-S1. He testified that he next saw Petitioner on

August 2, 2021 and that Petitioner complained of pain in the left back and leg to the lateral calf that was becoming severe as well as left foot numbness and tingling. He testified that he ordered another lumbar MRI for Petitioner which revealed left L4-L5 lateral and foraminal herniations, right L5-1 foraminal herniation, facet hypertrophy from L3 to S1, and bilateral severe L5 foraminal stenosis. (PX8, 0430-0431).

Dr. Carmichael testified that he last saw Petitioner on August 23, 2021. He testified that at this time, Petitioner reported his left leg gave out three times and increased activity, bending, sitting and standing aggravated his symptoms. (PX8, 0433). Dr. Carmichael testified that the plan was for Petitioner to continue with his home exercise program and activity modification. (PX8, 0434).

Dr. Carmichael testified that it was his opinion that the surgery was necessary at this point because injections and conservative care was not sufficient to get rid of Petitioner's pain. Dr. Carmichael testified that it was probably more likely than not that there was causal connection between the injury in August 2019 and February 2020 and his pain, dysfunction, and need for treatment. (PX8, 0434-0435).

Dr. Carmichael testified that he disagreed with Dr. Mather's opinion that X-ray is a better diagnostic tool than MRI to diagnose condition involving the spine and discs. Dr. Carmichael also testified that he disagreed with Dr. Mather's opinion that Petitioner's disc had auto fused. Dr. Carmichael testified that the L5-S1 is severely narrowed and there were bone spurs around it but that there was still a considerable amount of disc material and enough that there were focal herniations coming out of it. He testified that usually when doctors think about a fusion, they will see an X-ray where it seems like one continuous bone which had no gap in between, but that Petitioner had a very noticeable gap in between and disc material that's adequate enough for it to herniate out. (PX8, 0437-0438).

On cross examination, Dr. Carmichael testified that he did not know the exact mechanism of injury such as turning of a crank versus twisting or being thrown. He testified that he did not know if Petitioner was thrown forward or backward. He also testified that he didn't know the distance he was moved or thrown as well as the amount of force which he was thrown or at which the crank turned. (PX8, 0445).

Dr. Carmichael testified that his impression of Petitioner's prior back pain was that Petitioner was doing relatively well for over five years before the September 2019 incident. However, Dr. Carmichael testified that he did not know the extent of Petitioner's prior back complaints. Dr. Carmichael testified that on March 2, 2020, Petitioner complained of pain at 5/10 was subjective and he didn't note an objective finding to correlate Petitioner's pain complaints. (PX8, 0446-0448).

Dr. Carmichael testified that the next time he saw Petitioner was on March 22, 2021 and that his impression was that between those two visits, Petitioner was doing about the same and was hoping to have surgery. He also testified that as far as he knew, Petitioner was doing fine with epidural steroid injections until he was washing a windshield and had a return of his symptoms. Dr. Carmichael could not testify whether Petitioner was engaged in this activity for work or not. (PX8, 0449-0451). Dr. Carmichael testified that he relies heavily on the patient's history. He testified

that if the patient states that they were doing well and an event occurred and then they weren't doing well, he generally trusts them. He testified that Petitioner didn't give him many details about the June 5th windshield incident. (PX8, 0451-0452).

Dr. Carmichael testified that on August 23, 2021, Petitioner's physical examination was normal, and that Petitioner was rating his pain at 7/10. However, Dr. Carmichael testified that it could be a fairly common occurrence for a patient to complain of a seven out of ten-pain scale and have a completely normal physical examination. (PX8, 0453-0454).

Dr. Carmichael testified that he would ultimately defer any surgical recommendation to an orthopedic surgeon. He further testified that he did not review the reports of Dr. Mather and that prior to his deposition, he did not have any opinions on Dr. Mather's findings relative to Petitioner's condition. (PX8, 0455-0456).

Dr. Carmichael testified that the reason that he defers to Dr. Mulconrey is because they were in the same practice for about two years, and when he was in the practice in Bloomington, physicians would send patients to Dr. Mulconrey or his partners because he had a well-established reputation. (PX8, 0462).

On redirect, Dr. Carmichael testified that if he would have seen calcification on the MRI imaging, he would have noted it. (PX8, 0463). Dr. Carmichael testified that he did not believe the disc at L5-S1 was auto fused and further testified that the L5-S1 was definitely subject to trauma and to changing over time. He testified that there was clearly disc material that protruding out and an ability for the structures to shift around. (PX8, 0466-0468).

On recross, Dr. Carmichael testified that he would be surprised if another physician looked at Petitioner's L5-S1 level as auto fused. He testified that he would raise his eyebrows and believe that it was an unusual way of reading the imaging. He testified that if he was reading that something was auto fused, he would expect something different on the picture. (PX8, 0469-0470).

The medical expense summary and medical bills were entered into evidence at the time of arbitration as Petitioner's Exhibit 10 and Exhibit 10(a)-10(e).

CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law set forth below.

Issue C, whether the accident arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds as follows:

The Arbitrator notes that Respondent agrees to accident for the first date of accident, 9.15.19 (Case No. 19WC31352), but disputes the second date of accident, 2.7.20 (Case No. 21WC2952).

Petitioner used demonstrative evidence (PX 16) to explain that while working on 2.7.20, he was lifting a lever under the truck/trailer and re-hurt his back. The medical records of UnityPoint

Health Methodist Outpatient Therapy dated February 11, 2020, indicate that Petitioner reported that he may have re-injured his back at work Friday. The records indicate that Petitioner was pulling pins and unloading his trailer when he experienced a sharp shooting pain across the low back near the belt line. The records indicate that Petitioner reported that he notified his employer, and he was taken off work. (PX2, 0115). The records are consistent with Petitioner's testimony. Petitioner's accident occurred during the course of employment and was a risk distinctly associated with his employment.

The Arbitrator finds that Petitioner's accident on 2.7.20 arose out of and in the course of Petitioner's employment by Respondent.

Issue F, whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds as follows:

To obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. A work-related injury need not be the sole or principal causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. Even if the claimant had a preexisting degenerative condition which made him more vulnerable to injury, recovery for an accidental injury will not be denied as long as he can show that his employment was also a causative factor. Thus, a claimant may establish a causal connection in such cases if he can show that a work-related injury played a role in aggravating his preexisting condition. Sisbro, Inc. v. Industrial Comm'n, 207 Ill. 2d 193, 205, 797 N.E.2d 665, 278 Ill. Dec. 70 (2003). "A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." International Harvester v. Industrial Com., 93 Ill. 2d 59, 63 442 N.E.2d 908 (1982).

Petitioner did testify that he had treatment for his back around 2009 or 2010 but did not recall the extent of said treatment nor whether he had any treatment five years prior to September 2019. Petitioner testified that he had prior worker's compensations claims that had settled but could not recall if any claims were for his low back. Petitioner further testified that he had been in motor vehicle accidents prior to September 2019 but could not remember the nature of said accidents. Petitioner did recall an accident around 2007 resulting in three brain surgeries but stated that he did not injure his low back. The Arbitrator considers Petitioner's selective poor memory but does not see sufficient evidence of active medical treatment to the back in the years prior to his September 2019 accident.

Petitioner testified that on September 16, 2019, he was required to crank the trailer and while using the crank, he was picked up off his feet, and brushed up against the trailer. Petitioner testified that he felt immediate sharp back pain at the belt line and saw Dr. Ausfahl four days after the accident. Petitioner returned to work with restrictions and Petitioner testified that he further injured himself at work on February 7, 2020 when the lever of his fifth wheel got caught causing Petitioner's body to be jarred. Petitioner was eventually seen by Dr. Mulconrey who recommended that Petitioner undergo a spinal fusion and an interbody fusion with a laminectomy of L5-S1 after conservative treatment failed. Surgery was denied by Respondent after an IME with Dr. Mather.

A significant point of contention is whether the January 9, 2020 lumbar MRI and X-ray reveal auto fusion. While Dr. Mather opined that Petitioner's vertebrae at L5-S1 was auto fused, Petitioner's treaters disagreed. Dr. Mulconrey testified that Petitioner's x-ray did reveal some overgrowth of bone at the L5-S1 disc, but that it was still mobile. Dr. Carmichael testified that the L5-S1 is severely narrowed and there were bone spurs around it but that there was still a considerable amount of disc material and enough that there are focal herniations. Dr. Nathan, a board-certified radiologist, testified that he did not see a finding of auto fusion on the lumbar MRI dated January 9, 2020 and it was his opinion that the L5-S1 disk was not calcified.

The Arbitrator notes that Dr. Mather's interpretation is a clear outlier as three other medical providers found similar findings that are contrary to those of Dr. Mather. The Arbitrator further notes that Dr. Mulconrey, Dr. Nathan, and Dr. Carmichael were not retained to read Petitioner's radiological films, but instead were reading them in their regular course of their treatment of Petitioner.

Another point of contention is whether pain going to the knee is considered radiculopathy. Dr. Mather testified that he only considered pain going entirely through the leg into the foot to be radiculopathy. Dr. Mather further testified that since Petitioner did not complain of foot pain until five months after the date of injury, his symptoms cannot be casually related to the work accident.

Contrary to Dr. Mather, Dr. Carmichael testified that he would consider pain going to the knee as radiculopathy. He testified that there was generally not a difference whether someone is experiencing pain to their knee versus down to their foot. He testified that it may just indicate a different nerve that was involved. He testified that some nerves can only go to the very top of the thigh and can have very severe radiculopathy. Further, Dr. Carmichael testified that underlying impingements progress and that radiculopathy in the left leg can progress.

Additionally, physical therapist, Tracey Remier, P.T. testified that her findings from her range of motion testing and specials tests were consistent with prior patients that she had treated with neural foraminal stenosis at L5-S1. P.T. Reimer testified that on March 12, 2020, Petitioner was complaining of nerve pain traveling down both of his legs. P.T. Reimer testified that she has had patients complain about nerve pain going into their hip one day and then all the way into their foot the next day.

Dr. Mulconrey testified it was his opinion that Petitioner's injuries were sustained as a result of work-related activity based off the history that Petitioner provided him and his report of the symptoms beginning on the date of the workplace accident.

The Arbitrator notes that Dr. Mather stands alone in his opinions as compared to Petitioner's medical providers who have similar exam findings to one another as well as interpretations of studies, and opinions on diagnosis, treatment, work restrictions and causation. The Arbitrator finds the opinions of Petitioner's treating providers including Dr. Mulconrey, Dr. Carmichael, and radiologist Dr. Nathan to be more credible than those of Respondent's Section 12 examiner, Dr. Mather.

Petitioner has met his burden in proving a previous condition of good health, an accident, and a subsequent injury resulting in disability. **The Arbitrator finds that Petitioner's current condition of ill-being is causally related to the injuries of September 16, 2019 and August 7, 2020.**

Issue J, whether the medical services that were provided to Petitioner were reasonable and necessary and whether Respondent has paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds as follows:

Section 8(a) of the Act states a Respondent is responsible "…for all the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter incurred, limited, however, to that which is reasonably required to cure or relieve from the effects of the accidental injury…" A claimant has the burden of proving that the medical services were necessary, and the expenses were reasonable. See Gallentine v. Industrial Comm'n, 201 Ill.App.3d 880, 888 (2nd Dist. 1990).

Having found Petitioner's condition of ill-being casually related to his work accidents and having found Petitioner's treating providers to be more credible that Respondent's Section 12 examiner, the Arbitrator further finds Petitioner's treatment to be reasonable and necessary and finds that Respondent has not paid for said treatment.

As such, the Arbitrator orders Respondent to pay Petitioner directly for the outstanding medical services contained within Petitioner's Exhibit 10, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act. Respondent is entitled to a credit under Section 8(j) of the Act for medical paid in the amount of $6,365.92.

Issue K, whether Petitioner is entitled to any prospective medical care, the Arbitrator finds as follows:

Having found Petitioner's condition of ill-being casually related to his work accidents and having found Petitioner's treating providers to be more credible that Respondent's Section 12 examiner, the Arbitrator finds that Petitioner is entitled to prospective medical care.

Petitioner seeks a spinal fusion and an interbody fusion with laminectomy of L5-S1. Petitioner testified that Dr. Mulconrey never indicated that he could go back to work without restrictions and never placed him at MMI. Dr. Mather stood alone in his opinions that Petitioner could go back to work without restrictions and was at MMI.

Petitioner's testimony and medical records indicate that Petitioner has had multiple rounds of traditional physical therapy, a round of aquatic physical therapy, and multiple epidural steroid injections with only temporary and/or minimal relief. Dr. Mulconrey testified that Petitioner had approximately several months of conservative care and his condition had worsened. (See PX6, 0276). Dr. Mulconrey testified that his surgical recommendation was based on Petitioner's complaints of pain as well as imaging that he reviewed. Dr. Mulconrey testified that MRI dated January 9, 2020 revealed bilateral neuroforaminal stenosis. Dr. Mulconrey testified that Petitioner's complaints were consistent with imaging which revealed bilateral neuroforaminal

stenosis which is why he recommended surgery. Dr. Mulconrey testified that the surgery would remove compression off the nerve roots to improve Petitioner's lower extremity function and strength. Petitioner has presented evidence that Dr. Mulconrey's surgical recommendations are reasonable and necessary to improve Petitioner's lower extremity function and strength.

The fact that Petitioner has not undergone the disputed surgery though Veteran Affairs does not negate his claim. Dr. Mulconrey testified that after the surgery, Petitioner would return to work in three to six months with light duty, and possibly full duty in approximately eight months. Petitioner testified that he cannot sustain himself financially and must work. Petitioner's TTD benefits were terminated following Dr. Mather's IME. Petitioner is honest in testifying that he is able to do more than Dr. Mulconrey's restrictions. He works with constant pain.

The Arbitrator considers the fact that Petitioner continues to ride motorcycles even if only sparingly but turns to the medical evidence to determine whether Petitioner is malingering. The medical records do not suggest symptom magnification and Dr. Mulconrey testified that he had no reason to believe that Petitioner was a malinger or faking his subjective history in order to obtain surgery.

Respondent shall approve and pay for a spinal fusion and an interbody fusion with laminectomy of L5-S1 and necessary pre- and post-operative care as prescribed by Dr. Mulconrey as provided in Section 8(a) and 8.2 of the Act.

It is so ordered:

Arbitrator Rachael Sinnen

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC002952
Case Name	Michael Eddy v. Pulling Freight, Inc.
Consolidated Cases	19WC031352;
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	23IWCC0392
Number of Pages of Decision	34
Decision Issued By	Stephen Mathis, Commissioner, Marc Parker, Commissioner

Petitioner Attorney	Shane Mahoney
Respondent Attorney	Michael Scully

DATE FILED: 8/30/2023

/s/Stephen Mathis, Commissioner

Signature

/s/Marc Parker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Michael Eddy,

Petitioner,

vs. NO. 19 WC 31352
21WC 02952

Pulling Freight, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, prospective medical care, notice, evidentiary issues, 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 October 14, 2022, 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 party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

August 30, 2023

/s/ *Stephen J. Mathis*
Stephen J. Mathis

SJM/sj
o-8/9/2023
44

/s/ *Deborah L. Simpson*
Deborah L. Simpson

SPECIAL CONCURRING OPINION

This case was scheduled for Oral Arguments on August 9, 2023, before a three-member panel of the Commission including members Stephen Mathis, Deborah L. Simpson, and Deborah J. Baker, at which time Oral Arguments were either heard, waived or denied. Subsequent to Oral Arguments and prior to the departure of Deborah J. Baker on August 18,2023, a majority of the panel members had reached agreement as to the results set forth in this decision and opinion, as evidenced by the internal Decision worksheet initialed by the entire three-member panel, but no formal written decision was signed and issued prior to Commissioner Baker's departure.

Although I was not a member of the panel in question at the time Oral Arguments were heard, waived or denied, and I did not participate in the agreement reached by the majority in this case, I have reviewed the Decision worksheet showing how Commissioner Baker voted in this case, as well as the provisions of the Supreme Court in Zeigler v. Industrial Commission, 51 Ill.2d 137, 281 N.E.2d 342 (1972), which authorizes signature of a Decision by a member of the Commission who did not participate in the Decision. Accordingly, I am signing this Decision in order that it may issue.

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC002952
Case Name	Michael Eddy v. Pulling Freight, Inc.
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	31
Decision Issued By	Rachael Sinnen, Arbitrator

Petitioner Attorney	Shane Mahoney
Respondent Attorney	Michael Scully

DATE FILED: 10/14/2022

THE INTEREST RATE FOR THE WEEK OF OCTOBER 12, 2022 4.03%

/s/ Rachael Sinnen, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF **Cook**)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Michael Eddy
Employee/Petitioner

v.

Pulling Freight, Inc.
Employer/Respondent

Case # **21** WC **2952**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Rachael Sinnen**, Arbitrator of the Commission, in the city of **Chicago**, on **8.19.22**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, **2.7.20**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**20,346.24 over 16 weeks**; the average weekly wage was $**1,271.64**.

On the date of accident, Petitioner was **57** years of age, ***single*** with **0** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**19,515.28** for TTD, $**0** for TPD, $**0** for maintenance, and $**6,365.92** for other benefits, for a total credit of $**25,881.20**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

See Arbitration Decision for Case No. 19WC31352, consolidated with the instant case and hereby incorporated.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

OCTOBER 14, 2022

Signature of Arbitrator

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

Michael Eddy,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	Case No. 19WC31352
	)	*Consolidated with*
	)	Case No. 21WC2952
Pulling Freight, Inc.	)	
	)	
	)	
Respondent.	)	

FINDINGS OF FACT

This matter proceeded to hearing on August 19, 2022 in Chicago, Illinois before Arbitrator Rachael Sinnen on Petitioner's 8(a) petition. Issues in dispute include accident, causal connection, medical bills, and future medical. The parties agreed that if future medical was denied, then an award for nature and extent would be rendered. (Arbitrator's Exhibit "AX" 1 and 2).

PETITIONER'S TESTIMONY

Petitioner testified that he resides in Peoria, Illinois and currently works at Pulling Freight, Inc. in Morton, Illinois. He testified that he drives a semi-truck for Pulling Freight and has been employed with them since May 2019. Petitioner testified that in September 2019 he traveled from Morton, Illinois to Chicago, Illinois to obtain FedEx trailers and take them back to Morton, Illinois. He testified that his shifts in September 2019 were from approximately 10:00 p.m. to 5:00 a.m., five days a week. He testified that he would sit for approximately two-thirds of his shift or approximately, seven to eight hours.

Petitioner testified that on September 16, 2019, he was backing his semi-truck underneath the trailer that was in a dock. When he got out of his semi-truck, the trailer was 8 to 10 inches above the fifth wheel. He testified that the fifth wheel connects the semi-truck and trailer. Petitioner testified that the fifth wheel is an apparatus on the back of the truck with a slot that catches a kingpin that drops out of the front of the trailer. He testified that when you back the semi-truck's fifth wheel under the trailer, it latches to the trailer's kingpin. He testified that he began cranking the trailer using the dolly cranks on the side of the trailer. Petitioner testified that when the trailer touched the fifth wheel, there was pressure against the trailer and dock which caused the trailer to surge forward when he was on the upswing of the crank. He testified that the crank went into free-fly and picked him up off his feet, brushed him off the trailer, and caused him to land back onto

his feet in a position similar to a baseball catcher's position. He testified that he was jolted when he landed.

At the time of arbitration, a video depicting a gentleman using a crank to attach a trailer to a fifth wheel listed as Petitioner's Exhibit 12 was viewed for demonstrative purposes only. Petitioner testified that the Exhibit 12 showed a man bringing the landing gear off the ground to finish connecting to the truck. He testified that Exhibit 12 depicted what he was doing on September 16, 2019 when he was injured. He testified that Exhibit 12 truly and accurately depicted the same body mechanics and motions that he was doing on September 16, 2019. Petitioner testified that the main difference in Exhibit 12 and the September 16, 2019 accident was that he was facing the trailer with both hands on the dolly crank when it went into "free-fly." He testified that instead of the crank getting knocked out of his hands, the crank picked him up off the ground and pushed him against the trailer.

Petitioner testified that immediately after the occurrence, he experienced sharp pain in the middle of his back at his belt line. He testified that when he refers to belt line pain, he is referring to right above the buttocks. He testified that after the accident, he finished the process of hooking the trailer up, got his paperwork, and proceeded to drive back to Morton, Illinois. He testified that he reported the accident to his employer, Ben Pulling, via text message.

Petitioner testified that on September 20, 2019, he sought treatment for his low back pain. He testified his pain had gotten a little worse. He testified that he saw Dr. Ausfahl and reported that his low back was bothering him with stiffness. He testified that quick movements and bending over aggravated his pain. He testified that Dr. Ausfahl recommended over the counter medication and gave him a work restriction of no pushing, pulling, or lifting over 25 pounds.

Petitioner testified that he followed up with Dr. Ausfahl on September 27, 2019 and reported that his pain level hadn't changed but that the pain was going into his left hip. He testified that his left hip would get agitated and swell. He testified that Dr. Ausfahl gave him Naproxen and maintained his work restrictions. He testified that he continued to work and followed up with Dr. Ausfahl on October 4, 2019. He testified that his pain was also in his right hip but wasn't as bad. He testified Dr. Ausfahl lifted his restrictions and told him to follow up one more time on October 29, 2019. Petitioner testified that on that October 29, 2019, he informed Dr. Ausfahl that his pain returned along his belt line and his left hip would swell up when agitated. He also testified that his pain would go into his right hip as well. He testified that Dr. Ausfahl recommended physical therapy.

Petitioner testified that he first saw the physical therapist on November 6, 2019, and at that time his pain was still in his belt line and in his left hip. He testified that when his symptoms got really bad, the pain would move into his right hip. He also testified that his pain radiated down his left leg to just above the knee. He testified that he ended up going to six physical therapy sessions, but they were not very helpful. He testified that the therapist recommended aquatic therapy because it relieved pressure on his body and allowed him to move more freely. He testified that he attended thirteen aquatic therapy sessions. He testified that during this time period he was working, but that Dr. Ausfahl had put him back on his original work restriction of no twisting, turning, or lifting 25 pounds.

Petitioner testified that he did not believe that Respondent was honoring his work restrictions. He testified that due to federal regulations of trucking, you have to pre-trip your semi- truck and trailer which entailed opening your hood to check your oil. Petitioner testified that all of Respondent's trucks have a cattleguard that wraps around the nose of the hood. He testified that the cattleguard is on pins and in order to check the oil, he had to bend down, pull the cattleguard's pins and then reach up and pull the cattleguard down. He testified that once the cattleguard is down, you have to reach up and pull the hood open.

At the time of arbitration, a photograph of the cattleguard and hood were entered into evidence as Exhibit 15. Petitioner testified that the photograph truly and accurately depicted the truck that Petitioner drives every day for Respondent. He also testified that the photograph depicts the cattleguard that's on the front of Respondent's semi-trucks. Petitioner testified that the cattleguard weighed more than 25lbs and was made of steel. Petitioner also testified that he had to work with dollies during his work restrictions. He testified that a dolly is an apparatus that is used to connect two trailers. He testified that he would have to hook up the first trailer to the truck, and then hook the dolly up to the back of the first trailer using a pintle hitch. He testified that then the second trailer is connected to the dolly.

At the time of arbitration, a FedEx video of hooking up a dolly was identified as Petitioner's Exhibit 14 and was viewed for demonstrative purposes only. Petitioner testified that Petitioner's Exhibit 14 was a FedEx training video that demonstrated how to attach a dolly. Petitioner testified that the video depicted a man pulling a dolly. Petitioner testified that the dollies weigh approximately 3,000 to 4,000 pounds. He testified that you have to lift the tongue of the dolly off of the ground and then pull it to the trailer.

Petitioner testified that he was experiencing pain while engaged in these duties and driving over the road. He testified that after sitting a while, his back would start bothering him at the belt line and would produce an internal swelling sensation in his left hip. He testified that he had to start "seat dancing" which he described as moving all over the place and a constant repositioning of his legs. He testified if he did not do this the pain would go into his left leg and cause it to get numb.

Petitioner testified that Dr. Ausfahl eventually ordered an MRI of the lumbar spine. Petitioner testified that Dr. Ausfahl told him that the MRI showed that he had pinched nerves in his lower back. He testified that Dr. Ausfahl referred him to Daniel Mulconrey, M.D. of Midwest Orthopaedics.

Petitioner testified that on February 7, 2020, he reinjured himself while pulling his fifth wheel's lever. He testified that the fifth wheel has a lever on the driver's side toward the front of the wheel that you have to pull to unlatch the truck and trailer.

At the time of arbitration, a video of pulling a fifth wheel lever was identified as Petitioner's Exhibit 16 and viewed for demonstrative purposes only. Petitioner testified that Exhibit 16 depicted a man pulling a lever which releases the fifth wheel and allows the truck and trailer to separate. He testified that in the video, the man was able to pull out the lever smoothly, but when he pulled the lever on February 7, 2020, it got stuck and jarred his whole body. Petitioner testified that he reported this accident to his employer.

Petitioner testified that he reported the February 7, 2020 accident to Dr. Mulconrey and further reported that it had reaggravated and made his symptoms worse. Petitioner testified that he told Dr. Mulconrey that he had pain in his belt line mainly into his left hip and down his left leg to his knee. Petitioner testified that Dr. Mulconrey recommended that he undergo additional physical therapy and an injection with Dr. Carmichael. He also testified that Dr. Mulconrey placed him on work restrictions of no lifting 10 lbs., no over the road driving, or riding in a truck. Petitioner testified that at this time, Respondent took Petitioner off of work. Petitioner testified that he underwent physical therapy at Midwest Orthopaedics and underwent three or four injections with Dr. Carmichael. He testified that injections only provided temporary relief and that physical therapy only provided minimal relief.

Petitioner testified that Dr. Mulconrey discussed the option of surgery because it was the only treatment option left. Petitioner testified that he wanted to have the surgery to be able to get back to things that he did before he got hurt, such as martial arts and riding his motorcycle.

He testified that the surgery was not authorized, and he was sent to an independent medical examination with Dr. Mather. Petitioner testified that he took issue with Dr. Mather's testimony and reports. Petitioner testified that Dr. Mather stated in his deposition that he gave Petitioner the option to stop and correct Dr. Mather's dictation while he was dictating into his recorder during the exam. Petitioner testified that Dr. Mather never told him that he could correct his dictations. Petitioner testified that Dr. Mather instructed him to touch his toes, but he was only able to get down to his knees. He testified that it was inaccurate when Dr. Mather stated that he was able to touch his toes freely and stand right back up during Dr. Mather's examination.

Petitioner testified that Dr. Mather lifted Petitioner's left leg to 80 degrees. Petitioner testified that he complained of pain when his left leg got 4 or 5 inches off the examination table, but that Dr. Mather inaccurately stated in his report that Petitioner's leg went to a full 80 degrees without Petitioner complaining of pain. Petitioner testified that after Dr. Mather issued his report, temporary total disability and medical benefits were discontinued, and he was required to go back to work. Petitioner testified that he still has the symptoms in his back, and they are more severe and constant. Petitioner testified that his average pain range is between 5-7/10. Petitioner testified that he ended up undergoing injections with Dr. Carmichael through his Veteran's Affairs' benefits. However, he testified that Dr. Carmichael told him that injections where just a temporary relief and informed him that surgery was the only other treatment modality that could be offered to him.

Petitioner testified that his current daily work schedule is about eleven to thirteen hours long with approximately eight to nine hours spent sitting in the cab of his semi-truck. He testified that sitting still for so long aggravated his pain and caused radiculopathy all the way down to his feet in both legs. He testified that the only way he can get relief is if he positions himself in his recliner in a way that relieves pressure off his back. Petitioner testified that he wants to have the lumbar fusion as recommended by Dr. Mulconrey.

On cross examination, Petitioner testified that he had always been honest and truthful with his medical professionals and provided them with complete answers. He testified that he was honest

for the purpose of getting better. He also testified that he gave his providers a truthful history of how the accidents occurred. He testified that he did this because he wanted to be diagnosed properly in order to help him get better. Petitioner testified that he first sought treatment four days after the September 16, 2019 accident and never went to the emergency department or any clinics on the date of the accident. He testified that Dr. Ausfahl removed restrictions on October 4, 2019 but placed him back on restrictions on October 29, 2019. Petitioner testified that throughout his direct examination he was alternating between sitting and standing.

Petitioner testified that following his February 7, 2020 accident, he called Dr. Ausfahl's office who informed him that he did not need to set up an appointment in their clinic but to instead wait for an appointment with Dr. Mulconrey on February 24, 2020. Petitioner testified that his pain after the second accident was the same as his pain after the first accident. He testified that he was having flare ups in the days leading up to February 7, 2020. He also followed up with Veteran Affairs on January 14, 2021 to discuss his ongoing lower back pain. Petitioner testified that he believed that he inquired whether alternative treatment could be done as an alternative to the fusion surgery.

Petitioner testified that if he wanted to get the disputed surgery on his own, he could have obtained it through Veteran Affairs. However, Petitioner testified that he couldn't sustain himself financially. Petitioner testified that since July 2020, he had been working as a truck driver, working 11-to-13-hour shifts, six days a week. He testified that his work had not been interrupted since that time. He testified that he had not missed any work from July 2020 through present due to pain or alleged injuries. He testified that he just deals with the pain and works. Petitioner testified that he did not know the number of times he saw Dr. Mulconrey or the exact dates. However, Petitioner testified that he last saw Dr. Carmichael on August 23, 2021 and had not had any updated medical treatment since that time. He further testified that he did not have any current restrictions from either Dr. Carmichael or Dr. Mulconrey. Petitioner testified that the independent medical examination took away his restrictions.

Petitioner testified that each of his shifts since July 2020 required him to pull out the fifth wheel lever. He testified that this requires him to reach under the trailer with one arm to grab the lever's handle. Petitioner testified that this sometimes takes a bit of strength. Petitioner testified that he has to do this between two to five times per shift. Petitioner testified that there is no one with him to help with this task. He also testified that since July 2020, he has been required to crank a trailer during each shift. He testified that some trailers are easier to crank than others. He testified that there is no one to help him with this task and that the task must be done on a daily basis. He testified that he also climbs in and out of his cab multiple times during a shift. Petitioner further testified that he had to spend quite a bit of time in a seated position and that there were sometimes vibrations in the semi-cab while driving the truck. However, Petitioner testified that he drove with all of the air out of his seat to avoid bouncing in the cab. He testified that all of these activities were examples of duties that he performed 11-to-13 hours per day for six days a week since July 2020.

Petitioner testified that he did not know when the photograph marked as Exhibit 15 was taken. Petitioner testified that he took the photograph so that it could be used at trial. Petitioner testified that he was able to open the hood of the semi-truck to take the photograph. Petitioner testified that

he believed that he told Dr. Mulconrey that he returned to work in July 2020. Petitioner testified that Dr. Carmichael was also aware that he was back at work. He testified that Dr. Carmichael did not give him any work restrictions because he was an associate of Dr. Mulconrey.

Petitioner testified that he injured his back a bunch of years prior to September 2019. Petitioner testified that he had prior worker's compensations claims that had settled. He testified that he could not remember if the claims were for his low back. Petitioner testified that he had been in motor vehicle accidents prior to September 2019. However, Petitioner testified that he could not remember how many or when. Petitioner testified that he could not remember if he was involved in an accident in Mukwonago, Wisconsin in 1998. He testified that he could not remember an auto collision on August 12, 2008, on Jefferson Street in Peoria, Illinois.

Petitioner testified that he couldn't remember if he once lived at 4418 Crabtree Court, Peoria, Illinois. He testified that his son's name is also Michael Eddy. Petitioner testified that he was not good at remembering dates and during direct examination, when he was asked if dates were accurate for treatment and posed as a question; He accepted them as the accurate dates. Petitioner testified that he was in a motorcycle accident and was required to have three brain surgeries. Petitioner testified that he was driving down a road in Peoria and when he went around a corner, his tire blew out and his bike hit a concrete culvert causing him to do flips with the bike. Petitioner believed that it occurred in 2007 but was not certain. Petitioner testified he injured his right foot and head during the motorcycle accident. He testified that he did not injure his low back. Petitioner testified that he did not treat for his low back for the motorcycle accident.

Petitioner did testify that he had back treatment around 2009 or 2010 but did not recall treating for five years prior to September 2019 or what the extent of the treatment was. Petitioner testified that he was also involved in an accident where he fell out of a semi-trailer and had to have left elbow surgery to reattach tendons. He testified that he did not injure his low back in that accident.

Petitioner testified that he only watches martial arts and has not practiced martial arts in the last two to three years. He testified that no doctor has ever told him that he cannot do martial arts. Petitioner also testified that he enjoys riding motorcycles but only very rarely rides them currently. However, he testified that he had just bought a new motorcycle a month prior to arbitration. He testified that he is not medically restricted from driving a motorcycle. He testified that he bought a new motorcycle for nostalgia because it was similar to an old bike that he once owned. He testified that he probably rides his motorcycle once a month or once every couple of months.

Petitioner testified that he did not dispute that Dr. Mather was dictating into a recorder when he was doing his independent medical examination. However, Petitioner testified that he did not interrupt Dr. Mather to correct him because he was raised not to disrespect people. Petitioner testified that he tries to maintain his home exercise program but is unable to do it on a daily basis due to his work hours.

Petitioner testified that he forwarded an email between his employer and himself to his counsel. He testified that the email referenced an accident where Petitioner slipped and aggravated his injury when he was fixing a windshield wiper. Petitioner testified that he did not file a new claim for this injury and did not seek treatment as a result. However, he testified that he informed Dr.

Carmichael of this accident. Petitioner testified that he intends to continue working and was scheduled for a shift during the coming Sunday. He also testified that he did not have any current plans to return to Dr. Mulconrey or the Veteran Affairs.

On re-direct, Petitioner testified that he had not had treatment for low back pain or leg issues in the three years prior to September 2019. He testified that prior to September 2019, no physician had ever recommended a lumbar fusion. Petitioner testified that Dr. Mulconrey never indicated that he could go back to work without restrictions. He testified that Dr. Mather stated that he could go back to work without restrictions. He testified that his temporary total disability was terminated. He testified that he was not married and that the only way he can support himself is through work. He testified that Dr. Mulconrey indicated that if he underwent the lumber fusion, he would have at least three to six months of recovery time where he could not work. Petitioner testified that if he was awarded the ability to have the lumbar fusion, he would proceed with the procedure.

On re-cross, Petitioner testified that Dr. Mulconrey placed him on restrictions of no over the road driving and no riding in a truck. Petitioner agreed that since July 2020, he had been driving trucks six days a week for 11 to 13 hours a day. However, Petitioner testified that he didn't have a choice but to work. He testified that he was able to do more than Dr. Mulconrey's restrictions but had constant pain when working. He testified that he is still in constant pain when he works.

MEDICAL RECORDS

The medical records of UnityPoint Health- James Ausfahl, M.D. were entered into evidence at the time of arbitration as Petitioner's Exhibit 1. The records reflect that on September 20 ,2019, Petitioner presented to James Ausfahl, M.D. of UnityPoint Health Clinic with complaints of low back pain. It was noted that Petitioner reported that he was thrown forward while cranking up the trailer of a truck when the trailer hit the fifth wheel, resulting in Petitioner being thrown forward and sideways. It was noted that Petitioner reported that he did not fall but had an onset of low back pain. It was noted that Petitioner described the pain as being in his left paralumbar area. He noted that he experienced some stiffness for a few days, but now the stiffness was annoying but not devastating. It was noted Petitioner reported that his pain was aggravated by quick movement, sometimes bending, and getting back up after bending. It was noted that physical examination revealed a positive left Patrick's test. Dr. Ausfahl diagnosed Petitioner with low back pain. Dr Ausfahl recommended that Petitioner continue to take over the counter ibuprofen as needed. (Petitioner's Exhibit "PX" 1, 0005-0009).

The medical records of Dr. Ausfahl reflect that on September 27, 2019, Petitioner complained of left low back pain and reported that his pain level was unchanged since his last visit, but that the pain had "moved" from the midline spine to the left low back, left of his spine. It was noted that Petitioner described his pain as being in the lumbar area, just about the top of the sacrum. It was noted that physical examination revealed a positive left Patrick's test and pain on palpation of the left sacroiliac joint. It was noted that Dr. Ausfahl diagnosed Petitioner with left lower back pain and possible sacroiliitis. It was also noted that Dr. Ausfahl placed Petitioner on a return-to-work restriction and recommended that Petitioner continued to use naproxen. (PX1, 0009-0014).

The medical records of Dr. Ausfahl reflect that on October 4, 2019, Petitioner reported that the pain was getting better but that the pain had begun to involve the right side as well as the left. It was noted that Dr. Ausfahl removed Petitioner's work restrictions and advised him to return in two weeks for a recheck. (PX1, 0016-0019).

The medical records of Dr. Ausfahl reflect that on October 29, 2019, Petitioner complained of left hip pain and reported low back pain going to the left hip and occasionally into the right hip as well. It was noted that Petitioner reported that he had been functioning but with pain. It was noted that physical examination revealed pain upon palpation of the left sacroiliac joint area and lower paralumbar area. It was noted that Dr. Ausfahl diagnosed Petitioner with low back pain, returned Petitioner's work restrictions, and referred him to physical therapy. (PX1, 0019-0024).

The medical records of UnityPoint Health Methodist Outpatient Therapy were entered into evidence at the time of arbitration as Petitioner's Exhibit 2. The records reflect that on November 6, 2019, Petitioner presented to Janel Culbertson, P.T. for an initial physical therapy evaluation. It was noted that Petitioner reported that he injured his low back while at work on September 16, 2019. It was noted that Petitioner reported that a force from a trailer threw him, and he tweaked his back upon landing. It was noted that Petitioner reported that he had pain immediately but a few days later it became severe. It was noted that Petitioner reported a low back and "swelling" sensation which radiated across the back along the belt line and into the left and right hip. It was also noted that Petitioner described pulling down the back of the left leg to the knee and rated his pain at 3/10. It was noted that P.T. Culbertson found that Petitioner was significantly limited in his spine and hip range of motion with bending and rotation. It was noted that P.T. Culbertson recommended that Petitioner attend skilled physical therapy two times a week for eight weeks to address his pain, mobility, and strength deficits. (PX2, 0081-0087).

The medical records of UnityPoint Health Methodist Outpatient Therapy indicated that Petitioner attended physical therapy from November 12, 2019 through December 12, 2019 for seven (7) visits. (PX2, 0085-0100). The records indicate that on November 12, 2019, Petitioner noted swelling and described his pain as burning. (PX2, 0088). The records indicate that on November 14, 2019, Petitioner reported that he had to maneuver dollies for attaching a double trailer and that his work was making him work through this which he felt was breaking his work restrictions. The record further indicates that this task was setting him back from gains he made in therapy. (PX2, 0090). The records also indicate that on November 21, 2019, Petitioner reported that he felt like he was unable to bend and lift. The record also indicated that he reported that sitting remained bothersome and he felt like he had to move a lot to get into a position to make himself more comfortable. (PX2, 0094).

The medical records indicate that on December 6, 2019, Petitioner reported that his back felt "swelled up". It was noted that Petitioner also noticed that when he sat and rode in his truck, he had a swelling and tightness sensation. The records note that he was unable to keep his pants buckled when sitting in the truck. The records further note that Petitioner was experiencing radicular symptoms across his entire low back into the left lower extremity to about the knee. It was noted that since Petitioner was having increased symptoms, that a trial of aquatic therapy would be beneficial and provide improved buoyancy, strengthening with resistance of water, and

warm water temperature to manage symptoms. (PX2, 0096-0098). The medical records indicate that Petitioner attended aquatic therapy sessions on December 10 and 12, 2019. (PX2,0099-0100).

The medical records of Dr. Ausfahl indicted that Petitioner followed up with him on December 19, 2019. The notes indicate that Petitioner reported that he was still having pain and that a couple of maneuvers done in physical therapy caused him major pain. The notes indicate that Petitioner believed he was not making any progress. It was noted that he still had morning stiffness and still described his pain being in the left lower back with radiation into his left buttock. At this time, it is also noted that Petitioner complained of occasional radiation to the posterior thigh but noted that it never went below his knee. The records indicate that Dr. Ausfahl diagnosed Petitioner with persistent low back pain and referred him for MRI imaging of the lumbar spine. (PX1, 0025-0029).

The medical records of UnityPoint Health Methodist Outpatient Therapy indicated that Petitioner attended aquatic therapy on December 26, 2019 and January 2, 2020. (PX2, 0101-0102). The notes indicted that on December 26, 2019, Petitioner noted that he had a lot of discomfort in his low back but that his work was finally honoring his restrictions. It is noted that Petitioner rated his pain at 4/10. (PX2, 0101). The notes indicate that on January 2, 2020, Petitioner rated his left low back pain at 3-4/10. The notes also indicated that Petitioner did not currently have left leg pain and noted that he received relief after therapy but then when he went to work, his pain increased. The records reflect that Petitioner noted that he had a flare up on New Year's Eve which lasted for a day. The records further note that Petitioner reported that when his back pain worsened, his leg pain would usually worsen too. (PX2, 0102).

The medical records of UnityPoint Health Methodist Medical Center Hospital were entered into evidence at the time of arbitration as Petitioner's Exhibit 3. The records reflect that on January 9, 2020, Petitioner underwent an MRI of the lumbar spine which revealed multilevel degenerative change, severe bilateral neuroforaminal stenosis, right greater than left at L5-S1. (PX3, 0142-0145).

The medical records of UnityPoint Health Methodist Outpatient Therapy indicate that Petitioner continued aquatic therapy on January 14, 2020, through February 13, 2020 for a total of ten (10) visits. (PX2, 0104-0118). The records indicated that on January 16, 2020, Petitioner reported that he was not doing well as he drove a truck the following night that required a lot of work to maintain in the lane properly, gave increased perturbations sitting in the chair, and was overall very rough. The records further indicate that Petitioner reported that aquatic therapy had given him a couple of hours of relief, but with his work schedule, he was right back to work after his therapy sessions. The records indicate that Petitioner reported that he had intermittent pain into the left foot and that the radicular pain into the foot had been happening the past week. (PX2, 0105-0107). The records indicate that on January 21, 2020, Petitioner rated his low back pain at 3-4/10. (PX2, 0108). The records indicate that on January 23, 2020, Petitioner reported that his back was swelling and that his back was so much worse after a 12–14-hour shift. (PX2, 0109). The medical records indicate that on January 28, 2020, Petitioner reported that he did feel better after therapy, but he worked so much that it reversed his progress. (PX2, 0110). On January 30, 2020, the notes indicate that Petitioner reported that therapy gave him relief, but he was back in his truck for work two hours after treatment. It noted that Petitioner reported that work aggravated his back and was inhibiting his progress. (PX2, 0111).

The medical records of UnityPoint Health Methodist Outpatient Therapy dated February 11, 2020, indicate that Petitioner reported that he may have re-injured his back at work Friday. The records indicate that Petitioner was pulling pins and unloading his trailer when he experienced a sharp shooting pain across the low back near the belt line. The records indicate that Petitioner reported that he notified his employer, and he was taken off work. (PX2, 0115). The record indicates that on February 13, 2020, P.T. Foster recommended that Petitioner's physical therapy be put on hold until his appointment with the orthopedic surgeon. (PX2, 0116-0117).

The medical records of Midwest Orthopaedic Center were entered into evidence at the time of arbitration as Petitioner's Exhibit 4. The medical records indicate that on February 24, 2020, Petitioner presented to Daniel S. Mulconrey, M.D. of Midwest Orthopaedic Center with complaints of lumbar and lower extremity pain. The records indicate that Petitioner reported that he was working on a trailer at a dock, he bent down over his truck on the fifth wheel and when he was bent over, adjusting his cattle pins, he had significant increase in lumbar based pain as well as lower extremity pain. The records indicate that Petitioner rated his lumbar spine pain at 2/10 and his lumbar based pain at 7/10. The records further indicate that Petitioner reported pain in both buttocks, posterior aspect of the thigh, left leg, calf, and foot. The records indicate that Petitioner also noted weakness in the thigh and numbness in both thighs, calf, and foot. The records indicate that Dr. Mulconrey diagnosed Petitioner with lumbar degenerative disk disease and neurogenic claudication with spinal stenosis and recommended that Petitioner continue with physical therapy for the next six weeks and undergo a bilateral L5-S1 transforaminal injection with Dr. Carmichael. The record indicates that Dr. Mulconrey placed Petitioner on a work restriction of 10 pounds, with no lifting or over the road/local driving or riding in a tractor/trailer. (PX4, 0150-0160). The records note that on March 2, 2020, Petitioner underwent consult for a bilateral L5 transforaminal epidural steroid injection with Dr. Carmichael as recommended by Dr. Mulconrey. (PX4, 0161-0165).

The medical records of the Department of Veteran Affairs were entered into evidence at the time of arbitration as Petitioner's Exhibit 5. The records indicate that on March 6, 2020, Petitioner presented to Tracie Peterson of the VA for a routine visit and reported that he was seeing Dr. Mulconrey for his back pain. The notes further indicate that Petitioner rated his pain 5/10 and was prescribed Tylenol No. 3 for pain. (PX5, 0258-0259).

The medical records of Midwest Orthopaedic Center indicate that Petitioner attended physical therapy with Tracey Reimer, P.T. from March 9, 2020 through April 16, 2020 for a total of twelve (12) visits. (PX4, 0166-0191). The records indicate that on March 9, 2020, Petitioner rated his pain at 4-5/10 in his low back and 6-7/10 in his left hip. The records also indicate that Petitioner reported that he could get pain in his left posterior thigh which could also radiate into his left heel. He also noted that his left hip was a lot more irritable since wearing the brace. The records note that Petitioner reported that he injured himself even more when he lifted the hood or maybe unlatching trailers, thus he felt that the pain was even more intensified. The record further indicates that Petitioner noted that his left lower extremity had given out two times. The record notes that Petitioner also reported that he had back pain ten years ago and was managed with epidurals until this incident and that he did martial arts and would like to get back on his motorcycle. The notes indicate that P.T. Reimer recommended that Petitioner be seen two times a week for eight weeks. (PX4, 0166-0168).

The notes also indicate that on March 17, 2020, Petitioner noted that his discomfort was only in the left leg with nerve pain going down to the knee. (PX4, 0171). The record dated March 19, 2020 indicated that Petitioner reported that he was getting a little stronger in the left leg but noted that he still gets a little "taxed" after therapy. The record also noted that Petitioner's pain going down the back of his leg was still there and was causing discomfort, but that it was not as strong as before. (PX4, 0172). The record dated March 24, 2020 indicated that Petitioner had been experiencing some more nerve pain and was questioning why he also felt weakness as if his leg wanted to give out. (PX4, 0175). The record dated March 27, 2020 indicates that Petitioner reported that his left leg felt weak and rated his pain at 6/10. (PX4, 0177). The record dated March 31, 2020 indicates that Petitioner reported that he had been doing a little more walking and was currently a little sorer from it. The record also noted an increase in Petitioner's left hip tingling sensation and some right leg numbness going down into the knee. (PX4, 00179). The record dated April 2, 2020 indicates that Petitioner was rating his pain at 5/10 and reported that his left knee was bothering him a little. (PX4, 0180). The record dated April 7, 2020 indicates that Petitioner was frustrated that he still had some left knee pain, that his back muscle felt tired, and also felt that he should have been stronger by now. (PX4, 0182). The records indicate that on April 9, 2020, Petitioner reported a little tingling in his left lower extremity after lying in prone position for manual therapy and further noted that his pain was still present but that he had better left lower extremity strength over the past week. (PX4, 0183). The record dated April 13, 2020 indicates that Petitioner reported that he was just walking when he felt like his back was going to give out on him as well as a sharp "knifing" pain going through the middle of the spine. (PX4, 0184).

The Midwest Orthopaedic Center record dated April 15, 2020 notes that Petitioner returned to Dr. Mulconrey and reported severe lumbar based pain with intermittent lower extremity pain. The notes indicate that Petitioner reported that he had pain in his bilateral lower extremities with the left being worse than the right. The notes also indicate that Petitioner reported increased lower extremity radiculopathy which caused him to have buckling and weakness which caused him to fall. The record indicates that physical examination revealed a mildly positive FABER sign, as well as pain and tenderness over the Fortin point. The record indicates that X-ray imaging revealed severe degenerative disk disease at L5-S1, and MRI imaging revealed bilateral foraminal narrowing with severe facet arthropathy, L5-S1 as well as mild central canal stenosis associated with this segment. (PX4, 0185-0186).

The record indicates that Dr. Mulconrey noted that Petitioner failed physical therapy as well as a structured home exercises program for his left lower extremity weakness, lumbar-based pain, and lower extremity radiculopathy. The record notes that Dr. Mulconrey recommended that Petitioner proceed with operative intervention. The records noted that Dr. Mulconrey opined that Petitioner would need a resection of the facet joint for complete decompression of the spinal canal and left exiting nerve root. The record indicates that Dr. Mulconrey noted that this would require instrumented spinal fusion and interbody fusion at the L5-S1 segment as well to address lumbar spondylosis. (PX4, 0185-0186).

The record dated April 16, 2020 indicates that Petitioner returned to P.T. Reimer for continued physical therapy and reported that he saw Dr. Mulconrey, and they discussed an injection or surgery. The notes indicate that Petitioner reported that he was considering surgery and that Dr.

Mulconrey was putting in the paperwork for verification. The notes also indicate that Petitioner noted that he was nervous but wanted to be more active without pain. The record noted that Petitioner felt that he was stronger but that something did not feel right in his left lower extremity and rated his pain at 5/10. The notes indicate that P.T. Reimer noted that she would discuss recommendation regarding physical therapy with Dr. Mulconrey while Petitioner was waiting for surgical approval. The notes indicate that P.T. Reimer recommended that Petitioner continue with his home exercise program until new physical therapy recommendations were issued. (PX4, 0189-0191).

The record dated May 15, 2020 indicates that Petitioner returned to Dr. Mulconrey and noted that he continued to deal with severe lumbar based pain as well as bilateral lower extremity pain with the left being greater than the right. The notes indicate that Petitioner reported that he had a difficult time with sitting and standing and that his tolerance was slowly decreasing, and he was having progressive right lower extremity weakness as well. The notes indicate that Petitioner rated his pain at 6/10. The notes indicate Dr. Mulconrey diagnosed Petitioner with lumbar degenerative changes and neurogenic claudication with lateral recess and foraminal spinal stenosis. The notes indicated that Dr. Mulconrey provided Petitioner with the same work note as the last office appointment pending surgery. The record indicated that Dr. Mulconrey believed that Petitioner would return to work in 3 to 6 months with light duty and possibly full duty in approximately 8 months. The records further indicated that Dr. Mulconrey would wait for authorization from Respondent before proceeding with surgical intervention. (PX4, 0192-0196).

The Midwest Orthopedic Center record dated July 31, 2020 indicates that Petitioner returned to Dr. Mulconrey and reported that he had an IME and the IME doctor determined that his current medical condition was not work related. The notes indicate that Dr. Mulconrey opted to see what occurs in Petitioner's litigated case prior to surgery. (PX4, 0198-0199).

The Department of Veteran Affairs record dated January 14, 2021 indicates that Petitioner presented to Dr. Chittivelu and reported chronic low back pain which radiated to his bilateral lower extremities more on the left. The record indicates that Petitioner reported that he had tingling on his left lower extremity down to his feet. The note indicates that Petitioner has tried NSAIDS and Tramadol in the past but since he was a truck driver he wanted to see if they could do something without interfering with his driving. The notes indicate that Petitioner rated his pain at 7/10 and reported his pain as sharp, dull, achy, and stabbing. The records indicate that physical examination revealed that straight leg rising test was positive for back pain and lateral left thigh pain. The note indicates that Dr. Chittivelu recommended that Petitioner start Mobic, lyrical for one month and to report in 3-4 weeks for follow up and referral to orthopedic. (PX5, 0249-0252).

The Midwest Orthopedic Center record dated March 22, 2021 indicates that Petitioner presented to Dr. Carmichael with complaints of low back pain. The note indicates that Petitioner reported that more than ten years ago he had some back issues but then he did very well for over five years until 2019. The notes indicate that Petitioner reported that in September 2019, he was working at a dock and was working with a 5th wheel trailer and the trailer suddenly shifted putting a lot of force on the crank that he was cranking causing it to jerk him and throw him into the trailer. The notes indicate that Petitioner stated that this caused him to injure his back and develop an onset of back and leg pain that has since persisted. (PX4, 0200-0211).

The record indicates that Petitioner reported symptoms including left foot numbness and tingling in the left back as well as leg pain which he rated at a 6/10. The notes indicate that Dr. Carmichael recommended a left L5/S1 transforaminal steroid injection. The Midwest Orthopaedic Center record dated April 6, 2021 indicates that Petitioner underwent a L5/S1 transforaminal epidural steroid injection. (PX4, 0211-0215).

The record indicates that on April 19, 2021, Petitioner followed up with Dr. Carmichael and complained of left foot numbness and tingling in the left back as well as leg pain which he rated at 6/10. (PX4, 0216-0220). The record indicates that on May 25, 2022, Petitioner underwent another L5/S1 transforaminal epidural steroid injection with Dr. Carmichael. (PX4, 0224-0225). The record dated June 28, 2021 indicates that Petitioner continued to complain of left foot numbness and tingling in the left back as well as leg pain which he rated at a 6/10. (PX4, 0227-0228). The record dated July 13, 2021 indicates that Petitioner underwent a third L5/S1 transforaminal epidural steroid injection with Dr. Carmichael. (PX4, 0233-0234).

The Midwest Orthopaedic Center records dated July 23, 2021 and August 2, 2021 indicates that Petitioner presented to Dr. Carmichael for a two week follow up after an epidural steroid injection on July 13, 2021. The record indicates that Petitioner noted mild weakness and instability in the left leg since his epidural steroid injection on July 13, 2021. The notes indicate that Petitioner reported that his pain had dramatically improved since the transforaminal epidural. The note also indicates that Petitioner noted some pain in the left low back that he described as a baseball sensation that had been moving around from his midline to his left upper buttocks. Petitioner noted that if he was seated for a long time and then stands or walks, he felt like his left leg could give out. (PX4, 0235-0239).

The notes indicate that Dr. Carmichael diagnosed Petitioner with intervertebral thoracic disc disorder with radiculopathy and noted that it appeared that a mild sensory ataxia in the left leg could be due to anesthetic affecting the dorsal root ganglion of the left L5 nerve root. The notes indicate that Dr. Carmichael recommended an updated MRI and increased Petitioner's prescription for Lyrica from 75 to 150 mg. The notes indicate that an MRI dated August 16, 2021 revealed mild L4-5 central spinal stenosis secondary to concentric bulging disc, ligamentous hypertrophy, facet arthropathy, moderate bilateral L4-5 and moderate bilateral L5-S1 foraminal stenosis, and lumbar spondylosis with no other sites of lumbar disc herniation, or conus or cauda equina compression. (PX4, 0235-0239).

The Midwest Orthopaedic Center record dated August 23, 2021 noted that Petitioner had an L5/S1 transforaminal epidural steroid injection on the right on April 6, 2021 that helped. The record noted that Petitioner had a L5/S1 transforaminal epidural steroid injection on the left on May 25, 2021 and did well until June 5, 2021 when Petitioner's symptoms returned while washing a windshield. The record noted that Petitioner had a left L5/S1 transforaminal epidural injection which did not seem to work. The record noted that Petitioner's current symptoms were pain in the left back and leg to the lateral calf. The record states that Petitioner's pain was reduced in his right side since the first epidural steroid injection. However, he noted that it was coming back a little to the right proximal anterolateral hip. Petitioner also complained of left foot numbness and tingling. He also noted that his left leg gave out at times. Petitioner noted that this had happened three times

without warning, but it did not lead to a fall. He noted that his aggravating factors included increased activity, bending, sitting, and standing. He noted that laying down helped alleviate his pain. (PX4, 0244-0246).

The record indicates Dr. Carmichael noted that MRI imaging of the lumbar spine taken on January 9, 2020 showed multilevel disc changes with significant foraminal stenosis right greater than left at the L5-S1. The record also indicates that Dr. Carmichael also noted that an MRI taken on August 16, 2021 showed left L4/5 lateral and foraminal herniation, right L5/1 foraminal herniation, facet hypertrophy from L3-S1, and bilateral severe L5 foraminal stenosis. The record indicates that Dr. Carmichael diagnosed Petitioner with intervertebral thoracic disc disorder with radiculopathy. The record noted that Petitioner would like to have surgery with Dr. Mulconrey but that it had been put on hold by insurance. The notes indicate that Petitioner was to continue his home exercise program and engage in activity modification. (PX4, 0240-0241; 0244-0246).

TESTIMONY OF DANIEL SCOTT MULCONREY, M.D.

The transcript of the deposition of Daniel Scott Mulconrey, M.D. was entered into evidence at the time of arbitration as Petitioner's Exhibit 6. Dr. Mulconrey testified that attended medical school at the University of Illinois College of Medicine and graduated in 2001. He testified that he completed an orthopedic surgery residency program at University of Nebraska, Creighton University in 2006 and went on to complete an orthopedic spine fellowship surgery program at Washington University in St. Louis in 2007. He testified that he has been practicing at Midwest Orthopaedic Center in Peoria, Illinois since 2007. He testified that his practice focuses on both adult and pediatric surgeries of the spine. (PX6, 0265-0266).

Dr. Mulconrey testified he first saw Petitioner on February 24, 2020 for lumbar-based pain and lower extremity pain. He testified that Petitioner informed him that since September 2019 he had been working with restrictions up until February 7, 2020 when Petitioner informed him that he was working on a dock on a trailer, was bent down over his truck at the fifth wheel and was adjusting the cattle pin when he had a significant increase in his back pain as well as leg pain. Dr. Mulconrey testified that since that time Petitioner reported that he had pain in both of the buttocks, back of the left calf, leg, and foot as well as weakness in his left thigh. (PX6, 0268-0269).

Dr. Mulconrey testified that Petitioner had missed work since February 7, 2020 and had done massage, tractions, some medications for pain relief and some physical therapy. Dr. Mulconrey testified that Petitioner filled out a new patient questionnaire. Dr. Mulconrey testified that Petitioner filled out the pain section of the questionnaire consistent with the history Petitioner gave him. (PX6, 0269-0271).

Dr. Mulconrey testified that he took X-ray imaging at his office which indicated that Petitioner had degenerative disc disease at L5-S1. He also testified that he reviewed an MRI that was performed at UnityPoint Medical Center on January 9, 2020 that revealed multi-level degenerative disc disease and neuroforaminal stenosis right greater than left at L5-S1. He testified that in layman's terms he had degeneration of his bottom disc and there was impingement on the nerve roots. (PX6, 0272-0273).

Dr. Mulconrey testified that he diagnosed Petitioner with lumbar degenerative disc disease, neurogenic claudication with spinal stenosis, and a history of work reported injuries. Dr. Mulconrey testified that he recommended that Petitioner return to him in six weeks after continuing a physical therapy program and provided him with a back brace. (PX6, 0273-0274). He also testified that he discussed a possible epidural cortisone injection at the L5-S1 level and placed him on a work restriction of 10- pound lifting, no bending, lift, twist and no over-the-road or local driving or riding in a tractor trailer. (PX6, 0273-0274). Dr. Mulconrey testified that he next saw Petitioner on April 15, 2020. (PX6, 0274). Dr. Mulconrey testified that it appeared that Petitioner had worsened since the last office appointment and was having increased left leg pains. Dr. Mulconrey also noted that Petitioner reported buckling and weakness of the left lower extremity which caused him to fall. Dr. Mulconrey testified that his assessment now added lower extremity weakness which was supported by physical examination. (PX6, 0275).

Dr. Mulconrey testified that by April 15, 2020, Petitioner had completed the physical therapy program, but his condition had worsened. He noted that Petitioner had not received the injection that he had discussed in the previous appointment, but that Petitioner was becoming very concerned as he was falling, and he had developed leg weakness. (PX6, 0275) He noted that Petitioner was not eager to undergo the injection due to his decline in his functional status. (PX6, 0276). Dr. Mulconrey testified that he thought this was very reasonable in the fact that he had now had approximately several months of conservative care and his condition had worsened. (PX6, 0276). Dr. Mulconrey testified that due to Petitioner's weakness, his pain, the change in his condition, and his inability to return to work, they discussed surgery. (PX6, 0275). Dr. Mulconrey testified that due to the compression of the nerve root and the degeneration of the disc at L5-S1, he recommended a spinal fusion and an interbody fusion with laminectomy of L5-S1. Dr. Mulconrey testified that the surgery would have removed compression off the nerve roots to improve Petitioner's lower extremity function and strength. Dr. Mulconrey testified that Petitioner would return to work in three to six months with light duty, and possible full duty in approximately eight months. (PX6, 0276-0277).

Dr. Mulconrey testified that Petitioner had not underwent the surgery due to lack of insurance approval. Dr. Mulconrey testified that he next saw Petitioner on July 31, 2020 after he underwent an independent medical examination. Dr. Mulconrey testified that he disagreed with a diagnosis of lumbar strain and psychogenic pain with functional overlay. Dr. Mulconrey also disagreed that Petitioner was a maximum medical improvement. (PX6, 0278-0279).

Dr. Mulconrey testified that his review of the X-rays revealed some overgrowth of bone associated with degeneration of the L5-S1 disc but in his opinion, it was still a mobile disc. Dr. Mulconrey testified that the disc at L5-S1 was not auto fused. Dr. Mulconrey testified that Petitioner's injury occurring with a work-related injury was consistent with the history that Petitioner provided him. (PX6, 0280-0282).

On cross examination, Dr. Mulconrey testified that he performs three to four spinal surgeries a week and one hundred and fifty a year. Dr. Mulconrey testified that he did not know when Petitioner was working or not working during his restrictions. (PX6, 0284-0285). Dr. Mulconrey could only describe Petitioner as bent over or flexed at the waist when he injured himself pulling pins. Dr. Mulconrey could not testify whether Petitioner was pulling horizontally or vertically. Dr.

Mulconrey could not testify regarding the direction of force, or the amount of force required to pull the pins. He could not testify whether Petitioner was pulling multiple pins or a single pin. Dr. Mulconrey testified that Petitioner never conveyed to him those lifting activities were part of Petitioner's job duties. (PX6, 0286- 0288).

Dr. Mulconrey testified that the radiologist's interpretation of the January 9, 2020 lumbar MRI was similar to his own. He further testified that there was nothing on the MRI that he could create a temporal relationship to the date of the accident described by Petitioner. Dr. Mulconrey testified that he did not believe that the L5-S1 was auto fused prior to Petitioner's work accident. He also testified that he agreed with Dr. Mather's interpretation of the X-ray with the exception of the auto fusion. Dr. Mulconrey testified that it would be speculation to assume that Petitioner would need the proposed surgery absent the workplace injury. (PX6, 0289-0291).

On cross examination, Dr. Mulconrey testified that his surgical recommendation was based on Petitioner's subjective pain complaints. Dr. Mulconrey testified in the absence of Petitioner's complaints, the MRI and X-rays finding didn't warrant surgery. Dr. Mulconrey testified that he had patients with similar MRIs who were able to carry on their daily lives without requiring a spinal fusion. (PX6, 0294).

On re-direct, Dr. Mulconrey testified that his surgical recommendation was based on Petitioner's complaints of pain as well as imaging that he reviewed. Dr. Mulconrey testified that MRI dated January 9, 2020 revealed bilateral neuroforaminal stenosis. Dr. Mulconrey testified that Petitioner's complaints were consistent with imaging which revealed bilateral neuroforaminal stenosis which is why he recommended surgery. Dr. Mulconrey testified that he had no reason to believe that Petitioner was a malinger. Dr. Mulconrey testified that he believed that the Petitioner would want to treat conservatively as possible without the need for surgery if possible. (PX6, 0295-0296).

TESTIMONY OF DAVID NATHAN, M.D.

The transcript of the deposition David Nathan M.D. was entered into evidence at the time of arbitration as Petitioner's Exhibit 7. Dr. Nathan testified that he graduated from Northwestern University in 1999. He testified that he did his internship in Chicago at St. Joseph's Hospital for a year and then did diagnostic radiology for four years at the University of Wisconsin. He testified that he did a one-year musculoskeletal imaging fellowship at the University of Wisconsin. He testified that he was licensed to practice in Illinois in 1999 and in Wisconsin in 2000. He also testified that he is licensed in Florida. Dr. Nathan testified that he is board certified by the American Board of Radiology. Dr. Nathan testified that after he finished his fellowship, he moved to Peoria, Illinois and began working for Central Illinois Radiological Associates. He testified that he worked for Central Illinois Radiological Associates from 2005 through 2015. Dr. Nathan testified that he now works for Specialists in Medical Imaging. (PX7, 0387-0389).

Dr. Nathan testified that he reads lumbar MRIs and X-rays quite frequently. He testified that he authored the narrative of Petitioner's January 9, 2020 lumbar MRI. Dr. Nathan testified that L5-S1 disk was abnormal and there was height loss that didn't have the normal degree of hydration for a healthy disk. He testified that there was a bulging of the disks diffusely, and then there was

a focal disk protrusion that was extending into the right neural foramen. He further testified that there was mild facet arthropathy and ligamentum flavum hypertrophy. Dr. Nathan testified that these findings were causing severe bilateral neural foraminal stenosis, more on the right side where the disk protrusion was, than on the left. Dr. Nathan testified "the nerve roots that exit the central canal from the spinal cord then go out to supply parts of the body. He testified that the way the exit is through the neural foramen and if the neural foramen are narrowed or stenosed, then there is risk that that is causing injury, inflammation, or irritation to the nerve roots that are exiting at that level, and that can cause symptoms in patients". Dr. Nathan testified that his impression of the MRI was multi-level degenerative changes and severe bilateral neural foraminal stenosis at L5-S1 more so on the right side than the left side. (PX7, 0389-0393).

Dr. Nathan testified that he did not see findings of auto fusion in the lumbar MRI. He testified that based on his review of the MRI, it was his opinion that the L5-S1 disk was not calcified. He testified that he did not see calcification of the disk space to suggest that the disk was fused. (PX7, 0394-0398).

On cross examination, Dr. Nathan testified that he was not a surgeon and was not an interventional radiologist. He testified that he never saw Petitioner in person. He testified that he reviews more than 2,000 images a day. He testified that his opinions are based entirely on the MRI report and images dated January 9, 2020. Dr. Nathan testified that it would be speculative to say whether his opinions would change if he saw an X-ray of Petitioner. However, he testified that he found it highly unlikely that he would see something that would change his mind but couldn't be dogmatic about it. Lastly, Dr. Nathan testified that it is possible for the L5-S1 level to fuse over time due to degenerative changes. On redirect, Dr. Nathan testified that his finding revealed a structural abnormality at the L5-S1 level. (PX7, 0398-0402).

DEPOSITION OF STEVEN MATHER, M.D.

The transcript of the deposition Steven Mather, M.D. was entered into evidence at the time of arbitration as Respondent's Exhibit 5. Dr. Mather testified that he became a medical doctor in 1985 and was licensed to practice in Illinois in 1992. He testified that he is board certified in orthopedic surgery since 1994. He testified that he had to complete a certified residency in orthopedic surgery, a board examination, and be in practice for two years prior. Dr. Mather testified that he has an office and surgical practice which sees 80 patients a week. He testified that his practice is an exclusively spinal oriented practice. Dr. Mather testified that he does three hundred to three hundred and fifty spinal surgeries a year. (Respondent's Exhibit "RX" 5, Pg 7-8).

Dr. Mather testified that about ten percent of his practice is independent medical examinations. He testified that he has been an examining physician since 1999. He testified that twenty five percent of his practice is treating worker's compensation claims. He testified that in his ordinary course of his practice he reviews medical treatment records, medical and diagnostic reports, and medical and diagnostic imaging as well as in person observation in order to render a diagnosis. He testified that he renders opinions regarding whether his diagnoses are medically causally related to an alleged accident. (RX5, Pg. 9-10).

Dr. Mather testified that the request of Respondent, he reviewed materials and conducted a physical examination of the Petitioner. He testified that he offered multiple reports in which he rendered findings and opinions. He testified that he prepared a report dated June 26, 2020, an addendum dated July 31, 2020, and a second addendum dated May 27, 2021. (RX5, Pg. 11-12).

Dr. Mather testified that Petitioner told him that he was working for FedEx as a driver and was with them for approximately a year before the injury but was driving semis before that. He testified that Petitioner told him that on September 16, he was adjusting the fifth wheel under a trailer. He noted that the fifth wheel was basically a pivot system where the trailer hooks up to the vehicle itself. He noted that as the trailer came down to the fifth wheel and he was cranking it, the trailer lurched forward, and this caused him to be thrown forward and hit his head on the trailer. He noted that this was about two o'clock in the morning. Petitioner had to drive back from Chicago to Morton Illinois, which is about a three-hour drive. He noted that he went to work the next day and told them about the back pain and stiffness. He texted his employer and went to see Proctor First Care in Peoria Heights for back pain and then he started physical therapy. (RX5, Pg. 14-15).

Dr. Mather testified that Petitioner informed him that he worked with light duty and that physical therapy helped him a bit but then he started having pain down the left leg about five months after the injury. Dr. Mather testified that Petitioner saw Dr. Montgomery [sic], who was a spine specialist who put in some more physical therapy. He testified that Petitioner told him that he was told by Respondent to do things that were in excess of his restrictions so Dr. Montgomery [sic] put him on a ten-pound lifting restriction. Dr. Mather further testified that Petitioner had an oral history of back problems from ten years prior, but nothing recent. He testified that Petitioner had a major motorcycle accident, which required three brain surgeries, and a right foot surgery but did not injure his spine in the accident. Petitioner described his current symptoms as bilateral low back pain, numbness and tingling in the back of the right leg and calf. (RX5, Pg. 15-16).

Dr. Mather testified that for the first five months, Petitioner didn't have anything that suggested any radicular pain, which would indicate that there really was no nerve involvement, so he ruled out anything like spinal stenosis or nerve compression as the source of Petitioner's subjective complaints. Dr. Mather testified that he believed that Petitioner was dealing with low back pain which in his opinion was a very common complaint after some sort of mechanical injury. (RX5, Pg.17).

Dr. Mather testified that he would have expected that Petitioner would have reported hitting his head during the accident to Dr. Ausfahl during his first date of service. He also testified that Petitioner had no radicular complaints and no objective findings on September 27, 2019. He also noted that Petitioner reported that his symptoms were nothing major. Dr. Mather also testified regarding his review of the initial physical therapy report dated November 6, 2019. He noted that Petitioner did not have radicular complaints and also denied hitting his head from the work injury. He testified that this was not consistent with Petitioner's report to him. (RX5, Pg. 17-18).
With regard to the MRI dated January 9, 2020, Dr. Mather testified that Petitioner had no foraminal stenosis at L5-S1 and that his MRI was unremarkable for Petitioner's age. Dr. Mather testified that his review of the February 24, 2020 visit with Dr. Mulconrey revealed that Petitioner had a sudden appearance of numbness, tingling, and pain down the left leg all the way down the foot but had normal sensation. (RX5, Pg. 19).

Dr. Mather testified that he performed a physical examination of Petitioner. He testified that Petitioner did not complain of any of back discomfort when he got out of the chair. He testified that Petitioner was not taking pain medication, had no back tenderness, no spasms, normal gait, and full range of motion of the lumbar spine. He testified Petitioner could almost touch his toes with knee straights and never complained of discomfort when getting up from the bent-over position. He testified that Petitioner had minimal discomfort with lateral bending and had no pain with the Waddell's maneuver. Dr. Mather testified that he had some back discomfort with straight leg raising at 80 degrees but that it was an irrelevant and subjective finding. He also testified that the straight leg test was negative because a positive straight leg raise was supposed to reproduce pain before 70 degrees. (RX5, Pg. 20-21).

With regard to X-ray imaging, Dr. Mather testified that the X-ray imaging revealed a collapsed disc at L5-S1 with large anterior osteophytes on the front of the disc and basically the osteophytes connecting L5 and S1 to fuse it. Dr. Mather testified that MRIs are not good for showing calcification at L5-S1 because bone, especially very dense bone such as osteophytes do not have a signal because there is absence of signal on MRI, it's not very good for showing calcification. Dr. Mather testified that the best view of the calcification at L5-S1 would be X-ray or CT. (RX5, Pg. 22-24).

Dr. Mather testified that his final diagnoses for Petitioner was lumbar strain on the day of the injury but that the strain had resolved. Dr. Mather testified that Petitioner's symptoms would have resolved itself in approximately four weeks with or without treatment. Dr. Mather testified that no additional treatment necessary. Dr. Mather testified that the basis for forming the diagnosis was that there was no nerve root compression shown on the MRI. He further testified that a sudden complaint of numbness and tingling and pain down the left leg below the knee didn't make any sense since it occurred five months after the injury. Dr. Mather further testified that the L5-S1 level had auto fused making it immobile and impervious to trauma. Dr. Mather believed that only ten visits of physical therapy were necessary for Petitioner and that Petitioner did not meet the criteria for epidural steroid injections. (RX5, Pg. 24-26).

Dr. Mather testified that he believed that Petitioner could return to full duty because the disc at L5-S1 was impervious to trauma and could not be injured. Dr. Mather testified that for his first addendum to his report, he reviewed an X-ray dated February 24, 2020 and June, 17, 2013. He testified that the February X-ray showed an auto fusion between L5-S1 and the June 17, 2013 X-ray did not. He testified that he agreed with Dr. Ausfahl's reading of the MRI with no nerve root compression. (RX5. Pg. 29-30).

With regard to his interpretation of the radiologist's interpretation of the MRI, Dr. Mather testified that there were some diffuse degenerative changes throughout most of the lumbar spine from L2-S1 as well as some disc bulging on the right side, which was opposite of Petitioner's left leg symptoms. Dr. Mather testified that this was significant because right-side bulges do not cause left sided symptoms. (RX5, Pg. 32).

Dr. Mather testified that the additional records did not change his diagnosis of lumbar strain. He also testified that Petitioner current complaints were not related to the work accidents and that the

ongoing complaints could not be explained on the basis of the physical examination and MRI. Dr. Mather testified that a L5-S1 laminectomy and fusion with decompression of the L5 nerve root would be inappropriate because Petitioner was complaining of S1 symptoms, there was no clinic findings that suggest the L5 nerve root is entrapped, and his straight leg test was negative because Petitioner's complaints didn't start until five months post injury. (RX5, Pg 36-37).

On cross examination, Dr. Mather testified that he had been involved with medicolegal consulting since 1999. He testified that he charges $1,200 per hour for the review of records, $1,200 for independent medical examinations, $1,500.00 per hour for depositions, and $4,800 for a half day of trial. He testified that he does approximately 200-210 independent medical examinations with 100 percent being for respondents. He testified that twenty percent of his income is from medicolegal works. (RX5, Pg. 49-50). He also testified that he is not board certified in radiology. He further testified that he does one independent medical examination every three weeks for Respondent's law firm. (RX5, Pg.51). Dr. Mather testified that he dictated Petitioner's employer as Ben Dulling and Petitioner's orthopedic surgeon as Dr. Montgomery. (RX5, Pg. 57)

On cross examination, Dr. Mather testified that he agreed that Petitioner was having numbness and pain down the left leg to the knee as of November 2019. Dr. Mather testified that he agreed that Petitioner was having pain into the left and right hip by October 29, 2019. Dr. Mather testified that pain was not radicular unless it went below the knee. Dr. Mather based this opinion on the Hoppenfeld Physical Exam. However, he did not cite a specific section or read an exert to support his theory. He testified that one hundred percent of the time, pain will at least go below the knee. (RX5, Pg. 58-59).

Dr. Mather testified that his report stated that Radiologist, Dr. David Nathan indicated that there was no foraminal stenosis at L5-S1. He testified that his report was inaccurate in terms of the interpretation of what Dr. Nathan said. He further testified that he did not review the MRI films when he wrote that portion of his report. He testified that he incorrectly reported the radiologist's opinion and did not know how it had happened. Dr. Mather agreed that two radiologists indicated that there was moderate to severe foraminal stenosis at L5-S1. (RX5, Page 66-67). Dr. Mather further testified that he was unaware that Petitioner had reinjured himself on February 7, 2020 and never saw it in his review of Petitioner's records. (RX5, Pg 70).

On re-direct, Dr. Mather testified that with regard to the reference to "Dr. Montgomery", it was possible that something may have just been lost in translation during the oral history he took from Petitioner. He testified that it could have been his interpretation or Petitioner's misunderstanding. (RX5, Pg. 73-74).

DEPOSITION OF TRACEY REIMER, P.T.

The transcript of the deposition of Tracey Reimer, P.T. was entered into evidence at the time of arbitration as Petitioner's Exhibit 9. P.T. Reimer testified that prior to treating Petitioner, she reviewed Dr. Mulconrey's notes in the regular course of business in order to treat Petitioner. (PX9, 0629). She testified that she treats patients with neural foraminal stenosis at L5-S1 and neurogenic claudication with spinal stenosis. (PX9, 0630).

She testified that she first saw Petitioner on March 9, 2020. She testified that she performed a physical examination which included straight leg raise test and Faber test which were both positive. (PX9, 0635-0637).

She further testified that when obtaining a history from Petitioner she assumed that Petitioner injured himself in September and then his symptoms intensified after the February accident. (PX9, 0639). She testified that her findings from her range of motion testing and specials tests were consistent with prior patients that she had treated with neural foraminal stenosis at L5-S1. (PX9, 0641). P.T. Reimer testified that on March 12, 2020, Petitioner was complaining of nerve pain traveling down both of his legs. (PX9, 0644). P.T. Reimer testified that she has had patients complain about nerve pain going into their hip one day and then all the way into their foot the next day. (PX9,0646-0647).

DEPOSITION OF CRAIG CARMICHAEL, M.D.

The transcript of the deposition of Craig Carmichael, M.D. was entered into evidence at the time of arbitration as Petitioner's Exhibit 8. Dr. Carmichael testified that attended medical school at Washington University School of Medicine until 1996 and did a residency in physical medicine and rehabilitation at Mayo Clinic until 2000. He testified that he then went to practice at McLean County Orthopedics in 2000 until 2019. He testified that his area of specialty is mostly spine, interventional pain medicine, spine injections, spine diagnosis, and comprehensive treatment of the spine. He testified that in 2019 he went to Midwest Orthopaedic Center in Peoria, Illinois for interventional pain management. He further testified that he left Midwest Orthopaedic Center in 2021 to start his own practice. (PX8, 0415-0416).

Dr. Carmichael testified that he treats patient with lumbar spine and lumbar radiculopathy issues. He testified that he is board certified in physical medicine and rehabilitation and electrodiagnostic medicine. He testified that he had the opportunity to treat Petitioner on March 2, 2020. He testified that Petitioner was complaining of pain across the back and into the legs. Specifically, he noted that Petitioner reported pain across the low back bilaterally and in the left posterior thigh to the knee and occasionally to the foot. (PX8, 0416-417).

He testified that Petitioner informed him that he had some initial back pain ten years prior but did well for over five years until September 2019 when he had an injury at work. Dr. Carmichael testified that Petitioner told him that he was working on a trailer at the dock and was working with a fifth wheel when the trailer suddenly shifted putting a lot of force on the crank as he was cranking it, and that jerked him and threw him into the trailer injuring his back. (PX8, 0417-0418).

Dr. Carmichael testified that when he first saw Petitioner, he had already obtained an MRI. Dr. Carmichael testified that he reviewed both the MRI report and MRI film. He testified that his review of the MRI report and MRI film revealed significant foraminal stenosis, right greater than left at L5-S1. (PX8, 0418-0419). Dr. Carmichael diagnosed Petitioner with significant foraminal stenosis and proceeded with a bilateral L5 transforaminal epidural injection as recommended by Dr. Mulconrey. (PX8, 0420-0421).

Dr. Carmichael testified that he saw Petitioner for a follow up on March 22, 2021. Dr. Carmichael testified that during that visit Petitioner complained of pain in the low back bilaterally and bilateral posterior thigh to the knee and occasionally to the foot, worse with increased activity, bending, sitting, and standing. (PX8, 0421). Dr. Carmichael testified that Petitioner filled out a new patient document which indicated that his symptoms had worsened on February 7, 2020 when he was bending over to pull pins on a cattleguard. Dr. Carmichael testified that Petitioner indicated that his pain was present in the right and left buttock, in the back of the left leg, calf, foot, and further described weakness in the left thigh and some numbness and tingling throughout the legs. (PX8,0422-0423).

Dr. Carmichael defined radiculopathy as an impingement or disruption in a particular nerve root exiting the spine. Dr. Carmichael testified that the clearest way to determine impingement would be some change on muscle activity such as diminished reflex or weakness in the muscle. He testified that radiculitis is more inflammation of the nerve root where you still have pain radiating in the pattern of that nerve, but you don't necessarily have a focal deficit of weakness. He testified that then there's referred pain in which you have an object that irritated the back or other part of the body, but the pain is felt somewhere else. (PX8, 0423-0424).

Dr. Carmichael testified he would consider pain going to just the knee as well as pain going below the knee to both be radiculopathy. Dr. Carmichael testified that there is generally not a difference whether someone is experiencing pain to their knee versus down to their foot. He testified that it may just indicate a different nerve that's involved, and there are some nerves that can be pinched that only go to the very top of the thigh with very severe radiculopathy. (PX8, 0424)

Dr. Carmichael testified that he next saw Petitioner on April 6, 2021 for a right L5-1 transforaminal epidural injection and again on May 25, 2021 for a left L5-1 transforaminal epidural injection. (PX8, 0426-0427). Dr. Carmichael testified that Petitioner followed up with him on June 28, 2021 and reported that he was doing great until June 5, 2021 when he was washing a windshield and had some return of symptoms. Dr. Carmichael testified that he recommended a repeat left transforaminal epidural that was performed on July 13, 2021. (PX8, 0427-0428).

Dr. Carmichael testified that on July 23, 2021, Petitioner returned to him and reported that he had mild weakness and instability to the left leg since July 13, 2021. Dr. Carmichael noted that Petitioner reported that his pain had dramatically improved since the injection but that he still had some pain in the left low back that he described at times like a baseball sensation that had been moving around from the midline to the left upper buttock. He also testified that Petitioner informed him that if he had been seated a long time and then goes to stand or walk, it felt like his left leg could give out although it didn't. (PX8, 0428-0429)

Dr. Carmichael testified that physical examination revealed very slight weakness in the left quadriceps. He testified that the significance of this finding was that the underlying impingement was progressing and the radiculopathy in the left leg was progressing, or it could be that Petitioner has some anesthetic effect from the injection on July 13, 2021. (PX8, 0429)

Dr. Carmichael testified that at this time, his diagnoses were intervertebral thoracic disc disorder with radiculopathy and foraminal stenosis at L5-S1. He testified that he next saw Petitioner on

August 2, 2021 and that Petitioner complained of pain in the left back and leg to the lateral calf that was becoming severe as well as left foot numbness and tingling. He testified that he ordered another lumbar MRI for Petitioner which revealed left L4-L5 lateral and foraminal herniations, right L5-1 foraminal herniation, facet hypertrophy from L3 to S1, and bilateral severe L5 foraminal stenosis. (PX8, 0430-0431).

Dr. Carmichael testified that he last saw Petitioner on August 23, 2021. He testified that at this time, Petitioner reported his left leg gave out three times and increased activity, bending, sitting and standing aggravated his symptoms. (PX8, 0433). Dr. Carmichael testified that the plan was for Petitioner to continue with his home exercise program and activity modification. (PX8, 0434).

Dr. Carmichael testified that it was his opinion that the surgery was necessary at this point because injections and conservative care was not sufficient to get rid of Petitioner's pain. Dr. Carmichael testified that it was probably more likely than not that there was causal connection between the injury in August 2019 and February 2020 and his pain, dysfunction, and need for treatment. (PX8, 0434-0435).

Dr. Carmichael testified that he disagreed with Dr. Mather's opinion that X-ray is a better diagnostic tool than MRI to diagnose condition involving the spine and discs. Dr. Carmichael also testified that he disagreed with Dr. Mather's opinion that Petitioner's disc had auto fused. Dr. Carmichael testified that the L5-S1 is severely narrowed and there were bone spurs around it but that there was still a considerable amount of disc material and enough that there were focal herniations coming out of it. He testified that usually when doctors think about a fusion, they will see an X-ray where it seems like one continuous bone which had no gap in between, but that Petitioner had a very noticeable gap in between and disc material that's adequate enough for it to herniate out. (PX8, 0437-0438).

On cross examination, Dr. Carmichael testified that he did not know the exact mechanism of injury such as turning of a crank versus twisting or being thrown. He testified that he did not know if Petitioner was thrown forward or backward. He also testified that he didn't know the distance he was moved or thrown as well as the amount of force which he was thrown or at which the crank turned. (PX8, 0445).

Dr. Carmichael testified that his impression of Petitioner's prior back pain was that Petitioner was doing relatively well for over five years before the September 2019 incident. However, Dr. Carmichael testified that he did not know the extent of Petitioner's prior back complaints. Dr. Carmichael testified that on March 2, 2020, Petitioner complained of pain at 5/10 was subjective and he didn't note an objective finding to correlate Petitioner's pain complaints. (PX8, 0446-0448).

Dr. Carmichael testified that the next time he saw Petitioner was on March 22, 2021 and that his impression was that between those two visits, Petitioner was doing about the same and was hoping to have surgery. He also testified that as far as he knew, Petitioner was doing fine with epidural steroid injections until he was washing a windshield and had a return of his symptoms. Dr. Carmichael could not testify whether Petitioner was engaged in this activity for work or not. (PX8, 0449-0451). Dr. Carmichael testified that he relies heavily on the patient's history. He testified

that if the patient states that they were doing well and an event occurred and then they weren't doing well, he generally trusts them. He testified that Petitioner didn't give him many details about the June 5th windshield incident. (PX8, 0451-0452).

Dr. Carmichael testified that on August 23, 2021, Petitioner's physical examination was normal, and that Petitioner was rating his pain at 7/10. However, Dr. Carmichael testified that it could be a fairly common occurrence for a patient to complain of a seven out of ten-pain scale and have a completely normal physical examination. (PX8, 0453-0454).

Dr. Carmichael testified that he would ultimately defer any surgical recommendation to an orthopedic surgeon. He further testified that he did not review the reports of Dr. Mather and that prior to his deposition, he did not have any opinions on Dr. Mather's findings relative to Petitioner's condition. (PX8, 0455-0456).

Dr. Carmichael testified that the reason that he defers to Dr. Mulconrey is because they were in the same practice for about two years, and when he was in the practice in Bloomington, physicians would send patients to Dr. Mulconrey or his partners because he had a well-established reputation. (PX8, 0462).

On redirect, Dr. Carmichael testified that if he would have seen calcification on the MRI imaging, he would have noted it. (PX8, 0463). Dr. Carmichael testified that he did not believe the disc at L5-S1 was auto fused and further testified that the L5-S1 was definitely subject to trauma and to changing over time. He testified that there was clearly disc material that protruding out and an ability for the structures to shift around. (PX8, 0466-0468).

On recross, Dr. Carmichael testified that he would be surprised if another physician looked at Petitioner's L5-S1 level as auto fused. He testified that he would raise his eyebrows and believe that it was an unusual way of reading the imaging. He testified that if he was reading that something was auto fused, he would expect something different on the picture. (PX8, 0469-0470).

The medical expense summary and medical bills were entered into evidence at the time of arbitration as Petitioner's Exhibit 10 and Exhibit 10(a)-10(e).

CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law set forth below.

Issue C, whether the accident arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds as follows:

The Arbitrator notes that Respondent agrees to accident for the first date of accident, 9.15.19 (Case No. 19WC31352), but disputes the second date of accident, 2.7.20 (Case No. 21WC2952).

Petitioner used demonstrative evidence (PX 16) to explain that while working on 2.7.20, he was lifting a lever under the truck/trailer and re-hurt his back. The medical records of UnityPoint

Health Methodist Outpatient Therapy dated February 11, 2020, indicate that Petitioner reported that he may have re-injured his back at work Friday. The records indicate that Petitioner was pulling pins and unloading his trailer when he experienced a sharp shooting pain across the low back near the belt line. The records indicate that Petitioner reported that he notified his employer, and he was taken off work. (PX2, 0115). The records are consistent with Petitioner's testimony. Petitioner's accident occurred during the course of employment and was a risk distinctly associated with his employment.

The Arbitrator finds that Petitioner's accident on 2.7.20 arose out of and in the course of Petitioner's employment by Respondent.

Issue F, whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds as follows:

To obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. A work-related injury need not be the sole or principal causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. Even if the claimant had a preexisting degenerative condition which made him more vulnerable to injury, recovery for an accidental injury will not be denied as long as he can show that his employment was also a causative factor. Thus, a claimant may establish a causal connection in such cases if he can show that a work-related injury played a role in aggravating his preexisting condition. Sisbro, Inc. v. Industrial Comm'n, 207 Ill. 2d 193, 205, 797 N.E.2d 665, 278 Ill. Dec. 70 (2003). "A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." International Harvester v. Industrial Com., 93 Ill. 2d 59, 63 442 N.E.2d 908 (1982).

Petitioner did testify that he had treatment for his back around 2009 or 2010 but did not recall the extent of said treatment nor whether he had any treatment five years prior to September 2019. Petitioner testified that he had prior worker's compensations claims that had settled but could not recall if any claims were for his low back. Petitioner further testified that he had been in motor vehicle accidents prior to September 2019 but could not remember the nature of said accidents. Petitioner did recall an accident around 2007 resulting in three brain surgeries but stated that he did not injure his low back. The Arbitrator considers Petitioner's selective poor memory but does not see sufficient evidence of active medical treatment to the back in the years prior to his September 2019 accident.

Petitioner testified that on September 16, 2019, he was required to crank the trailer and while using the crank, he was picked up off his feet, and brushed up against the trailer. Petitioner testified that he felt immediate sharp back pain at the belt line and saw Dr. Ausfahl four days after the accident. Petitioner returned to work with restrictions and Petitioner testified that he further injured himself at work on February 7, 2020 when the lever of his fifth wheel got caught causing Petitioner's body to be jarred. Petitioner was eventually seen by Dr. Mulconrey who recommended that Petitioner undergo a spinal fusion and an interbody fusion with a laminectomy of L5-S1 after conservative treatment failed. Surgery was denied by Respondent after an IME with Dr. Mather.

A significant point of contention is whether the January 9, 2020 lumbar MRI and X-ray reveal auto fusion. While Dr. Mather opined that Petitioner's vertebrae at L5-S1 was auto fused, Petitioner's treaters disagreed. Dr. Mulconrey testified that Petitioner's x-ray did reveal some overgrowth of bone at the L5-S1 disc, but that it was still mobile. Dr. Carmichael testified that the L5-S1 is severely narrowed and there were bone spurs around it but that there was still a considerable amount of disc material and enough that there are focal herniations. Dr. Nathan, a board-certified radiologist, testified that he did not see a finding of auto fusion on the lumbar MRI dated January 9, 2020 and it was his opinion that the L5-S1 disk was not calcified.

The Arbitrator notes that Dr. Mather's interpretation is a clear outlier as three other medical providers found similar findings that are contrary to those of Dr. Mather. The Arbitrator further notes that Dr. Mulconrey, Dr. Nathan, and Dr. Carmichael were not retained to read Petitioner's radiological films, but instead were reading them in their regular course of their treatment of Petitioner.

Another point of contention is whether pain going to the knee is considered radiculopathy. Dr. Mather testified that he only considered pain going entirely through the leg into the foot to be radiculopathy. Dr. Mather further testified that since Petitioner did not complain of foot pain until five months after the date of injury, his symptoms cannot be casually related to the work accident.

Contrary to Dr. Mather, Dr. Carmichael testified that he would consider pain going to the knee as radiculopathy. He testified that there was generally not a difference whether someone is experiencing pain to their knee versus down to their foot. He testified that it may just indicate a different nerve that was involved. He testified that some nerves can only go to the very top of the thigh and can have very severe radiculopathy. Further, Dr. Carmichael testified that underlying impingements progress and that radiculopathy in the left leg can progress.

Additionally, physical therapist, Tracey Remier, P.T. testified that her findings from her range of motion testing and specials tests were consistent with prior patients that she had treated with neural foraminal stenosis at L5-S1. P.T. Reimer testified that on March 12, 2020, Petitioner was complaining of nerve pain traveling down both of his legs. P.T. Reimer testified that she has had patients complain about nerve pain going into their hip one day and then all the way into their foot the next day.

Dr. Mulconrey testified it was his opinion that Petitioner's injuries were sustained as a result of work-related activity based off the history that Petitioner provided him and his report of the symptoms beginning on the date of the workplace accident.

The Arbitrator notes that Dr. Mather stands alone in his opinions as compared to Petitioner's medical providers who have similar exam findings to one another as well as interpretations of studies, and opinions on diagnosis, treatment, work restrictions and causation. The Arbitrator finds the opinions of Petitioner's treating providers including Dr. Mulconrey, Dr. Carmichael, and radiologist Dr. Nathan to be more credible than those of Respondent's Section 12 examiner, Dr. Mather.

Petitioner has met his burden in proving a previous condition of good health, an accident, and a subsequent injury resulting in disability. **The Arbitrator finds that Petitioner's current condition of ill-being is causally related to the injuries of September 16, 2019 and August 7, 2020.**

Issue J, whether the medical services that were provided to Petitioner were reasonable and necessary and whether Respondent has paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds as follows:

Section 8(a) of the Act states a Respondent is responsible "…for all the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter incurred, limited, however, to that which is reasonably required to cure or relieve from the effects of the accidental injury…" A claimant has the burden of proving that the medical services were necessary, and the expenses were reasonable. See Gallentine v. Industrial Comm'n, 201 Ill.App.3d 880, 888 (2nd Dist. 1990).

Having found Petitioner's condition of ill-being casually related to his work accidents and having found Petitioner's treating providers to be more credible that Respondent's Section 12 examiner, the Arbitrator further finds Petitioner's treatment to be reasonable and necessary and finds that Respondent has not paid for said treatment.

As such, the Arbitrator orders Respondent to pay Petitioner directly for the outstanding medical services contained within Petitioner's Exhibit 10, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act. Respondent is entitled to a credit under Section 8(j) of the Act for medical paid in the amount of $6,365.92.

Issue K, whether Petitioner is entitled to any prospective medical care, the Arbitrator finds as follows:

Having found Petitioner's condition of ill-being casually related to his work accidents and having found Petitioner's treating providers to be more credible that Respondent's Section 12 examiner, the Arbitrator finds that Petitioner is entitled to prospective medical care.

Petitioner seeks a spinal fusion and an interbody fusion with laminectomy of L5-S1. Petitioner testified that Dr. Mulconrey never indicated that he could go back to work without restrictions and never placed him at MMI. Dr. Mather stood alone in his opinions that Petitioner could go back to work without restrictions and was at MMI.

Petitioner's testimony and medical records indicate that Petitioner has had multiple rounds of traditional physical therapy, a round of aquatic physical therapy, and multiple epidural steroid injections with only temporary and/or minimal relief. Dr. Mulconrey testified that Petitioner had approximately several months of conservative care and his condition had worsened. (See PX6, 0276). Dr. Mulconrey testified that his surgical recommendation was based on Petitioner's complaints of pain as well as imaging that he reviewed. Dr. Mulconrey testified that MRI dated January 9, 2020 revealed bilateral neuroforaminal stenosis. Dr. Mulconrey testified that Petitioner's complaints were consistent with imaging which revealed bilateral neuroforaminal

stenosis which is why he recommended surgery. Dr. Mulconrey testified that the surgery would remove compression off the nerve roots to improve Petitioner's lower extremity function and strength. Petitioner has presented evidence that Dr. Mulconrey's surgical recommendations are reasonable and necessary to improve Petitioner's lower extremity function and strength.

The fact that Petitioner has not undergone the disputed surgery though Veteran Affairs does not negate his claim. Dr. Mulconrey testified that after the surgery, Petitioner would return to work in three to six months with light duty, and possibly full duty in approximately eight months. Petitioner testified that he cannot sustain himself financially and must work. Petitioner's TTD benefits were terminated following Dr. Mather's IME. Petitioner is honest in testifying that he is able to do more than Dr. Mulconrey's restrictions. He works with constant pain.

The Arbitrator considers the fact that Petitioner continues to ride motorcycles even if only sparingly but turns to the medical evidence to determine whether Petitioner is malingering. The medical records do not suggest symptom magnification and Dr. Mulconrey testified that he had no reason to believe that Petitioner was a malinger or faking his subjective history in order to obtain surgery.

Respondent shall approve and pay for a spinal fusion and an interbody fusion with laminectomy of L5-S1 and necessary pre- and post-operative care as prescribed by Dr. Mulconrey as provided in Section 8(a) and 8.2 of the Act.

It is so ordered:

Arbitrator Rachael Sinnen

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC000620
Case Name	Patrick Szymanski v. J Ave Development, Inc.
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0393
Number of Pages of Decision	16
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Russell Haugen
Respondent Attorney	Ilir Imeri

DATE FILED: 8/30/2023

/s/Kathryn Doerries, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF DU PAGE)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

PATRICK SZYMANSKI,

Petitioner,

vs. NO: 22 WC 00620

J AVE DEVELOPMENT, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b)/8(a) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, temporary total disability, medical expenses, prospective medical, and Other-whether there was an intervening accident, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 12, 2022, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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 $11,800.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

August 30, 2023

o- 8/15/23
KAD/jsf

/s/*Kathryn A. Doerries*
Kathryn A. Doerries

/s/*Maria E. Portela*
Maria E. Portela

/s/*Amylee H. Simonovich*
Amylee H. Simonovich

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC000620
Case Name	Patrick Szymanski v. J Ave Development, Inc.
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	13
Decision Issued By	Stephen Friedman, Arbitrator

Petitioner Attorney	Russell Haugen
Respondent Attorney	Ilir Imeri

DATE FILED: 10/12/2022

THE INTEREST RATE FOR THE WEEK OF OCTOBER 12, 2022 4.03%

/s/Stephen Friedman, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
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
19(b)

Patrick Szymanski
Employee/Petitioner

v.

J Ave Development, Inc.
Employer/Respondent

Case # **22** WC **000620**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Stephen J. Friedman**, Arbitrator of the Commission, in the city of **Wheaton**, on **September 13, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, **December 10, 2021**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**62,499.70**; the average weekly wage was $**1,187.95**.

On the date of accident, Petitioner was **42** years of age, ***single*** with **0** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**15,689.14** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**4,335.72** for other benefits, for a total credit of $**20,024.86**.

Respondent is entitled to a credit of $**37,670.71** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $791.97/week for 35 3/7 weeks, commencing January 8, 2022 through September 13, 2022, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $**15,689.14** for TTD, and $**4,335.72** for other benefits, for a total credit of $**20,024.86**.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $600.00 to VM Spine Institute and $3,081.93 to Petitioner for his out-of-pocket payments, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit, pursuant to Section 8(j) of the Act, for all medical benefits that have been paid and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit.

Respondent shall authorize and pay for additional reasonable and necessary treatment consistent the recommendations of Dr. Colman including an L3-5 fusion, any post operative treatment, physical therapy or other reasonable and necessary care.

Petitioner’s claim for penalties and attorneys’ fees is denied.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

OCTOBER 12, 2022

/s/ Stephen J. Friedman
signature of Arbitrator

ICArbDec19(b)

Statement of Facts

Petitioner, Patrick Szymanski, testified that he was employed by Respondent, J. Ave. Development, Inc., as a diesel mechanic for three years prior to December 10, 2021. Petitioner's job duties as a diesel mechanic included changing alternators, starters, turbos, tires, brakes, and inspecting semi-trucks for leaks. Petitioner testified that as part of his job duties, he was required to lift up to 50 pounds and move around, bend, twist, pull, and push. Petitioner testified that prior to the accident on December 10, 2021, he did not have any prior work restrictions related to his back or lower extremities, and that he was able to complete all his assigned work tasks as a diesel mechanic.

Petitioner testified to having had back issues prior to December 10, 2021. He had a very long history of prior back pain for which he had received annual radio-frequency ablations approximately every six months for about 3 years. Petitioner testified that the prior radio-frequency ablations had helped relieve his back pain, but that the pain relief was temporary. His low back pain would return within six or seven months of undergoing the ablations. As of December 10, 2021, it had been approximately a year since his last ablation. Petitioner testified that he had not been able to obtain his annual ablation because of Covid. Petitioner testified that he had no back pain whatsoever prior to the accident on December 10, 2021. Petitioner testified the last ablation he had received approximately a year prior to the accident completely fixed all of his low back pain.

Petitioner testified that on December 10, 2021, he was on a ladder putting on a tarp when a gust of wind came, pushed the ladder over, and caused Petitioner to fall on his back. He was approximately 4 feet off the ground when he fell. He landed on concrete. Petitioner testified that he felt immediate pain in his lower back. Petitioner testified that the injury wasn't so severe that he needed to seek immediate care, He did not seek immediate treatment. Petitioner got up after the fall and went to the office to report the accident to his boss. Petitioner went back to work and finished his duties for the day. He worked an additional six hours after the accident. Petitioner testified that although he was able to continue working, he spent most of the time sitting and telling the other employees what to repair. At the end of his shift, Petitioner went home, took a shower, and went to bed. He did not seek any treatment on the day of the accident.

John Avelar, the owner of J. Ave. Development Inc., testified that Petitioner had been employed by Respondent for nearly five years prior to the accident. Mr. Avelar testified that on December 10, 2021, Petitioner came to him and reported having fallen off a ladder, landing on his back. Mr. Avelar testified that after Petitioner reported the injury, he just went back to work. Petitioner was able to work the next six to eight hours of his shift without issue. Petitioner never indicated to Mr. Avelar that he needed any treatment as a result of the accident. Mr. Avelar also testified that Petitioner had complained of back pain in the year prior to the accident on December 10, 2021. Petitioner would complain of back pain every three to six months prior to the accident and that he would say that he could not move due to the back pain and that he needed to go get his injection. Petitioner would typically take the next day off work after receiving his injections.

Petitioner testified that the next morning, he woke up and immediately fell to the ground in excruciating pain. Petitioner denies having sustained any type of new injury. Petitioner testified that he had to call an ambulance due to the pain. Petitioner testified that he was transported by the EMS to AMITA Health in Joliet on December 11, 2021, where he was admitted. The Lockport Fire Protection District ambulance report notes Petitioner, who was found lying on the floor in distress, told EMS personnel he was getting out of bed when he began to experience back pain which sent him to the floor where he has been unable to get up. He denied having any form of trauma (RX 1, p 168).

The ER admission notes indicate that Petitioner was brought in from home with complaints of low back pain/spasm. The reason is listed as “Fall at home” (RX 1, p 172). Other medical history lists chronic back pain, degenerative disc disease (RX 1, p 174). The patient notes taken by Katherine M. LeClear state he was taken from home for low back pain and unable to get up on own. He reports he tripped and aggravated an already bad back. He denies any other injuries (RX 1, p 179). On December 11, 2021, Petitioner was seen by Dr. Gandor at AMITA. The history states Petitioner has a history of chronic back pain, degenerative disc disease. He presents with back spasms. He generally gets epidural steroid injection and radio-frequency ablations in his back but that due to Covid, he has been unable to keep his appointments. Today he had a sudden onset of low back pain and felt it lock up. He has been too uncomfortable and unable to get out of bed. Examination, showed lumbar spine spasms, no bony tenderness, and negative straight leg raise. The impression was exacerbation of chronic back pain. Several doses of pain medication were given and Petitioner was not comfortable going home. He was admitted (RX 1, p 185-188).

On December 12, 2021, Petitioner underwent a lumbar MRI with the clinical indication being “chronic low back pain.” The impression was multilevel degenerative changes from L2 to S1 without any significant spinal canal stenosis. However, there was some neural foraminal stenosis noted from L2-L5 (RX 1, p 209-210). Petitioner saw Dr. Shaik on December 13, 2021 through December 16, 2021 for acute on chronic back pain. On December 14, 2021, the history includes Petitioner reporting falling off the ladder. He initially denied worsening back pain, but the following day he suddenly had excruciating back pain and called 911 (RX 1, p 190). Dr. Shaik noted no neuro deficits. He noted the MRI showing degenerative disc disease with disc protrusions from L2-3 through L5-S1 with mild to moderate central stenosis. He assessed likely discogenic pain from L3-4 and L4-5 based upon the MRI and exam. He discussed facet injection and possible epidural injections (RX 1, p 190-205). On December 16, 2021, Petitioner underwent bilateral L3-4, L4-5, and L5-S1 facet joint injections and L5-S1 inter-laminar epidural steroid injections (RX 1, p 194-195). Petitioner was discharged on December 16, 2021. He was advised to follow up with Dr. Shaik within 1 week and the pain clinic on an as-needed basis (RX 1, p 162). He was to continue physical therapy (RX 1, p 192-193).

On December 22, 2022, Petitioner sought treatment with Dr. Omar Said at Ascend Medical for complaints of low back pain (PX 2). Dr. Said treated Petitioner for his pre-accident injections and ablations. Dr. Said’s History states the patient has had this pain for years with intermittent flair ups. The worst flare up was last week. He fell on his back off a ladder. He woke up the next day and his back seized up and he could not even stand. Petitioner reported back pain and numbness in the legs. Dr. Said diagnosed lumbar spondylosis. Dr. Said recommended a radio-frequency ablation since Petitioner was “treated in the past with lumbar medial branch radio-frequency ablations which did help his pain considerably.” He also sent Petitioner for a surgical evaluation (PX 2). Petitioner underwent the recommended left lumbar medial branch radio-frequency ablation on December 27, 2021 (PX 2).

On January 4, 2022, Petitioner was seen for an initial evaluation by Dr. Vivek Mohan (PX 4). Petitioner advised Dr. Mohan that he had a history of “prior low back pain that’s worse over the last few years,” and of the December 10, 2021 fall from a ladder and ER visit. He stated the injections did not help. He reported the pain does not go into the legs. His pain level is 8-9/10. Dr. Mohan reviewed Petitioner’s prior lumbar MRI and noted that it showed multilevel disc protrusions from L3-4 through L5-S1, with the most pronounced protrusion occurring at L4-5. Physical examination included a negative neurological exam. Dr. Mohan diagnosed work injury, lumbar disc herniation and aggravation of his bilateral sacroiliitis joints. Mr. Mohan noted that although the MRI showed multilevel disc degeneration and herniations, he did not believe this was the cause of his

current pain. Dr. Mohan recommended 2 rounds of bilateral SI joint injections for both diagnostic and therapeutic purposes. Petitioner was also advised to continue with physical therapy. Dr. Mohan took Petitioner completely off work (PX 4).

Petitioner underwent the first round of the recommended bilateral SI joint injections on January 10, 2022 (PX 2). On January 14, 2022, Petitioner started an additional course of physical therapy at Team Rehabilitation. Petitioner was to undergo this additional therapy three times per week for twelve weeks (PX 5). On January 17, 2022, Petitioner underwent right L2, L3, L4, and L5 medial branch radiofrequency ablation to treat L3-4, L4-5, L5-S1 facet joints (PX 2).

On January 31, 2022, Petitioner advised Dr. Said that the injections had not led to any significant improvement of his pain and that he continued to have low back pain along with numbness in the lower extremities. Dr. Said diagnosed lumbar spondylosis, lumbosacral spondylosis, lumbar degenerative disc disease, lumbosacral degenerative disc disease, lumbar radiculopathy, and lumbosacral radiculopathy. Dr. Said noted that recent radio-frequency ablations had been less effective, with severe pain from the recent flare up of pain after he had a fall from a ladder. He recommended a lumbar medial branch radio-frequency ablation (PX 2).

On February 1, 2022, Petitioner told Dr. Mohan that neither the physical therapy nor the bilateral SI injections had provided any pain relief. Petitioner reported that his pain was radiating into the bilateral lower extremities and down both his feet. Dr. Mohan advised Petitioner that he was suffering from multilevel disc degeneration and herniations. Dr. Mohan noted that Petitioner was “a poor surgical candidate due to his weight and smoking history.” Dr. Mohan recommended that Petitioner undergo a discogram and CT scan to determine which levels are the source of his symptoms. He would then discuss surgical options. He kept Petitioner completely off of work (PX 3).

On February 11, 2022, Respondent obtained a Utilization Review (UR) to determine whether the discogram with a post lumbar CT scan was reasonable and necessary (RX 2). The UR non-certified the procedure. The report notes that the reviewer had the MRI and Dr. Said’s records and procedure reports. They did not review Dr. Mohan’s notes. The procedure was non-certified because ODG guidelines do not recommend the use of discography because the harms outweigh the potential diagnostic benefit. They state there is no indication why this diagnostic is being requested. They note there are rare exceptions including single level discography when a decision for fusion has already been made. They outline steps to be taken in those exceptional cases (RX 2).

Petitioner underwent the discogram on February 17, 2022. The discogram report noted only pressure that did not replicate his pain at L2-3 and L3-4. At L4-5, Petitioner reported severe pain with symptoms radiating into the right leg to the knee. At L5-S1, he reported moderate pain (PX 2). The CT scan impression was:
(1) At the L3-4 level, there is a 2-3 mm broad-based posterior focal disc herniation which indents the ventral and central portion of the thecal sac, probably Dallas classification III.
(2) At the L3-4 level, there is a 4-5 mm broad-based posterior and slightly left-sided disc herniation which indents the ventral and left side of the thecal sac with broad-based stenosis and generalized bilateral neuroforaminal narrowing, greater on the left, probably Dallas clarification III.
(3) At the L4-5 level, there is a 3-4 mm posterior central disc herniation which indents the ventral and central portion of the thecal sac with some central stenosis, probably Dallas classification III.
(4) At the L5-S1 level, there is a 2-3 mm posterior broad-based central disc protrusion which indents the ventral surface of the thecal sac at this level, probably Dallas classification II or III. (PX 3).

On March 1, 2022, Petitioner continued to have ongoing bilateral back pain that had worsened, with numbness in his bilateral extremities and a sensation that his feet were constantly cold. He was using a cane. Petitioner told Dr. Mohan that he was not taking any pain medication to manage his symptoms. After reviewing the discogram, Dr. Mohan advised Petitioner that he had severe degeneration from L2 to S1, with the L4-5 level being the worst. Dr. Mohan discussed surgical intervention including possible disc replacement at L4-5 and L5-S1, but noted the upper 2 levels may need to be addressed as well. He recommended a second opinion at a university setting and provided a referral to Dr. Colman at Rush. He advised Petitioner to taper nicotine and work on weight loss (PX 4).

On March 8, 2022, Petitioner was evaluated by Dr. Colman at Midwest Orthopedics at Rush (PX 6). Dr. Colman noted that Petitioner was 5'9 and 240 pounds and was a smoker for the past 25 years. Petitioner provided Dr. Colman with a history of the fall on December 10, 2021, and the severe pain the next morning requiring emergency services. He provided the history of prior back issues for which he had been seeking treatment via radio-frequency ablations. Physical examination noted full range of motion, with normal strength, sensation and reflexes, and negative straight leg raise. After reviewing the prior lumbar MRI, Dr. Colman diagnosed Petitioner with low back pain and spinal stenosis. Dr. Colman opined that Petitioner sustained traumatic disc herniations causing an acute to chronic acceleration of his underlying degenerative disc disease as a result of the accident. Dr. Colman states he had no symptoms just prior to the injury and had not been treated by a spine physician for 2 to 3 years prior to the injury. The mechanism of injury was sufficient to cause disc herniations and traumatic injury to the disc annulus. Dr. Colman stated that the severe back pain and referred radiating groin pain is suggestive of L3 and L4 disc injuries. He did not believe he had a substantial component of distal radiculopathy. Dr. Colman stated the only surgical option would be an L3-5 arthrodesis with decompression of the nerves and rebuilding of the discs with inter-body fusion. Dr. Colman stated that this was the last resort operation with a reliability addressing Petitioner's back pain 60% to 70%. He stated he did not think this was an unreasonable option (PX 6). On March 28, 2022, Petitioner advised Dr. Colman he wished to go forward with the surgery and a request for authorization was sent to the adjuster (PX 6).

Petitioner was seen for a Section 12 exam at Respondent's request by Dr. Alexander Ghanayem on June 2, 2022. After examination and review of medical records, his impression was that Petitioner did not sustain any acute injury falling off the ladder such as fractures or acute disc herniations. He may have aggravated his preexisting lumbar disc degeneration. He stated Petitioner's subjective complaints and physical examination findings are out of proportion to what he would expect. He noted an inconsistent loss of sensation. He stated the proposed L3-L5 fusion is fraught with bad outcomes. He noted the fusion would transfer stress to the adjacent levels and probable make him worse in the long run. He would not have recommended the discogram because he did not feel Petitioner was a surgical candidate. He opined Petitioner is at MMI and should undergo an FCE (RX 3).

Dr. Ghanayem testified by evidence deposition taken August 29, 2022 (RX 4). He testified to the history of the December 10, 2021 accident and the prior back problems some years ago. Dr. Ghanayem testified to his physical examination. Petitioner was neurologically intact. He noted sensory findings inconsistent with low back pathology. The MRI noted multilevel degeneration with no acute findings. He opined that Petitioner may have aggravated his pre-existing problems of lumbar disc degeneration. He disagreed with the surgical recommendation for an L3-L5 fusion. You are going to transfer stress to the remaining compromised discs. It is not predictive of a good functional outcome. He would not do a discogram. He testified that it is a test you do if you are trying to discern what type of fusion to do if there is a disc level that is questionable. He would not do the test since he was not doing a fusion. He does not like UR. He opined that Petitioner was at MMI as of the

date of his exam. He believed Petitioner could have done sedentary type stuff if it was available after a month (RX 4).

Dr. Ghanayem was provided records from December 11, 2021 to review. He noted that they refer to Petitioner experiencing back pain getting out of bed on the morning of December 11, 2021. Dr. Ghanayem testified the records do not talk about a fall off a ladder. He stated that if there is no work injury, then the back pain is unrelated to the factors of his employment. The records are inconsistent with what Petitioner told him (RX 4). Dr. Ghanayem testified he was told Petitioner is a diesel mechanic. He did not have a job description. He would have had Petitioner at light or sedentary work until an FCE was completed. Dr. Ghanayem testified that orthopedic surgeons can disagree with respect to treatment options (RX 4).

Petitioner testified that he discussed the risks of proceeding to surgery with Dr. Colman, and he still wants to proceed with the surgery recommended so he can go back to work. He testified that he has not worked for Respondent or anyone else since December 10, 2021. He has not been offered any light work by Respondent. Mr. Avelar testified that if Petitioner had brought him work restrictions, he could have accommodated light duty. He could have done picking up checks, getting parts, office work. Petitioner never contacted him about light duty. No offer of light duty was made to Petitioner. Petitioner testified his bills have been paid by Blue Cross/Blue Shield, the insurance provided by Respondent.

Conclusions of Law

In support of the Arbitrator's decision with respect to (F) Causal Connection, the Arbitrator finds as follows:

A Workers' Compensation Claimant bears the burden of showing by a preponderance of credible evidence that his current condition of ill-being is causally related to the workplace injury. *Horath v. Industrial Commission*, 449 N.E.2d 1345, 1348 (Ill. 1983) citing *Rosenbaum v. Industrial Com.* (1982), 93 Ill.2d 381, 386, 67 Ill. Dec. 83, 444 N.E.2d 122). The Commission may find a causal relationship based on a medical expert's opinion that the injury "could have" or "might have" been caused by an accident. *Mason & Dixon Lines, Inc. v. Industrial Comm'n*, 99 Ill. 2d 174, 182, 457 N.E.2d 1222, 1226, 75 Ill. Dec. 663 (1983). However, expert medical evidence is not essential to support the Commission's conclusion that a causal relationship exists between a claimant's work duties and his condition of ill-being. *International Harvester v. Industrial Comm'n*, 93 Ill. 2d 59, 63, 442 N.E.2d 908, 911, 66 Ill. Dec. 347 (1982). A chain of events suggesting a causal connection may suffice to prove causation. *Consolidation Coal Co. v. Industrial Comm'n*, 265 Ill. App. 3d 830, 839, 639 N.E.2d 886, 892, 203 Ill. Dec. 327 (1994). Prior good health followed by a change immediately following an accident allows an inference that a subsequent condition of ill-being is the result of the accident. *Navistar International Transportation Co. v. Industrial Comm'n*, 315 Ill. App. 3d 1197, 1205 (2000).

Petitioner seeks compensation for his current condition of ill-being in the lumbar spine. Petitioner presented evidence of his ability to perform his full job duties up to the date of the December 10, 2021 fall from the ladder. Thereafter, beginning the next morning, he was taken by ambulance to the emergency room and has been under continuous treatment for the degenerative disc disease in his low back. Respondent disputes this based upon Petitioner's preexisting low back condition. Petitioner admitted at trial and in his medical histories that he has had this pain for years with intermittent flair ups. He testified to having radiofrequency ablations every year or so in the past several years. He had not had one recently due to Covid. Respondent also argues that the

Petitioner's initial histories to the paramedics and the emergency room do not mention the fall from a ladder, but rather that the pain began when he got out of bed the next morning.

Here, we are faced with a situation where an accident is claimed to have aggravated a preexisting condition. It is well-established that an accident need not be the sole or primary cause—as long as employment is a cause—of a claimant's condition. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205 (2003). Furthermore, an employer takes its employees as it finds them. *St. Elizabeth's Hospital v. Illinois Workers' Compensation Comm'n*, 371 Ill. App. 3d 882, 888 (2007). A claimant with a preexisting condition may recover where employment aggravates or accelerates that condition. *Caterpillar Tractor Co. v. Industrial Comm'n*, 92 Ill. 2d 30, 36 (1982). Where an accident accelerates the need for surgery, a claimant may recover under the Act. *Caterpillar Tractor Co*., 92 Ill. 2d at 36. The rationale justifying the use of the "chain of events" analysis to demonstrate the existence of an injury would also support its use to demonstrate an aggravation of a preexisting injury.

Petitioner testified that he was pain free before he fell from the ladder. No medical records were offered of his prior medical treatment or of any recent complaints of pain or inability to perform his work as a diesel mechanic. Mr. Avelar's testimony of complaints of back pain every 3 to 6 months does not establish ongoing symptoms. Following the accident, Petitioner has advanced increased complaints. The January 2022 injections did not provide relief and Petitioner is now recommended for a fusion. This timeline would support causation based upon a chain of events causing an aggravation.

Cases involving aggravation of a preexisting condition concern primarily medical questions and not legal ones. That is, if a claimant is in a certain condition, an accident occurs, and following the accident, the claimant's condition has deteriorated, it is plainly inferable that the intervening accident caused the deterioration. The salient factor is not the precise previous condition; it is the resulting deterioration from whatever the previous condition had been. *Nanette Schroeder v. The Illinois Workers' Compensation Comm'n*, 2017 IL App (4th) 160192WC (4th Dist., 2017). If the claimant had health problems prior to a work-related injury, he bears the burden of showing that the preexisting condition was aggravated by the employment and that the aggravation occurred as a result of an accident which arose out of and in the course of his employment. *Nunn v. Industrial Comm'n, 157 Ill. App. 3d 470, 476, 510 N.E.2d 502, 505, 109 Ill. Dec. 634 (1987)*.

Dr. Colman opined in his records that Petitioner sustained traumatic disc herniations causing an acute to chronic acceleration of his underlying degenerative disc disease as a result of the accident. Dr. Colman states he had no symptoms just prior to the injury and had not been treated by a spine physician for 2 to 3 years prior to the injury. The mechanism of injury was sufficient to cause disc herniations and traumatic injury to the disc annulus. Dr. Ghanayem stated that the MRI noted multilevel degeneration with no acute findings. He opined that Petitioner may have aggravated his pre-existing problems of lumbar disc degeneration. When provided the initial histories only relating the onset of symptoms to getting out of bed on the morning of December 11, 2021, he opined that if there is no work injury, then the back pain is unrelated to the factors of his employment. But accident is stipulated to, so there is no dispute that the accident occurred. Significantly, Dr. Ghanayem provides no causation opinion addressing that the accident occurred, but severe symptoms did not occur until the next morning.

Based upon the record as a whole, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that his condition of ill-being in the lumbar spine is causally connected to the accident on December 10, 2021.

In support of the Arbitrator's decision with respect to (J) Medical, the Arbitrator finds as follows:

Under section 8(a) of the Act, a claimant is entitled to recover reasonable medical expenses that are causally related to the accident and that are necessary to diagnose, relieve, or cure the effects of his injury. *Absolute Cleaning/SVMBL v. Illinois Workers' Compensation Comm'n, 409 Ill. App. 3d 463, 470, 949 N.E.2d 1158, 1165, 351 Ill. Dec. 63 (2011)*. Based upon the Arbitrator's finding with respect to Causal Connection, reasonable and necessary medical related to Petitioner's back would be compensable.

Petitioner offered PX 7 with the medical bills incurred by Petitioner for the treatment for his low back. The parties stipulated that the bills were paid by a group plan for which Respondent is entitled to credit under Section 8(j) of the Act. The Arbitrator has reviewed the medical exhibits submitted and finds that the bills are for reasonable and necessary treatment to the low back.

With respect to the charges for the discogram, the Arbitrator finds the non-certification by UR unpersuasive. In reviewing the analysis, the Arbitrator notes that the UR reviewer did not have any records of Dr. Mohan. He stated that there was no indication why this diagnostic is being requested. Dr. Mohan specifically ordered the discogram to determine which levels are the source of his symptoms. The Arbitrator also considered Dr. Ghanayem's testimony in assigning weight to the UR. His opinion of the value of a UR is crystal clear. More importantly when Dr. Ghanayem was asked when he would consider a discogram reasonable, he testified that it is a test you do if you are trying to discern what type of fusion to do if there is a disc level that is questionable, exactly why Dr. Mohan had ordered it.

Based upon the record as a whole and the Arbitrator's finding with respect to Causal Connection, the Arbitrator finds that Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $600.00 to VM Spine Institute and $3,081.93 to Petitioner for his out-of-pocket payments, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit, pursuant to Section 8(j) of the Act, for all medical benefits that have been paid and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit.

In support of the Arbitrator's decision with respect to (K) Prospective Medical, the Arbitrator finds as follows:

Petitioner is seeking prospective medical treatment based upon the opinions of Dr. Mohan and Dr. Colman. Dr. Mohan discussed surgical intervention including possible disc replacement at L4-5 and L5-S1, but noted the upper 2 levels may need to be addressed as well. He recommended and a second opinion at a university setting and provided a referral to Dr. Colman at Rush. Dr. Mohan noted that Petitioner was "a poor surgical candidate due to his weight and smoking history." Dr. Colman stated that the severe back pain and referred radiating groin pain is suggestive of L3 and L 4 disc injuries. He did not believe he had a substantial component of distal radiculopathy. Dr. Colman stated the only surgical option would be an L3-5 arthrodesis with decompression of the nerves and rebuilding of the discs with inter-body fusion. Dr. Colman stated that this was the last resort operation with a reliability addressing Petitioner's back pain 60% to 70%. He stated he did not think this was an unreasonable option.

Dr. Ghanayem stated Petitioner's subjective complaints and physical examination findings are out of proportion to what he would expect. He noted an inconsistent loss of sensation. He disagreed with the surgical

recommendation for an L3-L5 fusion. He stated the proposed L3-L5 fusion is fraught with bad outcomes. He noted the fusion would transfer stress to the adjacent compromised discs levels and probably make him worse in the long run. It is not predictive of a good functional outcome. He opined Petitioner is at MMI and should undergo an FCE.

It is the Commission's province to assess the credibility of witnesses, draw reasonable inferences from the evidence, determine what weight to give testimony, and resolve conflicts in the evidence, particularly medical opinion evidence. *Berry v. Industrial Comm'n*, 99 Ill. 2d 401, 406-07, 459 N.E.2d 963, 76 Ill. Dec. 828 (1984); *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 675, 928 N.E.2d 474, 340 Ill. Dec. 475 (2009); *Fickas v. Industrial Comm'n*, 308 Ill. App. 3d 1037, 1041, 721 N.E.2d 1165, 242 Ill. Dec. 634 (1999). Expert testimony shall be weighed like other evidence with its weight determined by the character, capacity, skill and opportunities for observation, as well as the state of mind of the expert and the nature of the case and its facts. *Madison Mining Company v. Industrial Commission*, 309 Ill. 91, 138 N.E. 211 (1923). The proponent of expert testimony must lay a foundation sufficient to establish the reliability of the bases for the expert's opinion. *Gross v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100615WC, 960 N.E.2d 587, 355 Ill. Dec. 705. If the basis of an expert's opinion is grounded in guess or surmise, it is too speculative to be reliable. Expert opinions must be supported by facts and are only as valid as the facts underlying them. *In re Joseph S.*, 339 Ill. App. 3d 599, 607, 791 N.E.2d 80, 87, 274 Ill. Dec. 284 (2003). A finder of fact is not bound by an expert opinion on an ultimate issue, but may look 'behind' the opinion to examine the underlying facts.

Having observed Petitioner testify and examined the evidence, the Arbitrator finds the opinions of Dr. Colman, supported by those of Dr. Mohan persuasive. Petitioner continues to advance significant complaints supported by the clinical findings and diagnostic testing. Dr. Mohan and Dr. Colman acknowledge the risks of the proposed treatment and have discussed these possibilities with Petitioner who has requested that they go forward with the procedures. Dr. Ghanayem’s position is based upon the probability of an unfavorable outcome, which Dr. Colman’s estimates place at 30% to 40%. He suggests that Petitioner simply accept his current pain and physical capacity levels. Petitioner has weighed the risks and wishes to go forward rather than remain at his current level of pain and limited function. Given that Dr. Colman believes there is a probability of improvement and Petitioner is choosing the procedure, the Arbitrator finds the procedure reasonable and necessary.

Based upon the record as a whole, and the Arbitrator’s finding with respect to Causal Connection, the Arbitrator finds that Respondent shall authorize and pay for additional reasonable and necessary treatment consistent the recommendations of Colman including the proposed L3-L5 fusion, physical therapy or other reasonable and necessary care.

In support of the Arbitrator’s decision with respect to (L) Temporary Compensation, the Arbitrator finds as follows:

Temporary compensation is provided for in Section 8(b) of the Workers' Compensation Act, which provides, weekly compensation shall be paid as long as the total temporary incapacity lasts, which has interpreted to mean that an employee is temporarily totally incapacitated from the time an injury incapacitates him for work until such time as he is as far recovered or restored as the permanent character of his injury will permit. The dispositive test is whether the claimant’s condition has stabilized, i.e., reached MMI. *Sunny Hill of Will County*

Mechanical Devices v. Industrial Comm'n, 344 Ill. App. 3d 752, 760 (4th Dist. 2003). Based upon the Arbitrator's findings with respect to Causal Connection and Prospective Medical, Petitioner is not yet at MMI.

Petitioner seeks benefits from January 8, 2022 to the date of hearing. Petitioner has been off work on the recommendation of his treating doctors while awaiting surgical authorization. While Dr. Ghanayem testified Petitioner could do sedentary work since the date of his examination, Petitioner's regular job was more strenuous than that and Respondent admitted that no offer of light duty has been made to Petitioner.

Based upon the record as a whole, and the Arbitrator's findings with respect to Causal Connection and Prospective Medical, the Arbitrator finds that Petitioner is entitled to temporary total disability commencing January 8, 2022 through September 13, 2022, being the date of hearing in this matter, a period of 35 3/7 weeks. Respondent shall be given a credit for the stipulated payments of $15,689.14 for TTD, and $4,335.72 for other benefits, for a total credit of $20,024.86.

In support of the Arbitrator's decision with respect to (M) Penalties, the Arbitrator finds as follows:

Penalties imposed under section 19(l) are in the nature of a late fee. The award of section 19(l) penalties is mandatory if the payment is late, for whatever reason, and the employer or its carrier cannot show an adequate justification for the delay. The standard for determining whether an employer has good and just cause for a delay in payment is defined in terms of reasonableness. The employer bears the burden of justifying the delay, and its justification is sufficient only if a reasonable person in the employer's position would have believed the delay was justified.

The standard for awarding penalties and attorney fees under sections 19(k) and 16 is higher than the standard for awarding penalties under section 19(l) because sections 19(k) and (16) require more than an "unreasonable delay" in payment of benefits. For the award of penalties and attorney fees under sections 19(k) and 16, it is not enough for the claimant to show that the employer simply failed, neglected, or refused to make payment or unreasonably delayed payment without good and just cause. Instead, penalties and attorney fees under sections 19(k) and 16 are intended to address situations where there is not only delay, but the delay is deliberate or the result of bad faith or improper purpose. In addition, while section 19(l) penalties are mandatory, the imposition of penalties and attorney fees under sections 19(k) and 16 is discretionary.

Having heard the evidence in this matter, the Arbitrator finds that a reasonable person in the employer's position would have believed the delay was justified. Respondent's two bases for contesting this matter, 1) that the accident did not cause the condition of Petitioner's low back, and 2) that Petitioner was at MMI as of June 2022 and no longer entitled to medical or TTD, were supported by believable, if unpersuasive, evidence.

While Petitioner reported falling off the ladder, this was unwitnessed. After the fall, he walked to the office to report this to Mr. Avelar but did not request any medical care, or exhibit any outward sign of disability. Then he went back to work for the rest of the shift. When he was taken by ambulance to the emergency room the next morning, the histories do not mention the work accident, only his symptoms falling while getting out of bed. These facts coupled with the documented pre-existing history of back symptoms and treatment, raise a reasonable question of causation.

With respect to ongoing benefits for temporary compensation or medical, Respondent offered the opinions of Dr. Ghanayem that Petitioner was at MMI and in need of no further medical treatment. Once Petitioner was MMI, he would no longer be entitled to temporary compensation or further medical care. Petitioner did not seek vocational services or look for work and would not qualify for maintenance. While this opinion was ultimately unsuccessful, a clear medical opinion by a qualified orthopedic surgeon was presented to support Respondent's position.

Based upon the record as a whole, the Arbitrator finds that Respondent was not unreasonable in delaying and denying benefits and declines to award penalties or attorneys' fees.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	14WC003865
Case Name	Alexia Kern (Widow of James Kern) v. United Airlines, Inc
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0394
Number of Pages of Decision	28
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Kurt Niermann
Respondent Attorney	Karen Coon

DATE FILED: 8/31/2023

/s/Carolyn Doherty, Commissioner

Signature

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 SOL	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ALEXIA KERN, WIDOW OF
JAMES KERN,

Petitioner,

vs. NO: 14 WC 003865

UNITED AIR LINES, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, notice, causal connection, medical expenses, prospective medical care, temporary total disability, permanent partial disability, death benefits, penalties and fees, and the statute of limitations, and being advised of the facts of law, reverses the Decision of the Arbitrator rendered on statute of limitations issues and renders no decision on the underlying merits of the case.

In this case, James. J. Kern, the Decedent and original petitioner in this matter, alleged an accident occurring on July 17, 2008, while in the course of his employment as a pilot with Respondent. On November 12, 2009, Mr. Kern filed his first Application (09 WC 46675) regarding this injury.

On October 18, 2012, the Application in 09 WC 46675 was dismissed for want of prosecution. No petition to reinstate appears of record, in CompFile, or the Commission's legacy docket system, and the case was never reinstated by the Commission.

Over 15 months after the dismissal of the original Application 09 WC 46675, Mr. Kern filed a new Application (the "refiled claim") on February 5, 2014, alleging the same accident date of July 17, 2008. Mr. Kern was still alive in February 2014. This refiled Application was given a new case number 14 WC 003865.

On May 21, 2015, Mr. Kern passed away. On August 14, 2015, Alexia Kern amended the refiled claim to substitute herself as Petitioner's widow but did not formally designate herself as proceeding on behalf of Mr. Kern's estate. Moreover, the Commission notes that the Application in the amended refiled claim did not list the matter as a "fatal case" nor did it indicate a date of death.

Five years later, on February 25, 2020, Petitioner again amended the refiled claim, this time to designate it as a "fatal case". Petitioner confirmed during oral argument that this was the first designation of this matter as a "fatal case" and that fact is further supported by a review of the filed pleadings. The caption remained "Alexis Kern widow of" and again did not mention the estate but this Application indicated "fatal" and a May 21, 2015 date of death.

The Arbitrator denied the Respondent's Motion to Dismiss based on Statute of Limitations and further denied Petitioner's claim on its merits following a full hearing at trial.

Based on the foregoing, the Commission reverses the Arbitrator's denial of the Respondent's Motion to Dismiss. Specifically, the Commission finds that the original Application filed by Petitioner in 2009 and dismissed for want of prosecution in 2012 was never properly reinstated. In an attempt to revive the original claim over 15 months after its dismissal, Petitioner, Mr. Kern, filed a new Application (the "refiled claim") on February 5, 2014, alleging the same accident date of July 17, 2008. Mr. Kern was still alive in February 2014. This new application was filed well after the 60-day limitations period for petitioning to reinstate set forth in the rules and regulations governing practice before the Commission. 50 Ill. Adm. Code 9020.90(a) (2016). Commission Rule 9020.90 is the sole means for reviving a workers' compensation claim that is dismissed for want of prosecution. Mr. Kern failed to file a petition to reinstate his original claim pursuant to Commission Rule 9020.90. Accordingly, the refiled claim was not sufficient to revive the original claim and the refiled claim is appropriately dismissed as untimely. See *Farrar v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 143129WC ¶¶ 17-18. The Commission further finds that each of the re-filings on February 5, 2014 and August 14, 2015 under case number 14 WC 003865 are a nullity.

The Commission next specifically addresses the February 25, 2020 amended Application in case 14 WC 003865 which is the first filing indicating that Petitioner was proceeding on a fatal case with a date of death on May 21, 2015. The Commission notes that this filing, designating the matter as a fatal case with the widow pursuing survivor's benefits under Section 7 of the Act, is an action separate and apart from the original action and thus subject to its own limitations period.[1] *E.g.*, *A.O. Smith Corp. v. Industrial Comm'n*, 109 Ill. 2d 52, 57 (1985). The Commission has liberal pleading guidelines and could entertain the addition of a Section 7 claim to one properly brought on behalf of an injured employee's estate. While noting the holding of *A.O. Smith* and the validity of that argument, the Commission finds the argument inapplicable in the instant matter. In this case, the amended Application first indicating a fatal matter was filed in February 2020, well after the termination of pilot disability payments[2] and well after limitations period in section 6(d) of the Act had run. See 820 ILCS 305/6(d) (West 2008).

[1] 820 ILCS 305/6(d) (West 2008).

[2] At oral argument, Petitioner and Respondent agreed that the termination of Mr. Kern's pilot disability payments occurred approximately two weeks after his death on May 21, 2015.

Accordingly, the Commission concludes that the original action in 09 WC 46675 was dismissed for want of prosecution and never properly reinstated. The Commission further concludes that the February 5, 2014 and August 14, 2015 Applications under case number 14 WC 003865 are a nullity. Lastly, the Commission concludes that the Application filed on February 25, 2020 first alleging a fatal matter was barred by the statute of limitations under Section 6(d) of the Act and is hereby dismissed. The Commission renders no decision on the underlying merits of the case.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator dated June 17, 2022, to deny the Motion to Dismiss based on the statute of limitations is reversed as stated herein and Petitioner's case is hereby dismissed.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

August 31, 2023

d: 08/24/23
CMD/kcb
045

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

/s/ *Marc Parker*
Marc Parker

/s/ *Christopher A. Harris*
Christopher A. Harris

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	14WC003865
Case Name	KERN, ALEXIA WIDOW OF JAMES KERN v. UNITED AIRLINES, INC.,
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	24
Decision Issued By	Nina Mariano, Arbitrator

Petitioner Attorney	Kurt Niermann
Respondent Attorney	Karen Coon

DATE FILED: 6/17/2022

THE INTEREST RATE FOR THE WEEK OF JUNE 14, 2022 2.16%

/s/Nina Mariano; Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF **COOK**)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Kern, Alexia Widow of James Kern
Employee/Petitioner

v.

United Airlines, Inc.
Employer/Respondent

Case # **14 WC 03865**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Nina Mariano**, Arbitrator of the Commission, in the city of **Chicago**, on **December 16, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Statute of Limitations, Objection to Second Amended Complaint, Death Benefits beginning 5/22/15; hold harmless for PDI disability payments.**

FINDINGS

On **7/17/08**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between decedent James Kern and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**N/A**; the average weekly wage was **$N/A.**

On the date of accident, Petitioner was 43 years of age, ***married*** with **2** dependent children.

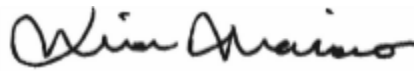
TTD benefits are not in dispute.

ORDER

Because the accident did not arise out of employment, benefits are denied.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.



Signature of Arbitrator

JUNE 17, 2022

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

ALEXIA KERN, WIDOW OF JAMES KERN,	)	
	)	
PETITIONER,	)	
	)	
v.	)	
	)	CASE NO. 14 WC 003865
UNITED AIRLINES, INC.,	)	
	)	
	)	
RESPONDENT.	)	

FINDINGS OF FACT

This matter proceeded to hearing on December 16, 2021 in Chicago, Illinois before Arbitrator Nina Mariano. Issues in dispute include accident, causal connection, earnings, nature and extent, penalties, death benefits starting on 5/22/15, hold harmless for PDI disability payments, objection to second amendment of Application and statute of limitations. Arbitrator's Exhibit "Ax" 1.

James J. Kern ("Mr. Kern") was a 43 year old pilot with United Airlines as of July 17, 2008. Mr. Kern alleges accidental injuries sustained on July 17, 2008. On that date, Mr. Kern alleges injuries including a fall and seizure while exiting the cockpit after working a flight. Mr. Kern was medically retired due to a seizure disorder on January 26, 2009. Mr. Kern passed away on May 21, 2015 when he drowned in a pond behind his house. At the time of the injury, Mr. Kern was married to Alexia Kern ("Ms. Kern") and they had two children, James Kern, Jr. and Douglas Kern. Ms. Kern is seeking death benefits under Section 7 of the Act.

James. J. Kern, originally filed an Application for Adjustment of Claim for benefits, Case 09 WC 46675, with the Illinois Workers' Compensation Commission on November 12, 2009. (Rx. 6) On October 18, 2012, Arbitrator Carlson dismissed the case 09W WC 46675 for want of prosecution. (Rx. 6) Mr. Kern filed a second Application for Adjustment of Claim on February 5, 2014, also alleging injuries for the same alleged accident on July 17, 2008 in the instant case 14 WC 03865. (Rx. 5) Following Mr. Kern's death on May 21, 2015, the Application for Adjustment of Claim was amended on August 14, 2015, to name Mr. Kern's widow, Ms. Kern, as Petitioner. (Rx. 5) The current Petitioner, Ms. Kern, subsequently amended the Application for Adjustment of Claim again on February 25, 2020 to change the matter to a fatal case with a date of death of May 21, 2015. (Rx. 5)

There is a dispute regarding the original accident in 2008 and the causation of Mr. Kern's death in 2015. Respondent also raises an objection to the second amendment of the 14 WC 03865 Application for adjustment of Claim and whether the claim is barred by the statute of limitations.

Petitioner seeks a hold harmless for medical bills and PDI disability payments which would be inapplicable herein as these are benefits which would be related to a claim by the estate for benefits accrued prior to Mr. Kern's death, rather than to an action for death benefits.

With respect to the issue of accident, occurring on July 17, 2008, Petitioner introduced an unsigned, typed report (Px. 4) which, purportedly, is authored by Mr. Kern regarding the accident. The report indicates that when they landed at Heathrow on July 17 2008, he was the last pilot to get his flight bag out of the cockpit. He suggests that when entering the cockpit, the last thing he remembered was tripping and then falling. He struck his head behind the right ear on the corner of the center cockpit console. When he got up, he was in "extreme agony", and exited the cockpit. The federal air marshal ("FAM") onboard heard a loud scream and rushed to the front of the plane. Mr. Kern indicates he swayed side to side and fell forward in the first class cabin. When he came to, he realized he was being attended to by both FAM's onboard. Emergency personnel arrived and he was taken to an ambulance on the tarmac. On the way to the hospital, he was awake but vomited. He was admitted as medical personnel indicated he struck his head when he fell and as a precaution, should stay overnight. His wife was told he had had a convulsion so they prescribed a CT scan as a precaution and took spinal fluid. His wife arrived and described the hospital as "something akin to a substandard mental institution." She decided to take him home against medical advice. When they got home, his wife took him to Ivona Hospital, where they admitted him for observation and various tests. He was released the next day and went home to Pennsylvania, where he underwent an EEG and saw a neurologist. He was scheduled for a 24-hour EEG on August 8th. (Px. 4)

Also submitted into evidence by the Petitioner is a typed statement from one of the air marshals on the July 17, 2008 flight. (Px 9) The July 30, 2008 letter of Dr. Jackal suggests that the doctor requested Mr. Kern obtain this statement from the air marshals to clarify what happened at the time of the initial occurrence. (Px 3) The document indicates Flight UA918 landed at London Heathrow International and was deplaning passengers. As the Federal Air Marshals were awaiting the arrival of customs to download weapons, a loud scream was heard from the direction of the flight deck. Air Marshal Simons, who was sitting in seat 2A in first class, "looked up towards the flight deck and saw First Officer James Kern scream as he fell towards the floor with his arms locked and outstretched, as if he were knocked unconscious. Kern hit the wall, then the deck, as he lay in the aisle with his feet in the flight deck and his body in the aisle towards the first class galley. Kern's arms were outstretched and locked, as well as his legs, and his body was convulsing and foam was exiting his mouth. Simons took immediate control of Kern's head, stabilized his spine to prevent any further damage to Kern's spine, and positioned Kern's head to open and maintain a patent airway so Kern could breathe." (Px 9) The air marshals alerted emergency paramedics and a medical team arrived at the aircraft to assist Kern. It was noted that while waiting, FAM Simons stabilized Kern, and held Kern's arms from flying around, as Kern continued to convulse for approximately two minutes. When Kern began to open his eyes and regain consciousness, Simons began to ask him questions to assess Kern's condition. Kern's speech was slurred and his actions were very infant-like and aggressive. He knew his last name, but did not know he was on a plane or just flew a plane. Heathrow EMS arrived and Kern was becoming more conscious, so oxygen was placed on Kern by Heathrow EMS and further assistance was taken over by them.

The first medical attention that Mr. Kern received occurred at Hillingdon Hospital in England. (Rx. 3) The accident and emergency department form indicates that the patient presented by ambulance after he apparently collapsed and had a witnessed fit for approximately 30 seconds. The notes indicate the patient claims that he just passed out as he had not eaten for two days and had recent problems with his right ear. It was noted that he was a pilot from a flight from Washington, and when he was collecting bags from the cock pit, he collapsed. He indicated that he felt nauseous in the emergency department and vomited once. He further indicated that there was no headache. The primary medical problem/diagnosis was listed as seizure.

A further history was taken by a physician, Dr. Desilva, which indicated Petitioner was a 43 year old male who was a United States pilot. (Rx. 3, pg. 14) The history indicates that he was on a flight from Washington to London Heathrow Airport. Petitioner was not feeling well on the plane, was exhausted and weak, and had a runny nose. After the landing, petitioner got up to get his bags in the plane and collapsed. The notes indicate there was a question regarding loss of consciousness and no pre-syncopal symptoms. According to the report, the seizure was witnessed, which included no jerking of the limbs, no incontinence, and no tongue biting. Petitioner denied a headache. Additionally, he recovered within seconds, and reported he had no post activity drowsiness. Petitioner was transported to the hospital by ambulance and vomited once in the ambulance. He was then walking when he suddenly fell to the ground and was witnessed to have a tonic-clonic seizure lasting approximately one minute. He recovered within minutes and was not drowsy presently. The history on the next page indicates that he had exhausted himself over the past few days doing heavy work and gardening in the USA. Additionally, he had a runny nose for approximately one week, with clear mucous, and denied a cough, headache or fevers. He also felt that his right ear was slightly blocked.

The social history was taken that the patient was a pilot for United Airlines, who does not smoke, and drinks two glasses of wine per day. The differential diagnosis was that the history was not suggestive of primary epileptic disorder. Probably vasovagal and tonic-clonic movements were noted. It was further noted he was exhausted with no sleep, had nasal symptoms, no food, and there is an indication of 'ETOH' (alcohol). (Rx 3) The management plan was to have petitioner eat/drink and admit him for 24 hour observation. A head CT was ordered to exclude any structural pathology. If okay, he would return to U.S. as a passenger. He would need to see a neurologist in the USA prior to returning to work, and he was advised to decrease his alcohol intake.

There is another history from Dr. Barnes at Hillingdon, who notes the history was reviewed, and Petitioner denied any prior episodes of fits/faints and seizures. The patient indicated he was feeling better after rest. It was noted that if he was okay tomorrow, he could follow up and return to the United States. Shortly thereafter, there is a chart note indicating that Petitioner was returned from a CT and suffered a tonic-clonic fit, which lasted approximately two minutes. The CT of the brain was noted to be normal.

There is a reference to a blood alcohol test, but the handwritten notes are difficult to read. Additionally, the same handwriting indicates the patient was discharged against medical advice. It was noted that the CT was normal, however, there were some concerns from nursing and junior medical staff that Petitioner may have been withdrawing from alcohol overnight. (Px. 3) The diagnosis was seizures, which could be related to sleep deprivation, and could be related to alcohol withdrawal. It was indicated that he clearly should not drive a car or fly a plane until further investigation.

Another chart note labeled daily assessment and plan of care indicates the patient came in to the hospital with seizures, as well as a laceration on his right arm and the right back of his head. The patient's wife was now present. The patient had a seizure one time, medication was given, and the patient settled after the seizure. It was noted he did not sleep, and it was explained that he must stay on bed rest. On July 18, 2008, Mr. Kern was discharged at his own request and against medical advice. Additionally, it indicates that he takes full responsibility for what may occur as a result of his action.

On July 18, 2008, Petitioner was seen at Inova Fair Oaks Hospital. (Rx 11) Mr. Kern presented for an evaluation for a head injury. The intake assessment indicates, "he was loading luggage on a airport (he is a pilot) and was found on the cabin floor of the aircraft with what looked by a seizure. He is not sure if he fell and hit his head then had a seizure. EMS was called and he was taken to a hospital. He and wife were concerned he was not getting good care and he was checked out AMA and came to the US. He arrives here straight from Dulles." *Id.* Labs were run including a routine chemistry, toxicology, routine coagulation and urinalysis, which were normal.

The medical records also contain handwritten nurse notes dated July 19, 2008 which indicate that Petitioner was neurologically intact and denied the seizure episode. (Rx 11) It was noted that he had a half-inch long partially healed laceration noted behind his right ear and a superficial abrasion at the right elbow.

A CT scan of the head taken on July 18, 2008 found no evidence of any acute intracranial injury. A CT of the chest was technically limited but there were no central pulmonary emboli identified. The study showed hepatic steatosis (fatty liver disease). An MRI of the brain showed no evidence of acute intercranial injury.

A consultation was performed by Dr. Shabih Hasan from neurosurgery on July 19, 2008. (Rx 11) It was noted that the patient is a 43-year-old pilot who was brought in after he had two episodes of convulsions. It was noted that the history was obtained through the patient, his wife, as well as the emergency room and from the ER doctor. The patient reported that he was healthy and flew into London. "At the cockpit, he was taking out his baggage, he suddenly became stiffened and started shaking." It was noted that he passed out, had some concussion and confusion and was helped by some air marshals. He also had a later milder episode accompanied by some stiffening and frothing, but he did not bite his tongue or have incontinence. He was taken to a hospital in London where he had a workup including a CT scan and spinal tap. There was no previous history of seizures or confusion. In the London hospital, the patient may have had an episode where he fell off the bed and was noted to have a thumping by another patient, but no witnessed seizure. It was noted that the patient had some agitation earlier after he spoke with his employer. The patient did not report any headaches, confusion, staring spells, focal paralysis, tingling, or seizures. There is no report of passing out or syncopal episodes in the past. The patient reported that he may be a little clumsy and that may have caused him to fall as he has noticed that a year ago on his flight as well. He did not lose consciousness and denied any head injuries.

Dr. Hasan noted the patient reported there was no tobacco or alcohol abuse. A urine toxicology screen was negative for any drugs. In a review of the systems, petitioner currently feels slightly anxious but no headaches, no neck stiffness, fever or chills. There was no confusion, dizziness, double vision or ataxia. There is no report of muscle pain or stiffness. Dr. Hasan noted an MRI

was reviewed and was normal. Liver enzymes were slightly elevated, ALT, AST, D-dimer is 1207, and troponin was less than 0.01.

Dr. Hasan's impression/recommendation was that the patient had a recent history of fall, convulsion, and possible seizure. He did not report any prior history of seizures. The neurologic exam was non-focal and MRI was normal. Dr. Hasan recommended an electroencephalogram. The patient wanted to go back to Pennsylvania for further evaluation and treatment. They discussed seizure precautions and Dr. Hasan noted there would be no driving or flying until the patient was cleared by his neurologist with further workup.

Mr. Kern was next seen by Dr. Roy Jackel at The Epilepsy Center of Bucks/Montgomery County on July 30, 2008 for an evaluation regarding an episode of head trauma. (Px. 3) The history given was that on July 17, he landed at Heathrow Airport. He had been up and had not gotten a lot of sleep. The history from Mr. Kern indicated that as he was getting out of the cockpit, he thinks he may have slipped or tripped when he was reaching for a bag. He fell and hit the back of his head behind his right ear. As he exited the cockpit, he reportedly collapsed. The petitioner suggested that he did not think he actually lost consciousness, but noted he may have been a little bit confused. Mr. Kern denied having a seizure when he fell or when he collapsed in first class, but did concede he did have some issues with nausea and vomiting.

Dr. Jackel reviewed the discharge summary from the Hillingdon Hospital in England. It indicates he had a presyncopal episode while at the airport with no witnessed seizure activity. However, in the hospital, he had two tonic-clonic seizures with tongue biting that lasted for two minutes and then self-terminated. He reportedly was post-ictal. In looking at the records from Inova Health System from Virginia, he was seen by a neurosurgeon. In this report, there was a notation that the patient reports he was healthy and flew to London. He then reported he was taking baggage out of the cockpit and he suddenly "stiffened and started shaking." It was then noted he passed out and had some concussion. He reportedly was confused. The neurosurgeon notes he had a milder episode where he had some stiffening and frothing, but did not bite his tongue.

Dr. Jackel's impression was head trauma, however, he noted the details of this were somewhat vague. The doctor noted that in the records, there was some confusion about whether or not the patient had a seizure or not. He did have an EEG at Grandview Hospital which was reported to be unremarkable. Dr. Jackal noted that he told Mr. Kern at this point the records did not correspond with his history of the accident, although he noted Mr. Kern seemed very reasonable and recalled the events well. Dr. Jackal attempted to reassure Mr. Kern and indicated even if the patient had fallen and hit his head initially and then had his seizure initially when he got to first class, one could consider this as a post-traumatic seizure and it would not necessarily suggest he had a high risk for seizures in the future. Dr. Jackal noted it did not sound as if he had any type of seizure, but just more significant head trauma with a little bit of confusion after the head trauma consistent with a post-concussive syndrome. Because of the confusion, they were going to do a 24-hour ambulatory EEG to try to get more prolonged recording to make sure there was no clear evidence of underlying irritable activity. Dr. Jackel also asked Mr. Kern to try to get a statement from the marshals that witnessed the event to make sure they did not report any clear evidence of seizures. If this came back unremarkable, Dr. Jackel believes they do not need to pursue things any further. Dr. Jackel did not start Petitioner on any type of anti-seizure medication.

The Ambulatory EEG report of August 8, 2008 was normal.

Mr. Kern next saw Dr. Jackal at The Epilepsy Center of Bucks/Montgomery County on September 30, 2008. His regular EEG and ambulatory EEG were both normal. He had not had any recurrent events (seizures). The blood work indicated petitioner had some elevated liver function tests initially but these were coming down.

Dr. Jackel's impression was once again an episode of head trauma with what may have been a post-concussive syndrome. It remained unclear if he did or did not have a post-traumatic seizure as the reports varied. At this point, Dr. Jackel did not have anything to suggest that he had a predisposition for epilepsy, and would hold off prescribing any epilepsy medication. Dr. Jackel recommended following Petitioner clinically. No restrictions were imposed although the doctor noted he still may have to work out issues with his flying. Mr. Kern would see Dr. Jackel on an as-needed basis. The letter further indicates Mr. Kern had been unable to obtain a report from the Air Marshals and it does not appear Mr. Kern ever provided Dr. Jackal with the Air Marshal's report indicating the accident and seizure activity. (Px. 3)

On March 24, 2009, Mr. Kern presented to the emergency department at Grandview Hospital in Sellersville, Pennsylvania status post generalized seizure that evening. The emergency room physician documentation form indicates he presented to the Grandview Hospital Emergency Department after witnessed grand mal tonic-clonic seizure at the local post office. Petitioner reported he did not feel well throughout the day today. He stated he was just not hungry. While at the post office, he denied any prodrome of symptoms but suddenly became unresponsive. He reported intermittent fever over the last several days with nausea without vomiting. It was noted Petitioner had a seizure after a head injury approximately one and a half years ago. Petitioner was accepted for admission and contact was made with Petitioner's treating neurologist, Dr. Jackel.

It was noted that Mr. Kern was previously diagnosed with a seizure disorder and started on Keppra. He had stopped taking this medication several weeks ago. (Rx 9) The history and physical included a history of three days of flu-like symptoms, subjective fever, increased somnolence, and generalized weakness. (Rx 9) The patient went to the post office the day of admission and was witnessed to have an episode of seizure, which is why the patient was brought to the emergency room. In the emergency room, the patient had an episode of tonic-clonic seizure lasting about one to two minutes. He had recently traveled to Paris in January. The patient was alert and oriented but with some confusion. He was to be admitted and started on Keppra. He had elevated glucose levels probably related to the seizure. It was noted that he had elevated liver function tests and they ordered a right upper quadrant ultrasound. An addendum note indicated the petitioner had another seizure prior to getting his medication and going home.

Petitioner underwent a CT of the head without contrast on March 23, 2009 which was interpreted as within normal limits. On March 24, 2009, an ultrasound of his abdomen showed a marked enlargement of the liver with fatty infiltration. A March 24, 2009, a chest X-ray suggested a questionable nodule at the left base, and a CT of the chest was recommended. An EEG performed on March 24, 2009 was unremarkable. Petitioner also underwent a venous duplex on March 24, 2009 which no evidence of deep venous thrombosis in the left lower extremity. Finally, on March 24, 2009, petitioner underwent a CT with IV contrast which was normal but again showed fatty infiltration in the liver.

On March 24, 2009, a neurological consult was conducted by Dr. Jackel. (Rx 9) The patient had what appeared to have a viral gastroenteritis since five days prior. He was having issues with

nausea and vomiting and was not eating. On Monday, he tried to fix a fence outside and exhausted himself. He then decided to go to the post office before they closed. When he was there, he began to have an episode where his right hand started shaking. He stated that things then got dim and he apparently went out for perhaps a minute. He reportedly had a generalized tonic-clonic seizure and was brought to the emergency room. The patient was getting ready to be discharged but had a second seizure in the emergency room and because of that, he was admitted. He was given some IV Keppra and was started on Keppra 500 milligrams twice a day.

Upon physical examination, neurological exam revealed his mental status to be intact. Dr. Jackel's impression was two generalized tonic-clonic seizures, one of them starting with the right hand shaking suggesting it would have been a partial seizure with secondary generalization. Since there was no other clear metabolic cause for his current events, it appeared the patient needed to be on medication. The plan was to keep Petitioner on Keppra 500 milligrams twice a day. Mr. Kern needed to be seizure free for six months before he was allowed to drive and he would not be able to fly at this point.

Petitioner was discharged from Grandview Hospital on March 25, 2009. (Rx. 9) The diagnosis at discharge was episode of seizure times two, seizure disorder, mild rhabdomyolysis and transaminitis. He presented to Grandview Hospital with an episode of a seizure just prior to coming to the hospital and an episode of a witnessed seizure in the emergency room. He was to follow up with his primary care physician and Dr. Jackel. The relevant paperwork regarding the driving license authority indicating Petitioner was not to drive until he was six months seizure free was also sent.

On November 3, 2009, Dr. Jackel issued a letter to Dr. Robert Davis pertaining to a follow up office visit. (Px. 3) Mr. Kern denied any additional seizures since March 24, 2009. He was still on Keppra 500 milligrams twice a day. Examination revealed a minimal postural tremor. Dr. Jackel's impression was partial seizure disorder with secondary generalization. Dr. Jackel felt they could discontinue the medication. Petitioner was noted to be also working on the job situation and Dr. Jackel asked Petitioner to get in touch with the Epilepsy Foundation of Eastern Pennsylvania. At this point, Dr. Jackel planned on seeing Petitioner back in six months just to check his progress.

No additional treating medical records were introduced into evidence.

Mr. Kern died on May 21, 2015 due to drowning per the death certificate. (Px 8) The secondary cause of death is listed as seizure disorder. (Px. 8) The toxicology report and coroner's report from the County of Bucks Office of the Coroner were introduced by the Respondent. (Rx. 4) The coroner's report reflects that Mr. Kern was found lying on the ground by a small fish pond on May 21, 2015. By the time the coroner arrived, there was life-saving equipment around him, his clothing was wet and had been mostly cut off. Rigor was just starting and lividity was fixed and disturbed. He had a postmortem laceration on his forehead over the nose and above the eyebrows. The cause of death is listed as drowning, with the manner of death being accidental due to a seizure disorder.

It was noted that the Petitioner had just been released the other day from a week of detox. His wife described her husband as totally doped up at approximately 6:00 p.m. on May 20, 2015. She did not know if this was due to his medications or 'something else he got into'. He was last known to be alive at approximately 9:00 a.m. on May 21, 2015. He was found by his son upon his return

from school at 2:30 p.m. on May 21, 2015. He was found face down in the fish pond and 911 was called with CPR going on for an hour.

The report reflects that the Petitioner was a Navy veteran pilot who had injured his back and had been battling drugs and alcohol abuse along with a seizure disorder. Other than the postmortem laceration of the forehead, there were no obvious signs of trauma or foul play.

The toxicology report reflects that Mr. Kern's blood alcohol concentration (bac) at the time of examination following his death was 0.135. This is well over the above the legal limit of .08. In addition, he tested positive for caffeine and Lidocaine. It was also noted that he also had Chlordiazepoxide, Cyclobenzaprine, Benzodiazepine and Nordiazepam in his system.

Dr. Coe

Petitioner obtained a records review report from Dr. Jeffrey Coe. Dr. Coe opined that based on his review of the medical records, the accident at work on July 17, 2008 resulted in a head injury with post-concussion syndrome and traumatic seizures. Because of these work-related conditions, he was disqualified from returning to work as a commercial pilot. In Dr. Coe's opinion, the traumatic seizures suffered as a result of work and his associated loss of pilot licensing contributed to Mr. Kern's death on May 21, 2015. Dr. Coe's opinions assume that Petitioner struck his head on July 17, 2008 prior to having a seizure.

Dr. Coe testified that he is an occupational medicine physician who performs employment-related evaluations and assesses people who may be exposed to hazards in the workplace. He did acknowledge that he is not an FAA examiner nor a neurologist. He testified consistent with his report that the Petitioner fell, struck his head, had a seizure with subsequent seizure activity, lost his pilot's license, became depressed and an alcoholic and drowned in 2015. It was his opinion that all of these developments, including Petitioner's drowning, were traceable to the work accident in 2008.

Dr. Coe was asked about the fatty liver, elevated MCV, and abnormal LFTs mentioned in the London records. (PX2 p.37) Dr. Coe indicated that those tests could be consistent with alcoholism but there were also other possible metabolic explanations for the findings. (PX2 p.37) Dr. Coe indicated that if the seizure was related to alcohol, fatigue or another non-occupational cause, then Mr. Kern's ensuing depression and death would not be work related. (PX2 p.40)

With regard to whether or not the seizure Mr. Kern suffered was related to alcohol withdrawal, Dr. Coe said it was a possibility, but there is no way to test if a seizure is caused by alcohol withdrawal after the fact unless there is a clear pattern or you see it on a repeated basis. (PX 2 p. 38)

Dr. Neri

Petitioner also obtained a records review report from a neurologist, Dr. Gene Neri. Dr. Neri opined that the accident on July 17, 2008 represented a syncopal episode with head trauma, such as mild to moderate concussion, which would be consistent with striking one's head against the console as described by Mr. Kern. Dr. Neri understood that Kern went to the flightdeck to get his bag, and either got dizzy and passed out or tripped, striking his head against the console. (PX1 p.15) Kern then pitched forward in first-class where he had a seizure. (PX1 p.15) So the sequence was head trauma prior to the seizure and him falling into first-class. (PX1 p.15) Dr. Neri does not discuss

the fact that early records do not substantiate that Mr. Kern hit his head prior to having a seizure on the plane.

Dr. Neri discusses that the Hillingdon Hospital records indicate that Petitioner was exhausted after doing four days of heavy work and gardening in the USA. This followed four to seven days of significant sleep deprivation with a mild upper respiratory infection, compounded by Petitioner's not eating for two days. These factors, Dr. Neri opined, made it more likely for the Petitioner to have a syncopal episode and a seizure. He noted that sleep deprivation was the number one cause of exacerbating epilepsy or causing seizures following a concussion. He also indicated because he had not eaten for two days, the likelihood of him having hypoglycemia could lead to the development of seizures.

Part of Dr. Neri's training was at Cook County Hospital and Hines VA hospital, where he encountered a lot of chronic alcoholism and alcoholic seizures. (PX1 p.25) Dr. Neri did not think the fall in the plane in London was caused by an alcoholic withdrawal seizure. (PX1 p.25) Dr. Neri explained that to have one of those seizures, Kern had to have been taking heavy amounts of alcohol for a long period of time, suppressing the brain activity, and then suddenly stopping the alcohol use. (PX1 p.26) Seizures might result when a heavy drinker suddenly stopped drinking, as could agitation, confusion, disorientation and often tremors. (PX1 p.27) These patients often had a whole syndrome rather than an isolated seizure. (PX1 p.27) Dr. Neri explained that Mr. Kern could not have been drinking with his heavy schedule the week or ten days before the accident. (PX1 p.28) Kern simply did not have time to do heavy drinking before the flight to London. (PX1 p.28)

He stated it was more likely than not a post-concussive seizure occurring in a patient with sleep deprivation, potential hypoglycemia and an upper respiratory infection which may or may not have had at least a low grade fever associated with that illness. Dr. Neri indicates that there were occasional mentions throughout the Hillingdon records of alcohol consumption. He suggests that Mr. Kern's agitation could be circumstantial, rather than being part of a withdrawal syndrome.

Dr. Neri concludes the following: Mr. Kern began his demise with a fall leading to a concussion on July 17, 2008; which led to post-concussive seizures post-traumatic seizures; which led to his not being able to work; which led to an advanced degree of drinking, depression, anxiety and self-medicating with alcohol: and led to his eventual drowning death.

The deposition of Dr. Neri was completed on July 17, 2020. (Px 1) The doctor testified consistent with his report that Mr. Kern's condition of being sleep deprived, not eating, and having an upper respiratory infection could be factors increasing the likelihood of a seizure. He disagreed with Dr. Kessler's theory that Mr. Kern had an alcohol withdrawal seizure, as he did not believe that the Petitioner had time in the days prior to the accident to have been drinking heavily. In the week before the work incident, he suggested Mr. Kern completed a return leg of a Washington/Kuwait trip. He then had two days of military duty with his Naval Reserve unit which consisted of preparing reports and inspections. The following day, he flew a three-day trip Washington to Paris. After that, he had a day off and started a Washington to London trip when the incident occurred. He advised that his alcohol use during that period consisted of one or two glasses of wine with dinner in Paris.

Dr. Neri went on to testify that it was his belief that the Petitioner's retirement from flying was due to seizures, which led the petitioner to become depressed and caused him to turn to alcohol to self-medicate which led to his untimely death.

Dr. Kessler

Dr. Elizabeth Kessler performed a records review at the request of Respondent. (Rx 1). Dr. Kessler is a physician with subspecialties in neurology and behavioral medicine. (RX1 p.4) She is board certified in neurology and clinical neurophysiology, which is EEGs and evoked potentials. (RX1 p.5) Those tests are used to detect seizures and to get information about metabolic abnormalities or brain function if someone has been anoxic. (RX1 p.5) She trained at Rush in the neurology department, evaluated seizure patients, and did EEG recordings during epilepsy surgery. (RX1 p.6) She started a solo practice and joined the faculty at Rosalind Franklin University of Medicine and Science, and worked as an attending physician at what was then called North Chicago VA. (RX1 p.6) She closed the private practice in 2003 to increase her work at the VA and teach there. (RX1 p.7) She sees patients throughout the hospital with potential neurological or psychiatric symptoms or diseases. (RX1 p.7) She is also on the traumatic brain injury team. (RX1 p.7) She sees all kinds of neurological conditions including seizures, and a lot of people with alcohol intoxication and alcohol withdrawal. (RX1 p.8)

Dr. Kessler believes the medical records support that the Petitioner may have been going through alcohol withdrawal at the time of the original accident in 2008. The doctor suspected that alcohol withdrawal is what likely caused him to convulse or have a seizure and hit his head on the airplane. Dr. Kessler asserts that the records do not support Dr. Coe's conclusion that the Petitioner sustained a head injury leading to seizures, the loss of his job and contributing to his death. Instead, the records are consistent with him having alcohol withdrawal seizures starting on July 17, 2008, causing incidental head injury without evidence of a brain injury, including any brain injury that could have caused subsequent seizures. She also notes that alcohol overuse would also account for the blood work abnormalities which are ongoing throughout the records and the fatty liver on imaging studies, which are not accounted for or even addressed in Dr. Coe's conclusion that the seizures were post-traumatic in origin. Dr. Kessler finds that the repeated seizures were not due to any brain injury sustained by hitting his head in the plane, and he sustained no work injury contributing to his death.

An addendum report was prepared by Dr. Kessler on July 13, 2020. (Rx. 2) This addressed new records produced by the Petitioner including the report of Dr. Neri (Px. 1) and the narrative from Mr. Kern (Px. 4). Dr. Kessler noted that Mr. Kern's description of events was inconsistent with what was reported by the Federal Air Marshal. (Px. 9)

Dr. Kessler also reviewed the April 14, 2020 report of Dr. Neri. Dr. Neri did not address the description of events as indicated by the Federal Air Marshal and did not take into account the statements of the Hillingdon Hospital records regarding the Petitioner's seizures potentially being related to alcohol withdrawal in addition to potential other factors such as sleep deprivation and fasting for two days. Dr. Neri also did not address the recommendation in the Hillingdon Hospital records that Mr. Kern reduce his alcohol intake.

Dr. Kessler finds that the medical records do not support Dr. Neri's contention that blunt head trauma sustained in a fall in the airplane caused his seizures. The Federal Air Marshal instead

described Mr. Kern beginning to have a seizure while standing which caused him to fall. In addition, blunt head trauma alone, without a moderate or severe brain injury, would not cause a seizure disorder. Dr. Kessler stated that multiple seizures within a 12-hour period followed by a chronic seizure disorder would more likely than not, not result from a concussion. Dr. Kessler clarified that she did not believe alcohol withdrawal would be the only explanation for the Petitioner's seizures; however, a concussion and subsequent seizures would not account for the blood work abnormalities that were consistent with excessive alcohol use. Sleep deprivation and fasting could provoke a more generalized convulsion but would not cause repeated convulsions as occurred on the day of the incident and would not cause subsequent seizures.

Dr. Kessler also addressed Dr. Neri's theory that the liver function abnormalities were related to Tylenol. She points out that Tylenol use was not mentioned in any of the medical records, nor was there evidence that Mr. Kern was taking an excessive amount of Tylenol. Tylenol would also not account for the elevated MCV, low platelet count and fatty liver seen multiple times on imaging.

Dr. Kessler did not agree with Dr. Neri that alcohol withdrawal seizures would be accompanied by other symptoms of alcohol withdrawal including symptoms consistent with the DTs. Alcohol withdrawal seizures typically occur before DTs and are not part of the DTs. An individual may have multiple seizures on one day from alcohol withdrawal, without any nightmares, tremors, sweating, elevated blood pressure, pulse and temperature, respiratory ankylosis and low amplitude EEG as stated by Dr. Neri.

Dr. Kessler also did not agree with Dr. Neri or Dr. Coe's speculation that because he suffered a concussion and a fall on July 17, 2008, that he had post-traumatic seizures that led to his drinking and death. In the medical records, Dr. Kessler finds no evidence that he had post-concussion symptoms, or even that he sustained a concussion from a fall and there was no indication of other symptoms that could be ascribed to a brain injury. All of the Mr. Kern's symptoms on the plane were found to be consistent with him having a seizure causing him to fall, becoming postictal and having other convulsions and postictal period unrelated to any head trauma. Dr. Kessler opined it would be more likely than not that an individual would not develop a chronic seizure disorder due to a concussion, and Mr. Kern was never even diagnosed with that.

Dr. Kessler does concede that there is a slight increased risk of seizures with concussion, but the types of brain injuries which would be associated with the development of a seizure disorder would include penetrating head injuries and brain contusions with hemorrhages; which was not the case with Mr. Kern. Dr. Kessler indicates that while alcohol withdrawal was not the only potential explanation for his seizures on July 17, 2008, alcohol withdrawal would be an explanation that would account for the repeated convulsions on that date with no other neurologic abnormalities and could account for the blood work abnormalities. She further indicates that sleep deprivation or fasting could cause a generalized convulsion, but not a seizure disorder with repeated seizures.

Dr. Kessler indicates that it was noteworthy that in the psychiatry records, the Petitioner reported that he had detoxed himself twice and had seizures as a result. In addition, the time course of his convulsions in the morning following an all-night flight would be consistent with the time course of alcohol withdrawal seizures. In conclusion, Dr. Kessler affirmed her opinion that Mr. Kern did not develop a seizure disorder due to a fall that prevented him from working, caused alcohol dependence or led to his demise.

Testimony of James Michael Kern (JMK)

JMK is a member of the US Navy Reserves, currently stationed at Villanova while he completes a chemical engineering degree with a minor in biomedial engineering and naval science. (T.14) He has experience with aircraft and flying and will begin flight school in May. (T.14) JMK was familiar with Boeing 777 aircraft. (T.16) Passengers are not allowed access to the flightdeck. (T.16) But he and the family would get to visit the flightdeck of 777s after a flight as the crew often knew his father from military patrol squadrons. (T.16-17) JMK produced three photos showing the layout of the flightdeck for 777s. (T.17-18) PX13A was a photo of the overhead flight controls which the Captain and First Officer would access. (T.18) These pilots worked in a cramped space as the flightdeck did not afford much room to move around. (T.18)

JMK verified that the layout of the 777 flightdeck was the same between the models. (T.19) The passenger cabin would be changed between the models but not the flightdeck. (T.19) PX13A was not a photo of the exact aircraft Kern flew to London on 7/17/08. (T.20) But the photo accurately represented what the interior of the cockpit looked like in Kern's aircraft. (T.20) PX13B showed the view from the engineer's seat looking forward. (T.23) The engineer's seat was at the bottom of the photo, and the distance between that seat and the center console was 8 inches to a foot at most. (T.25) The back of the pilot seats were made from stamped steel. (T.25) PX13C showed the storage area next to the door to the flightdeck, with the back of the Captain's seat on the right side and the engineers seat on the bottom left. (T.25; PX13C) Bright yellow coats were hanging in the storage closet and crewmembers would stow their flightbags and other equipment in a tray below the coats. (T.25-26) Kern stowed his flightbag there. (T.26-27)

To retrieve a flightbag from that location, the pilot would face the closet and grab the bag. (T.27) If the pilot became unbalanced while doing that, he was likely to fall backwards towards the middle console. (T.29-30) JMK explained that the person would be angled away from the cabin door and directly toward the console. (T.30) If the person fell towards the Captain's chair, they would slide across the seatback towards the middle console. (T.31-32) JMK estimated the distance between the closet and engineers seat was a couple of feet. (T.32) The space was really confined and not meant to provide comfort. (T.33) Each seat was secured to the floor with steel and the metal console was also constructed of stamped steel. (T.35)

JMK remembered Kern having a very busy flight schedule in addition to his work with the naval reserves. (T.38) Kern was posted at Willow Grove Naval Reserve as an operations officer in charge of 80 enlisted men and other officers. (T.38) Kern would be busy preparing flight schedules, planning for maintainers on the ground and receiving and deploying patrol squadrons. (T.38) JMK became familiar with this work during his summer training with Patrol Squadron 16 at Jacksonville and by visiting his dad at the base. (T.39) JMK discussed the randomized drug testing protocol for enlisted men and officers. (T.40-41) The testing was random and everyone was subjected to it. (T.41)

On the date of Kern's flight to London, JMK remembered that his dad was working with concrete in the back yard. (T.42) Kern did not have time to relax before getting ready in his uniform, getting into the car and off to work. (T.42) Kern was based out of Dulles Airport in Washington DC, a four hour drive from their house. (T.44) JMK did not believe that his dad drank any alcohol before

leaving for the London flight, noting that he normally did not drink as he was the family planner. (T.46) JMK never saw his dad have a seizure or just pass out before the accident. (T.47-48) He recalled Kern having a seizure in 2009 on a trip where they were heading to Hawaii with another family. (T.48-49) They could tell when Kern was not feeling well as he would get very pale. (T.48) The family had to abandon that trip because of the seizure. (T.48) His dad was effectively grounded at that point although official grounding had not yet occurred. (T.48)

Kern's official grounding came around February of 2010 and that is when Kern's attitude and actions started to change. (T.50) After receiving the grounding recommendation letter from Respondent, Kern started to drink into the spring and summer, usually Gilbey's brand vodka. (T.51) The drinking escalated toward the end of the year. (T.52) JMK thought Kern was a functioning drunk by 2011. (T.53) As 2015 came along, JMK could tell that his dad was trying to stop and try to make up to his family for his problem. (T.53) Kern bought him a hunting shotgun at age 11 and a car in 2014 or 2015 when he thought JMK was graduating from high school. (T.53) But JMK was only starting high school at that point and could not drive. (T.53-54) JMK could tell that his dad was trying to fight against drinking but it was just too much for him. (T.54) At that late stage, Kern would have seizures when he stopped drinking. (T.54)

His sister drove JMK home from school on his 15th birthday, on 5/21/15. (T.55) The dog was waiting for them in the driveway. His sister followed the dog to the backyard and yelled for JMK to come over. (T.56) They found Kern lying face down in the koi pond he had built years earlier. (T.56) She went to get help from neighbors and JMK went into the water to pull Kern's body out. (T.56) JMK tried chest compressions as did one of the neighbors and a neighbor nurse came over to perform proper CPR. (T.56)

On cross examination, JMK thought Kern left the house for London around 4:00 pm, when you consider he flew from Dulles at 10:12pm, he would have had an hour of preflight planning and a four hour commute to get to Dulles. (T.60) JMK thought that military and commercial aircraft both normally had wool covered seats for the crew. (T.63) Kern's flightbag would weigh between 40 and 50 lbs. (T.64) Respondent asked him whether it would be more likely that Kern fell forward when lifting his flightbag from the tray. (T.64) JMK said it would be just the opposite, explaining it from his perspective as a weightlifter. (T.65) You would have backward momentum when lifting something off the ground like that. (T.65) JMK was not present on the day Mr. Kern had a seizure on the airplane.

Testimony of Douglas Kern

Douglas Ann Kern (DAK) is an ensign and a pilot in the US Navy. (T.70) She had been on the flightdecks of 777s when flying internationally, as her dad usually bumped into someone he knew. (T.72) The photos in PX13 accurately represented what the 777 cockpit looked like when her dad was flying 777s. (T.72) The back of the console where the engineer sat was metal with sharp corners. (T.75) There were no safety bumpers on these consoles. (T.76) DAK noted that designers did not build the plane around the pilot; pilots had to learn to operate in that environment. (T.76)

DAK compiled a printout of all the medals and commendations her father had been awarded throughout his career and testified to his numerous accolades. (T.77)

DAK interpreted Kern's flightlog for the trip to London. (T.83) The log excerpt identified his crew, the 777 he was flying, his departure from Dulles at 10:12 pm, and landing in London at 04:57 am London time. (T.85-86) She recalled her dad and mom working in the backyard before Kern left for London. (T.87) DAK never saw Kern drinking before the accident. (T.87) DAK was certain that Kern was not drinking any alcohol before he left for Dulles for the London flight. (T.88) She remembers him being really sweaty, having concrete on him and rushing to get ready for his flight. (T.88) He packed a bag quickly and appeared to be flustered. (T.88)

DAK had never seen her dad have a seizure or pass out before the London accident. (T.89) He did start having seizures when he returned from London. (T.89) She recalled his seizure at the post office. (T.90) She remembered that because he had come to her school earlier that day to make a presentation for career day. (T.90) That was the first time she remembered him having a seizure. (T.90) Kern received news that he would be permanently grounded in 2010 and he started drinking a lot. (T.90-91) That was the first time she had seen him drink like that and he had seizures when he stopped drinking. (T.91) His whole demeanor changed after he received the bad news about being grounded. (T.91) His career as an aviator was gone. (T.91) He progressively drank over the next five years. (T.92)

On 5/21/15, DAK drove her brother home and found her dog sitting in the driveway, which struck her as odd. (T.92-93) She parked in the driveway, followed the dog to the back yard and the gate was open. (T.93) The dog took her to the backyard to where Kern was lying in the pond. (T.93) She called the paramedics while her brother tried to pull Kern out of the pond. (T.93) She ran to the neighbors' houses for help. (T.94) By the time she returned to the pond, a neighbor had flipped Kern over but Kern was blue. (T.94)

DAK testified that she knew Kern suffered from a chronic hamstring issue from a college injury. (T.94) Kern remained very active after that, but it caused him pain. (T.95) Kern took aspirin or ibuprofen or Tylenol to deal with it. (T.95)

DAK described the flightbag her dad would have been using. (T.96) The flightbag was the same for military and commercial pilots. (T.96) The bag contained publications, charts and other stuff. (T.97) Her own flightbag was about 30 lbs but Kern's was way heavier. (T.97) He had to take that bag with him as a condition of his employment. (T.98)

DAK testified to the rule that prohibited pilots from flying with alcohol in their system 12 hours before the flight. (T.99) This "bottle to throttle" rule also meant the pilot could not have hangover symptoms 12 hours before a flight. (T.99) Crews got together before a flight to plan out the flight. (T.100) The pilot performs a self-check to make sure they are good to fly and their fellow crew members also cross-checked each other to make sure they were okay for the flight. (T.100) The airline industry provided many different protective measures to try to detect and prevent pilots flying with alcohol in their systems. (T.100)

Testimony of Alexia Kern (Alex)

Alex was married to Kern in 1987. (T.104) DAK and JMK are their children. (T.105) Alex and Kern got married the year after they met. (T.106) Kern graduated first in his class and got to select the aircraft he wanted to fly. (T.106) Kern chose a land based craft so he could spend more time with Alex rather than being stationed on a carrier. (T.106) Alex's father was also a pilot and told Kern to develop career plans in the event the airline went BK. (T.107) So Kern got a law degree while also working as an active duty reservist. (T.107) He also obtained an engineering degree in college. (T.108) Kern had been recruited to play football in college and chose to go to the Naval Academy. (T.180-9) He injured his hamstring while playing and ended up with a lifelong problem with his hamstring. (T.109) They were very active together, but sometimes the hamstring laid Kern up. (T.109) He treated the hamstring on his own with Tylenol and always kept a bottle in his bag. (T.110) He regularly took the Tylenol. (T.110) The hamstring did not prevent him from flying, but it was a continuing issue which he addressed with Tylenol. (T.111)

Kern would always put in the maximum number of hours he could get with Respondent and he was working his way up to the Captain's chair. (T.112) She recounted his schedule for the week before the accident, including their plan to spend several days in the back yard putting in an elaborate set of stairs to the pool. (T.113) Alex saw Kern drink no alcohol the week before the London flight. (T.116) They were both in the yard doing the construction when he received a call from Respondent asking him to join the London flight. (T.117-118) Alex motioned for him to decline the flight, but Kern agreed to take the flight as he would not strand the other crewmembers who planned on working that flight. (T.118-9) Kern told the caller he was going to be late, he ran inside to get ready and he left for the airport. (T.119) He did not have time to eat before he left. (T.120) Kern would have gotten to the airport around 8:00 pm and would have spent an hour or two with his crew at the airport before the flight. (T.121-122) Kern was not originally scheduled for this flight to London. (T.121)

The following morning, Alex received a call from a woman in Respondent's operations department, who was concerned about Kern being left at a facility in London. (T.124-125) Alex had multiple conversations with this person. (T.127) She gave Alex the contact number for the place Kern had been taken to and Alex called the facility in London. (T.127-128) Alex spoke with Kern about coming over to get him out of that facility. (T.132) The operations woman arranged for Alex to fly over to London to get Kern. (T.132)

A driver took her to Hillingdon and walked her into the facility to make sure she was safe. (T.133-134) It appeared that construction had started on the building at some point and was then abandoned. (T.133-134) The taxi driver walked her through the abandoned part into the facility where Kern was being held. (T.134) The smell was so overwhelming that Alex could not get her bearings. (T.135) An elderly lady was in a bed yelling that she was dying. (T.134-5) Another patient in the corner appeared to be close to death. (T.135) A little cot was lying on the floor with blood on the pillow and the sheets. (T.135) A third woman with her husband told her that Kern was using that little cot. (T.135) Kern had fallen out of a bed which had no bedrails. (T.136) Kern returned to the room from showering and he had a wild animal look of fear. (T.136) He was bloody and had the shunt hanging out of his arm. (T.138) A female worker dragging a large bag of trash across the floor told Alex she could not take him out of the facility. (T.138) The woman complained that Kern would not cooperate and he kept saying he was going home. (T.137-138) The facility reminded Alex of Bedlam, the notorious London insane asylum. (T.138) The patient

with the husband told Alex she needed to get Kern out of there. (T.139) Alex did take Kern home and took him to Inova where he spent the night and received testing. (T.139-140)

Alex confirmed that Kern had not drank any alcohol the week before the accident. (T.141) When he was at home, he stayed close to the family. (T.141) Kern would occasionally have a glass of wine at dinner if Alex prepared a great meal. (T.142) But they had not had time to prepare a meal before he left for London. (T.142) She saw him every day after his accident in London as he was no longer flying. (T.143) Kern did not drink any alcohol for about 9 or 10 months after the London trip as he was busy getting tested and jumping through hoops to get his certification back. (T.144) His first drink after London came when they took a vacation to Hawaii in 2009. (T.145-146) That trip was rescheduled after Kern's seizure at LaGuardia derailed their first attempt to go to Hawaii. (T.146-148)

Alex was present when Kern received the letter from Respondent's Acting Medical Director, Dr. Korpman. (T.149-150; PX5) Dr. Korpman recommended that Kern be permanently grounded, but not for reasons involving alcoholism, drug use or self-inflicted injury. (T.150-151) Kern looked like he had been punched in the gut after reading that letter, he was demoralized. (T.151) Kern had been doing everything he could to get back to flying up to that point. (T.151) Flying is what Kern loved. (T.152) To her surprise, Kern went and grabbed himself a gin and tonic after reading the letter. (T.153) That is the first drink he had taken since Hawaii. (T.153) Alex explained that Kern became a functioning drunk after that point. (T.153) He started having a couple of drinks each night after he received the letter. (T.153-154) He still went in for flight physicals and tried to regain his certification. (T.154)

Back in 2008, Alex recalled Respondent sending Kern down to Talbott's Recovery Center for an assessment of why he was having seizures. (T.154-155) If Talbott's concluded he was an alcoholic, Kern would have to enter the program for two weeks of treatment. (T.155) But Kern was released after three days when the assessing psychiatrist concluded that Kern was not an alcoholic. (T.156) If Talbott's would have concluded otherwise and Kern just left after three days, Respondent would have fired him. (T.156) Alex noted that Kern's personality changed after London even before he started drinking. (T.159) He seemed like someone who had the onset of early dementia, he had hallucinations and he became more aggressive after London. (T.158) The depression set in when he received the letter from Dr. Korpman and Kern declined very quickly after that. (T.159)

He became a functioning drunk very quickly after that letter. (T.160) Over the period before his death, Kern's drinking worsened, he was ashamed of what he had become and tried to quit drinking. (T.161) He just couldn't accept a world where he would be on disability for the rest of his life without being able to return to the job he loved. (T.161) During the last two years of his life, Kern often drank a full liter of alcohol and he started to experience alcohol withdrawal seizures. (T.161) Alex got a breathalyzer device and could use it to predict seizures coming on based on a reduction in his alcohol levels. (T.161-162) His seizures would always manifest as two grand mal seizures. (T.162) Kern later also developed delirium tremens. (T.162) As the seizure would set in, he would scream out and his face would contort like he was in tremendous pain. (T.163) She would turn him on his side and then he would have the second seizure. (T.163)

She was not home when Kern died in the pond. (T.164) They were not able to make bills with the payments he was receiving so she went to work. (T.164) DAK called her at work to tell her that Kern was dead. (T.164) Alex's boss drove her home. (T.165) The pilot disability benefits stopped at that point and she ended up selling the house. (T.165)

Alex verified that Kern was under a 12 hour bottle to throttle rule while flying for Respondent. (T.170) Kern had never seized or passed out before the London flight. (T.171) She and Kern were avid runners before he started drinking. (T.171) Alex verified that his meal on the plane had to be the food that was burned as they had not prepared a meal before he left for London. (T.172)

On cross-examination, Alex confirmed that Kern attempted to rehabilitate himself and went to a couple of places for inpatient treatment. (T.183-186) The first place was in 2011 but the facility was focused on kids with heroin addiction. (T.188) The next place he went for treatment was in 2013. (T.188) And then one week before he died, he was also admitted to Grandview Hospital for a week after a seizure. (T.186) Alex went and picked him up and brought him home about a week before his death. (T.186) Kern was never treated for liver failure; he was fine except for the seizures. (T.188)

CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law set forth below.

The first issue that must be addressed before proceeding with any of the others is Respondent's Motion to Dismiss Petitioner's claim due to untimely filing in violation of the statute of limitations. The Arbitrator denied Respondent's Motion at trial and trial on all issues proceeded. Respondent's Motion was marked as Arbitrator's Exhibit 2 and Petitioner's Response was marked as Arbitrator's Exhibit 3.

Petitioner bears the burden of proving every aspect of his claim by a preponderance of the evidence. *Hutson v. Indus. Comm'n*, 223 Ill App. 3d 706, 714 (5th Dist. 1992). "Liability under the Workmen's Compensation Act may not be based on imagination, speculation, or conjecture, but must have a foundation of facts established by a preponderance of the evidence…" *Shell Petroleum Corp. v. Indus. Comm'n*, 366 Ill. 642, 650 (1937). The burden of proof is on a claimant to establish the elements of his right to compensation, and unless the evidence considered in its entirety supports a finding that the injury resulted from a cause connected with the employment, there is no right to recover. *Revere Paint & Varnish Corp. v. Indus. Comm'n*, 41 Ill.2d. 59, 63 (1968). Preponderance of the evidence means greater weight of the evidence in merit and worth that which has more evidence for it than against it. *Spankroy v. Alesky*, 45 Ill. App.3d 432, 436 (1st Dis. 1977).

It is the function of the Commission to judge the credibility of the witnesses and to resolve conflicts in the medical evidence and assign weight to witness testimony. *O'Dette v. Industrial Commission*, 79 Ill.2d 249, 253, 403 N.E.2d 221, 223 (1980); *Hosteny v. Workers' Compensation Commission*, 397 Ill. App. 3d 665, 674 (2009). Credibility is the quality of a witness which renders his evidence worthy of belief. The Arbitrator, whose province it is to evaluate witness credibility,

evaluates the demeanor of the witness and any external inconsistencies with his/her testimony. Where a claimant's testimony is inconsistent with his/her actual behavior and conduct, the Commission has held that an award cannot stand. *McDonald v. Industrial Commission,* 39 Ill. 2d 396 (1968); *Swift v. Industrial Commission,* 52 Ill. 2d 490 (1972). Internal inconsistencies in a claimant's testimony, as well as conflicts between the claimant's testimony and medical records, may be taken to indicate unreliability. *Gilbert v. Martin & Bayley/Hucks,* 08 ILWC 004187 (2010).

As to (C) Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent? And (F) Is Petitioner's current condition of ill-being causally related to the injury? The Arbitrator finds as follows:

An employee seeking benefits under the Act has the burden of proving all elements of his or her claim. *Beattie v. Industrial Comm'n*, 276 Ill. App. 3d 446, 449, 657 N.E.2d 1196, 212 Ill. Dec. 851 (1995). Among other things, the employee must establish a causal connection between the employment and the injury for which he or she seeks benefits. *Boyd Electric v. Dee*, 356 Ill. App. 3d 851, 860, 826 N.E.2d 493, 292 Ill. Dec. 352 (2005).

The Arbitrator finds that, based on the preponderance of the evidence, Petitioner failed to prove accidental injuries arising out of the decedent's employment. The Petitioner's arguments rely primarily on speculation. There is insufficient evidence to establish that Petitioner's seizure and hospitalization in 2008 were causally related to his employment. There is also insufficient evidence to establish that Petitioner's drowning in 2015 was related to his employment.

The weight of the evidence introduced supports that Petitioner had a seizure or a syncopal event as he exited the cockpit on July 17, 2008. This caused him to fall and strike his head and elbow. This is supported by a statement of the air marshals, as well as of the medical records from the emergency department at Hillingdon hospital, and the neurosurgeon Dr. Hasan at Inova Fair Oaks. The air marshal's statement indicates that FAM Simons was in seat 2A, which is directly outside of the cockpit and "looked up towards the flight deck and saw First Officer James Kern scream as he fell towards the floor with his arms locked and outstretched, as if he were knocked unconscious." He also had foam exiting his mouth. The initial history given by Mr. Kern when he arrived at Hillingdon the same day was that he passed out as he had not eaten for two days and had recent problems with his right ear.

Upon arriving at Ivona on July 18, 2008, Mr. Kern specifically reported that he was not sure if he fell and hit his head and then had a seizure. On July 19, 2008, Dr. Hasan's initial report indicates that Mr. Kern reported that he went to collect his bags from the cockpit when he stiffened and collapsed. Dr. Hasan's report further indicates that the patient was not feeling well on the plane, he was exhausted and weak, had a runny nose and didn't eat. The Petitioner noted he had been exhausting himself over the past four days doing heavy work and gardening in the USA and he had a runny nose for approximately one week with clear mucus. He also felt his right ear was slightly blocked on the plane.

Based on the initial medical evidence, initial history reported to medical providers by Mr. Kern and the witness statement of the incident, all of which the Arbitrator finds very persuasive and credible, it is more probable than not that Petitioner had a syncopal event which resulted in a witnessed fall where he subsequently hit his head. It is unclear from the record whether Petitioner was ever diagnosed with a seizure condition that was evidenced by any objective diagnostic findings. Petitioner did not prove that the cause of the seizure arose out of his employment by a preponderance of the evidence, and therefore, the incident that occurred on the plane on July 17, 2008 is not a compensable accident under the Worker's Compensation Act.

There is evidence in the record regarding alternative theories as to what happened to Mr. Kern on July 17, 2008, which may have been exacerbated by Petitioner's being overtired and exhausted from gardening and/or lack of sleep, having not eaten, and having a cold.

Respondent suggests that Petitioner's seizure may have been induced by alcohol withdrawal, causing him to fall and hit his head. This theory is supported by Respondent's expert, Dr. Kessler, who is board certified in neurology and sees many patients with alcohol withdrawal seizures. In the initial Hillingdon Hospital medical records, there were concerns noted by nursing and junior medical staff that the Petitioner may have been withdrawing from alcohol overnight. The records indicate sleep deprivation or possible alcohol withdrawal as potential causes for the seizures. An issue with alcohol is supported by his elevated liver enzymes and the fatty liver seen on all of his labs in Hillingdon, Grandview and Inova records. Dr. Kessler testified regarding the Petitioner's lab results and a fatty liver diagnosis. Dr. Coe also testified that alcohol use could be the cause of Petitioner's abnormal lab results and indicated an alcohol withdrawal seizure on July 17, 2008 was a possibility. Dr. Kessler testified that the timing of the alcohol withdrawal cycle would have been consistent with Petitioner's timeline of when he left for the flight and when the initial seizure and subsequent seizures occurred. The Arbitrator finds this theory to be persuasive as there are no other reasons to explain the elevated liver enzymes documented in the medical records and the timing of the incident is persuasive.

Petitioner's expert, Dr. Neri, provided the opinion that it was unlikely that Petitioner had an alcohol withdrawal induced seizure. The Arbitrator does not find Dr. Neri's opinion credible as he relies heavily on the fact that Mr. Kern would not have had enough time to consume a large amount of alcohol prior to leaving for the trip to London because Petitioner had a busy schedule. Dr. Neri's opinion regarding those facts have nothing to do with his medical expertise. If Mr. Kern was gardening for several days prior to this trip as the record indicates, he could have also been consuming alcohol, without anyone else's knowledge. Further, Dr. Neri's opinion assumes Petitioner hit his head prior to having the seizures, which was not established in the initial medical records or FAM statement, which he did not even review.

Dr. Coe testified that the only way to know if a seizure is a result of an alcohol withdrawal is a pattern of seeing it on a repeated basis. Mr. Kern's wife and two children all testified that Petitioner would have seizures when detoxing himself from alcohol after the accident occurred. Ms. Kern

testified to multiple seizures occurring within a short time period while he was withdrawing from alcohol. Ms. Kern even testified to screams that would come from her husband when he was seizing when going through alcohol withdrawal which is what the FAM testified to hearing when Mr. Kern seized on the airplane. Dr. Kessler testified that the "scream" referred to when someone is having a seizure is not an actual scream, but a noise the airway makes when one is seizing. The family's testimony supports a pattern of how Mr. Kern's seizures were triggered.

Dr. Neri testified to a host of factors that would be present if Mr. Kern had suffered an alcohol induced seizure. The medical records and statements from Ms. Kern in the record indicate that Petitioner's behavior after his initial seizures was that of agitation, anxiety, confusion, disorientation and erraticism, which would also support that he had an alcohol withdrawal induced seizure, according to both Dr. Neri and Dr. Kessler. The Arbitrator does not find testimony from Mr. Kern's children who were much younger at the time of the accident than when they testified credible regarding their father's drinking habits prior to the incident on July 17, 2008. Both the children and Ms. Kern testified that Mr. Kern rarely drank when the initial medical records state that Mr. Kern reported he drinks 2 glasses of wine per day with reports minimized in other later records. The medical staff at Hillingdon advised Mr. Kern to decrease his alcohol intake. Further, Ms. Kern testified that Mr. Kern did not begin to drink regularly until he received the grounding letter dated February 19, 2010 when an ultrasound of Mr. Kern's abdomen in March of 2009, about a year prior, indicated a marked enlargement of the liver with no documented reason or evidence of treatment for this condition in the records. Dr. Kessler testified that the abnormal liver tests would be caused by excessive alcohol consumption. For this reason, Arbitrator does not find Ms. Kern's testimony regarding her husband's drinking habits credible. A seizure due to alcohol withdrawal would be a cause unrelated to the Petitioner's employment.

Petitioner suggests that Petitioner tripped and fell and struck his head thereby resulting in the seizure. Such an inference is not supported by the initial facts and evidence. The unsigned and undated statement of Mr. Kern suggested that when entering the cockpit the last thing he remembered was tripping and then falling and Mr. Kern's later report to Dr. Jackal was that he may have tripped or slipped when he was pulling his bag out of the cockpit is suspect. Dr. Jackal noted that this was inconsistent with the histories in the medical records. Dr. Jackal requested a statement from the air marshals from Mr. Kern, and while it was obtained, it was never provided to him. This subsequent description of the accident is self-serving and not credible and it is not in accordance with any of the original accident descriptions given to his medical providers or by the air marshals. Further, none of the initial medical providers documented a bump on his head or diagnosed him with a concussion. Overall, this history appears to be an attempt by Mr. Kern to avoid being diagnosed with a seizure and avoid medical grounding. Finally, Dr. Coe's opinions regarding causal connection rely on Mr. Kern hitting his head prior to having a seizure which renders his opinions irrelevant based on the Arbitrator's finding that the seizure occurred prior to the fall.

In conclusion, Arbitrator finds that the Petitioner has failed to substantiate that Mr. Kern's injuries on July 17, 2008 were the result of his employment for the reasons outlined above. There is further insufficient evidence that his drowning death in 2015 was related to that occurrence. Arbitrator notes that the Petitioner had not been seen for any medical treatment since 2009. While Mr. Kern's family members testified that he seemed depressed and had increased his alcohol intake in the years subsequent to 2008, there is no medical evidence to support a diagnosis of alcoholism or depression. Further, it would be pure speculation to conclude that any depression or alcoholism is causally related to the alleged work injury. The opinions of Dr. Coe and Dr. Neri are speculative in this regard.

As the Petitioner has failed to meet their burden by a preponderance of the evidence to establish accident and causation, all other issues are moot.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC014527
Case Name	Glen J. Thomas v. Village of Roselle
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0395
Number of Pages of Decision	14
Decision Issued By	Marc Parker, Commissioner, Stephen Mathis, Commissioner

Petitioner Attorney	Erin Sievers
Respondent Attorney	Daniel Arkin

DATE FILED: 8/31/2023

/s/Stephen Mathis, Commissioner

Signature

/s/Marc Parker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☒ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Glen J. Thomas,

Petitioner,

vs. No. 15 WC 14527

Village of Roselle,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by the parties herein and proper notice given, the Commission, after considering the issues of wage calculations, benefit rates, nature and extent of the disability, "[c]alculation of various Section 8(d)(1) benefit rates and applicable dates for each rate," penalties and attorney fees, and being advised of the facts and law, corrects the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission notes that the Order part of the Arbitrator's Decision does not recite the parties' stipulation regarding Petitioner's entitlement to temporary total and temporary partial disability benefits, which Respondent has paid. The stipulation is recited in the last paragraph of page 2 of the Findings of Fact, as follows: "The parties stipulated as a result of Petitioner's February 17, 2015, accident he was temporarily and totally disabled from his water department job from February 18, 2015 through May 10, 2015; working part time from May 11, 2015 through August 24, 2015 and temporarily and totally disabled from August 25, 2015 through September 21, 2016. Petitioner did not lose any additional time from his water department job after September 21, 2016, because of his February 17, 2015, accident." The Commission adds this stipulation to the Order part of the Arbitrator's Decision.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 15, 2022 is hereby corrected, affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

No bond is required for removal of this cause to the Circuit Court. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

August 31, 2023

/s/ *Stephen J. Mathis*
Stephen J. Mathis

SJM/sk
o-8/9/2023
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/s/ *Deborah L. Simpson*
Deborah L. Simpson

SPECIAL CONCURRING OPINION

This case was scheduled for Oral Arguments on August 9, 2023, before a three-member panel of the Commission including members Stephen Mathis, Deborah L. Simpson, and Deborah J. Baker, at which time Oral Arguments were either heard, waived or denied. Subsequent to Oral Arguments and prior to the departure of Deborah J. Baker on August 18,2023, a majority of the panel members had reached agreement as to the results set forth in this decision and opinion, as evidenced by the internal Decision worksheet initialed by the entire three-member panel, but no formal written decision was signed and issued prior to Commissioner Baker's departure.

Although I was not a member of the panel in question at the time Oral Arguments were heard, waived or denied, and I did not participate in the agreement reached by the majority in this case, I have reviewed the Decision worksheet showing how Commissioner Baker voted in this case, as well as the provisions of the Supreme Court in Zeigler v. Industrial Commission, 51 Ill.2d 137, 281 N.E.2d 342 (1972), which authorizes signature of a Decision by a member of the Commission who did not participate in the Decision. Accordingly, I am signing this Decision in order that it may issue.

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC014527
Case Name	Glen J. Thomas v. Village of Roselle
Consolidated Cases	
Proceeding Type	
Decision Type	Amended Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	10
Decision Issued By	Frank Soto, Arbitrator

Petitioner Attorney	Rich Hannigan
Respondent Attorney	Daniel Arkin

DATE FILED: 11/15/2022

THE INTEREST RATE FOR THE WEEK OF NOVEMBER 15, 2022 4.44%

/s/Frank Soto, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
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
AMENDED ARBITRATION DECISION

Glen J. Thomas
Employee/Petitioner

v.

Village of Roselle
Employer/Respondent

Case # **15** WC **14527**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Frank Soto**, Arbitrator of the Commission, in the city of **Wheaton**, on **August 26, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☐ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **calculation of 8(d)(1) benefits**

FINDINGS

On February 17, 2015, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**107,540.68**; the average weekly wage was $**2,068.09**.

On the date of accident, Petitioner was **48** years of age, ***single*** with **3** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$90,850.45** in TTD benefits, $**7,601.96** in TPD benefits, and **$164,055.84** in wage differential benefits for a total credit of **$262,508.25**.

Respondent is entitled to a credit of $ **N/A** under Section 8(j) of the Act.

ORDER

Respondent shall pay 8(d)(1) benefits at $636.02 per week commencing **September 22, 2016,** and continuing until Petitioner turns 67, as set forth in the Conclusions of Law attached hereto;

Penalties are awarded in the amount of $10,000.00 pursuant to Section 19(l) of the Act, as set forth in the Conclusions of Law attached hereto;

Respondent shall pay Petitioner compensation that has accrued from February 17, 2015 through August 26, 2022 and shall pay the remainder of the award, if any, in weekly payments.

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.

By: */o/ Frank J. Soto* **NOVEMBER 15, 2022**
Arbitrator

Procedural History

This case proceeded to trial on August 26, 2022. The parties stipulated that Glen J. Thomas (hereafter referred to as "Petitioner") was employed in two separate capacities for the Village of Roselle (hereinafter referred to as "Respondent"). Petitioner was employed as a full-time public works employee and a par-time firefighter/paramedic. While performing his fighter job duties, Petitioner sustained a work injury, February 17, 2015, which prohibited Petitioner from ever returning to work as a firefighter but Petitioner was able to return to his full-time public works position. On February 17, 2017, Petitioner was involved in a non-work-related motorcycle accident resulting in his retirement on April 29, 2022. The parties further stipulate Petitioner is entitled to wage differential benefits involving the loss of his part-time firefighter position. (Arb. Ex. #1). The central issue in this case is the calculation of the wage differential rate.

Findings of Fact

On February 17, 2015, Petitioner was 48 years old and had been working for Respondent for 15 years as a firefighter and a water department employee. While fighting a fire Petitioner slipped on ice disconnecting hose lines and injured his right shoulder. Pursuant to the Collective Bargaining Agreement between Respondent and SEIU, Local 73 Part Time Firefighters (CBA), full time Village employees who also work part-time at the Fire Department shall receive 1.5 times their hourly rate for their Fire Department job classification. (PX6, p 17).

Petitioner treated with Dr. Drake at Core Orthopedics for his right shoulder. (PX1). On March 9, 2015, Dr. Drake performed a right rotator cuff repair and relocation of right bicep muscle. (PX1, p 52-53). Petitioner returned to work at the water department performing restricted work on May 11, 2015. Petitioner continued with physical therapy through October 13, 2015, when Dr. Drake ordered an FCE.

Petitioner saw Dr. Cole, pursuant to Section 12 of the Act, on November 16, 2015, who assessed residual pain/weakness of right shoulder status post partially irreparable rotator cuff tear right shoulder. Dr. Cole opined Petitioner could either proceed with an additional surgery and, if not, Petitioner could undergo an FCE to determine his physical abilities. Dr. Drake believed another surgery would be unlikely to improve Petitioner's symptoms even with a good outcome. Dr. Drake opined Petitioner could not return to work as a firefighter. (PX1).

Petitioner underwent an FCE at Athletico on August 31, 2016. (PX4). Petitioner was found not to have the physical capabilities and tolerance to perform all the essential job functions of a firefighter but he could perform the essential job functions of water systems operator. (PX4). On September 13, 2016, Dr. Drake opined Petitioner reached MMI and issued permanent restrictions of consistent with the FCE. (PX1, p 166-169).

Petitioner returned to work in the water department on September 22, 2016. On September 28, 2021, Petitioner was injured in a motorcycle accident and sustained left proximal tibial and fibular fractures. On October 19, 2021, he had surgery for left bicondylaor comminuted tibial plateau fracture, left comminuted fibular shaft fracture, left foot third metatarsal fracture, left foot fourth metatarsal fracture and left foot wound. He had open reduction and internal fixations of the fractures.

Petitioner was off work pursuant to FMLA which ended on December 22, 2021 which was extended to January 3, 2022. At that time, Petitioner was placed on extended medical leave and was paid his accrued sick and vacation time through April 29, 2022. On May 1, 2022, Petitioner's employment with Respondent was scheduled to terminated on May 1, 2022 so Petitioner elected to take his pension effective April 29, 2022.

The Parties stipulated Petitioner's combined average weekly wage at the time of the accident was $2,105.89, subject to the state maximum TTD rate of $1,361.79. The parties have also stipulated Petitioner lost access to his job as a firefighter as a result of the February 17, 2015, accident and Petitioner is entitled to wage differential benefits. Originally, Respondent paid Petitioner $481.57 in 8(d)(1) benefits beginning February 18, 2015. On August 23, 2022, Respondent paid Petitioner an underpayment of wage differential benefits totaling $11,329.53 for the time period of February 17, 2015 through August 25, 2022, or 392 3/7 weeks, representing a $28.87 per week underpayment. (PX 11).

The parties stipulated as a result of Petitioner's February 17, 2015, accident he was temporarily and totally disabled from his water department job from February 18, 2015 through May 10, 2015; working part time from May 11, 2015 through August 24, 2015 and temporarily and totally disabled from August 25, 2015 through September 21, 2016. Petitioner did not lose any additional time from his water department job after September 21, 2016, because of his February 17, 2015, accident.

Conclusions of Law

The Arbitrator adopts the above Findings of Fact in Support of the Conclusions of Law as set forth below. The claimant bears the burden of proving every aspect of her claim by a preponderance of the evidence. *Hutson v. Industrial Commission,* 223 Ill.App.3d 706 (1992).

With Respect to Issue "L" the nature and extent of Petitioner's Injury the Arbitrator finds as follows:

The parties stipulate that Petitioner is entitled to wage differential benefits involving the loss of his part-time firefighter position but the parties disagree regarding the calculation of those benefits.

Petitioner's rate varied from year to year based upon the Collective Bargaining Agreement (hereafter referred to as "CBA"). Article XII of the Collective Bargaining Agreement (hereinafter referred to as "CBA") states that "*Full-time Village employees who also work part-time at the Fire Department shall receive 1 ½ times the hourly rate for their Fire Department job classification*". (PX 6, p. 17). At the time of his retirement on April 30, 2022, Petitioner's hourly rate of pay as a public works employee was $21.70 and his hourly rate of pay as a firefighter/paramedic was $32.55. (Rx. 2). The parties stipulated Petitioner averaged 29.31 hours per week while working as a part time firefighter prior to his accident of February 17, 2015. (Arb. Ex. 1).

Respondent argues since Petitioner's employment with Respondent terminated on April 29, 2022 the calculation of the wage differential benefits should be based upon his public works hourly rate, not the 1 ½ times the public works hourly rate provided in Article XII of the CBA. Respondent argues being a fulltime employee for Respondent is a condition precedent to using the 1.5 multiplier for calculating the firefighter rate of pay. Respondent believes the wage differential benefits should be $424.02 per week. (*i.e*. Petitioner's public works base pay of $21.70 multiplied by the average hours Petitioner worked as a part-time firefighter of 29.31multiplied by 2/3 (or) $21.70 x. 29.31 = 636.03 x 2/3 = $424.02).

The Arbitrator notes the CBA does not state being a fulltime employment with Respondent is a condition precedent to using the 1.5 multiplier when calculating Illinois Workers' Compensation wage differential benefits. The Arbitrator finds the 1.5 multiplier was intended to determine the hourly rate of pay Petitioner was to receive while performing his firefighter duties similar to the 1.5 multiplier used when calculating the hourly rate of pay Petitioner would receive for working

overtime. Under Section 6.6 of the CBA, Petitioner would be paid the overtime hourly rate of 1 ½ times his regular straight-time hourly rate for hours worked in excess of 212 in a 28-day work cycle. (PX 6. P. 11).

Petitioner argues the wage differential benefits should be based upon Petitioner's rate of pay as a firefighter per Article XII of the CBA. Petitioner believes he is entitled to wage differential benefits of $636.03 per week based upon Petitioner's firefighter rate of $32.55 as of April 29, 2022, Petitioner's last date of employment.[1] (*i.e.*, Petitioner's firefighter hourly rate of pay of $32.55 multiplied by the average hours Petitioner worked as a part-time firefighter of 29.31 multiplied by 2/3 (or) $32.55 x 29.31= 954.04 x 2/3 = $636.03).

Section 8(d)(1) of the Act states: If, after the accidental injury has been sustained, the employee as a result thereof becomes partially incapacitated from pursuing his usual and customary line of employment, he shall, except in cases compensated under the specific schedule set forth in paragraph (e) of this Section, receive compensation for the duration of his disability, subject to the limitations as to maximum amounts fixed in paragraph (b) of this Section, equal to 66-2/3% of the difference between the average amount which he would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident. For accidental injuries that occur on or after September 1, 2011, an award for wage differential under this subsection shall be effective only until the employee reaches the age of 67 or 5 years from the date the award becomes final, whichever is later.

The object of Section 8(d)(1) is to compensate an injured claimant for his reduced earing capacity. *Smith,* 308 Ill.App3d at 265-66, 421 Ill.Dec 468, 719 N.E.2d 329. To qualify for a wage differential award under section 8(d)(1), a claimant must prove: (1) a partial incapacity which prevents him from pursuing his "usual and customary line of employment," and (2) an impairment of his earnings. To establish a diminished earning capacity, a claimant must prove his actual earnings for a substantial period before and after he returns to work, or what he is able to earn in some suitable employment if he cannot return to work. *Smith,* 308 Ill.App.3d at 266,241 Ill.Dec. 468, 719 N.E.2d 329.

[1] As of April 29, 2022, Petitioner's part-time firefighter rate of pay was $32.55 per hour or 1 ½ times his public work hourly rate of pay of $21.70. (RX 2).

The Arbitrator finds Petitioner proved both elements of his claim for wage differential benefits noting the party's stipulation. The Arbitrator further finds the wage differential benefits should be determined using Petitioner's firefighter hourly rate of pay of $32.55, not upon his public work hourly rate of pay. Petitioner was unable to return to his parttime firefighter position. Petitioner was paid his firefighter hourly rate while working in that capacity.

The Arbitrator finds using the weekly firefighter hourly rate is consistent with the object of Section 8(d)(1) which is to compensate an injured claimant for his reduced earring capacity. To find otherwise would not make the claimant whole and frustrate the fundamental remedial purpose of the Act. See *Contreras v. Industrial Comm'n*, 306 Ill. App. 3d 1071, 1076 (1999). The Act is meant to compensate a claimant for economic disabilities that dimmish his value in the labor market, not for physical disabilities *per se*. See, *e.g*. *World Color Press v. Industrial Comm'n*, 249 Ill. App. 3d 105, 109-10 (1993) ("The underlying purpose of the Act is to provide financial protection for workers whose earning power is interrupted or terminated as a consequence of injures arising out of and in the course of their employment." (Internal quotations marks omitted.)).

The Court addressed a similar issue regarding intervening injuries in *Chada v Illl. Workers' Comp. Comm'n,* 58 N.E.3d 848, 405 Ill.Dec 587 (Ill. App. 2016). In *Chada*, the claimant received wage differential benefits after injuring his low back and returning to work in a lower paid position due to work restrictions. Thereafter, Petitioner injured his cervical spine. In *Chada,* the Commission determined that the claimant's entitlement to wage differential benefits ended on the date the claimant began missing work as a result of his subsequent cervical injury. The Appellate Court disagreed finding the claimant's subsequent unrelated and more disabling work injury to the neck did not alter the fact that his low back injury reduced his earning capacity. The Appellate Court held once the claimant established an entitlement to wage differential benefits as a result of the prior injury, he was entitled to collect such benefits "for the duration of his disability" and the disability (*i.e*. the reduced earing capacity) the claimant suffered was the result of the prior injury which did not end merely because the claimant suffered a second more disabling work injury. The Appellate Court further held the claimant's entitlement to wage differential benefits would end if, and only if, he later became able to earn the salary he formerly earned in his prior position. *Id.*

To calculate 8(d)(1) benefits, the difference between the average amount which *he would be able to earn* in the full performance of his duties in the occupation in which he was engaged at the time of the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident. (820 ILCS 305/8(d)(1), *emphasis added*). The parties stipulated that Petitioner's average hours worked as a firefighter was 29.31 per week and his hourly rate as a part time firefighter and full-time employee of the water department was $32.55, on his last date of employment, yielding an average weekly wage of $954.03. As such, Petitioner is entitled 8(d)(1) benefits of $636.03 per week commencing September 22, 2016 and continuing until Petitioner turns 67. (*i.e.*, Petitioner's firefighter hourly rate of pay of $32.55 multiplied by the average hours Petitioner worked as a part-time firefighter of 29.31 multiplied by 2/3 (or) $32.55 x 29.31= 954.04 x 2/3 = $636.03).

With regards to Issue "M", Penalties the Arbitrator finds as follows:

Petitioner seeks penalties pursuant to Sections 19(k), 19(l) and 16 of the Act. Respondent underpaid Petitioner for years using an average weekly wage calculation based solely on Petitioner's public works hourly rate of pay and not using firefighter's hourly rate of 1 ½ times Petitioner's public works hourly rate of pay as provided in Article XII of the CBA. On August 23, 2022, Respondent issued a check for underpaid wage differential benefits totaling $11,329.53 for the time period of February 17, 2015 through August 25, 2022. (PX 11). Penalties under section 19(l) are in the nature of a late fee. The award of section 19(l) penalties is mandatory if the payment is late, for whatever reason, and the employer or its carrier cannot show an adequate justification for the delay. Where there is a delay in paying compensation, it is the employer's burden to show it had a reasonable belief the delay was justified. Respondent offers no objectively reasonable explanation as to why they underpaid benefits until the eve of trial. As such, the Arbitrator awards penalties in the maximum amount of $10,000.00 pursuant to Section 19(l) of the Act.

Petitioner also seeks penalties pursuant to Sections 19(k) and 16 of the Act claiming the underpayment was in bad faith or for improper purpose and/or was based upon an unreasonable or vexatious delay. 820 ILCS 305/19(k) penalties demand a higher standard of misconduct, an "unreasonable or vexatious" delay or an "intentional underpayment of compensation." *Id*. Penalties and attorney fees under sections 19(k) and 16 require more than an "unreasonable delay" in payment of benefits. Penalties and attorney fees under sections 19(k) and 16 are

intended to address situations where there is not only a delay, but the delay is deliberate or the result of bad faith or improper purpose. Penalties are "intended to address the situation where there is not only a delay, but the delay is deliberate or the result of bad faith or improper purpose." *McMahan v. IC*, 183 Ill.2d 499, 515 (1998). The Arbitrator finds the Petitioner failed to prove that Respondent's conduct was unreasonable, vexatious, bad faith or an improper purpose. As such the claim for penalties under sections 19(k) and 16 is hereby denied.

By: */o/ Frank J. Soto* November 12, 2022
Arbitrator Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC008450
Case Name	Linda Hinton v. State of Illinois - Ludeman Center
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0396
Number of Pages of Decision	14
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Michael Rom
Respondent Attorney	Rachel Peter

DATE FILED: 8/31/2023

/s/Maria Portela, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LINDA HINTON,

Petitioner,

vs. NO: 18 WC 8450

STATE OF ILLINOIS, LUDEMAN CENTER,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review under §19(b) having been filed by the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of benefit rates, benefit periods, vocational rehabilitation, temporary total disability benefits and maintenance benefits and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission affirms and adopts the Decision of the Arbitrator, but clarifies the correct benefit rates as well as benefit periods.

Prior to the Hearing on Arbitration, the parties stipulated that the correct average weekly wage was $1,450.09. Two thirds of that average weekly wage is $966.73. Although the Arbitrator correctly identified the average weekly wage as $1,450.09, in both the Order and the body of the Decision, the Arbitrator incorrectly calculated the temporary total disability benefit rate and maintenance rate to be $1,037.20. The Commission corrects the Decision both in the Order portion

of the Award, as well as on page 7 of the Decision, to reflect the correct temporary total disability benefit rate of $966.73.

Additionally, the Commission clarifies the Arbitrator's Decision with the following changes:

The Commission strikes the third paragraph of the Order and replaces it with the following:

> Respondent shall pay Petitioner maintenance benefits from February 27, 2020 through March 24, 2022, the date of hearing, pursuant to Section 8(a) of the Act. As above, Respondent shall get a credit for all amounts paid.

The Commission strikes the final sentence of the Arbitrator's Decision and replaces it with the following:

> Furthermore, Respondent shall reinstate Petitioner's maintenance benefits as of the date of cutoff, September 30, 2021, through March 24, 2022, the date of hearing, pursuant to Section 8(a) of the Act.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $966.73 per week for a period of 129 5/7 weeks, commencing September 1, 2017 through February 26, 2020, that being the period of temporary total incapacity for work under §8(b), and as provided in §19(b) of the Act. This award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any. Respondent shall get a credit for all amounts paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall provide further vocational rehabilitation as provided in Section 8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner maintenance benefits from February 27, 2020 through March 24, 2022, the date of hearing, pursuant to Section 8(a) of the Act. Respondent shall get a credit for all amounts paid.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision.

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.

Pursuant to §19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review. Therefore, no appeal bond is set in this case.

August 31, 2023

/s/ *Maria E. Portela*

/s/ *Amylee H. Simonovich*

/s/ *Kathryn A. Doerries*

MEP/dmm
O: 72523
49

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC008450
Case Name	HINTON, LINDA v. STATE OF ILLINOIS, LUDEMAN
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	10
Decision Issued By	Antara Nath Rivera, Arbitrator

Petitioner Attorney	Michael Rom
Respondent Attorney	Rachel Peter

DATE FILED: 5/23/2022

THE INTEREST RATE FOR THE WEEK OF MAY 17, 2022 1.49%

/s/ Antara Nath Rivera, Arbitrator
Signature

CERTIFIED as a true and correctcopy pursuant to 820 ILCS 305/14

May 23, 2022

/s/ Michele Kowalski

Michele Kowalski, Secretary

Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF **COOK**)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

LINDA HINTON
Employee/Petitioner

v.

STATE OF ILLINOIS, LUDEMAN
Employer/Respondent

Case # **18** WC **008450**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Antara Nath Rivera**, Arbitrator of the Commission, in the city of **Chicago**, on **3/24/22**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☒ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Vocational Rehabilitation**

FINDINGS

On the date of accident, **8/19/16**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**75,404.62**; the average weekly wage was $**1,450.09**.

On the date of accident, Petitioner was **54** years of age, ***single*** with **1** dependent children.

Respondent ***has*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**39,828.71** for TTD, $**0** for TPD, $**168,580.55** for maintenance, and $**0** for other benefits, for a total credit of $**208,409.26**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner TTD benefits of $1,037.20 /week for 129 5/7 weeks, commencing September 1, 2017, through February 26, 2020, as provided in Section 8(b) of the Act.

Respondent shall provide further vocational rehabilitation as provided in Section 8(a) of the Act.

Respondent shall reinstate Petitioner's maintenance benefits as of the date of cutoff, September 30, 2021, pursuant to Section 8(a) of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

MAY 23, 2022

Signature of Arbitrator

ICArbDec19(b)

STATEMENT OF FACTS:

Linda Hinton ("Petitioner") is a 59-year-old woman who was employed by the State of Illinois, Ludeman Developmental Center ("Respondent"). Petitioner testified that she was employed as a Registered Nurse. (Transcript of Proceedings at Arbitration ("T.") 19) Petitioner testified that she has three years of college education and received her nursing license in 1992. (T. 18) She testified that she does not have a four-year degree. *Id.*

Petitioner testified that she first began working as a nurse for the State of Illinois in 2008 at the Howell Developmental Center. (T. 69) Petitioner testified that she took a lay off and went back to work in 2012 at Chicago Reed Mental Health Center. (T. 69-70)

Petitioner testified that she began working for Respondent in 2014. (T. 70) Petitioner stated that she worked for Respondent for two and a half years when she was injured. (T. 20). Petitioner was 54 years old on August 19, 2016, the date of the accident. (Arbitrator's Exhibit ("AX")1, No. 1, 6) Petitioner testified that six months after she was hired, her role changed when she became a health center nurse. (T. 21) Petitioner testified that the duties of a health center nurse included receiving outside communications, providing patients with information, assisting with admission to the facility and discharge from the facility, and patient care in both pre-op and post-op. (T. 21-22) Petitioner testified that her position required some lifting but that there were technicians there to assist with that type of lifting. (T. 22)

Petitioner testified that on August 19, 2016, she was giving an immobile patient his medication through a G-tube. (T. 23) She testified that this patient had never been able to move. *Id.* Petitioner testified that when he attempted to get out of bed, he was able to get to the side of the bed and stand up. *Id.* Petitioner testified that she ran over to grab the bed rails so that he wouldn't fall. *Id.* She testified that when she did that, all of his weight was braced on her and that he began to head butt her at the same time. *Id.* Petitioner testified that she had her leg in between him trying to keep him from falling. *Id.* Petitioner testified that she was able to push him back until a technician came in and assisted her in pushing him back on the bed. *Id.*

Petitioner testified that about 15 minutes later, she began feeling a strain and her arm felt "crampy." (T. 23-24) Petitioner testified that she felt her left arm starting to swell. (T. 23) Petitioner testified that she got some ice out of the kitchen and continued to work the rest of her shift. (T. 24) She testified that later that evening, her arm began to swell. *Id.* Petitioner testified that several hours later, her arm felt heavy and very painful. *Id*. Petitioner testified that her arm looked like it was the size of her body. *Id*. Petitioner testified that the swelling started from her clavicle area, went down her left arm, and into her fingers. *Id*. Petitioner testified that she has had no prior injuries to her neck or left arm injuries. (T. 27)

Petitioner testified that she reported this to her supervisor. (T. 25) Petitioner testified that her supervisors, Jackie Boyd, the Director of Nursing, and Carla Dillard were both present at the time of Petitioner's injury. (T. 72)

Petitioner testified that she sought medical treatment for her injuries the following morning. (T. 25) She testified that she reported to Ingalls Urgent Care where she came under the care of Dr. Steve Lubera. *Id.* Petitioner testified that Dr. Lubera sent Petitioner to Ingalls Hospital for a venous Doppler

study. *Id.* Petitioner testified that she was admitted to Ingalls Hospital that same day for additional testing. *Id.* She testified that a CT scan and an echo of her heart were conducted. *Id.* Petitioner testified that she was also prescribed Heparin and Lovenox. *Id.*

On August 20, 2016, an ultrasound indicated acute thrombosis of the left subclavian, axillary parabrachial and basilic veins. (PX 5) Petitioner testified that she was sent to the University of Chicago Medical center for treatment and observation. (T. 28, PX 3) Petitioner testified that she was treated by Dr. Nanette Fabi; Dr. Joseph Thometz, heart specialist; and Dr. Ravi Deschmukh, vascular specialist. *Id.* Dr. Fabi diagnosed Petitioner with a left upper extremity deep vein thrombosis ("DVT") and recommended a full hematologic evaluation. (PX 3) Dr. Thometz prescribed medications such as Lovenox and Coumadin and recommended a course of physical therapy which took place at ATI Physical Therapy from October 14, 2016, through October 31, 2016. (PX 3, 4, 10)

Petitioner continued under the care of Dr. Fabi and Dr. Thometz. (PX 3) Petitioner underwent various hematological exams and was evaluated by different doctors who diagnosed discomfort, swelling, and DVT to the left lower extremity. *Id.* Petitioner received vascular care under the direction of Dr. Deschmukh who again diagnosed with DVT in the left upper extremity. *Id*.

Petitioner was seen by Independent Medical Examiner ("IME") Dr. Adam Yanke on October 19, 2017, May 20, 2019, and March 9, 2020. (T. 29, RX 5, RX 6, 7)

On October 19, 2017, Petitioner reported 10 out of 10 intermittent pains in her left arm. (RX 5) Dr. Yanke diagnosed Petitioner with DVT and recommended that she see a vascular surgeon. *Id*. He noted that she had not reached maximum medical improvement. *Id*. He limited her to no use of the left arm at work other than for sedentary work. *Id*. While Dr. Yanke noted that Petitioner mentioned having a prior clot, he opined that there was physical trauma to the left arm which precipitated her current diagnosis. *Id*.

On May 20, 2019, Dr. Yanke noted that he agreed with the vascular surgeon's diagnosis of venous claudication in the left arm and that he believes that this was caused by the work injury. (RX 7) He opined that she was at maximum medical improvement ("MMI") and should undergo a Functional Capacity Evaluation ("FCE") to determine permanent restrictions. *Id*.

On February 26, 2020, both the treating doctor, Dr. Thometz, and IME, Dr. Yanke, recommended that Petitioner undergo an FCE for left arm and out-patient rehabilitation and that Petitioner be released to return to work pursuant to that exam. (PX 3 at 689, PX 4)

On February 14, 2020, Petitioner underwent an FCE which placed Petitioner at the sedentary physical demand category with a ten-pound lifting restriction. (PX 3 at 692, 734-742)

On February 26, 2020, Dr. Thometz released the Petitioner to work within these restrictions. Dr. Thometz further indicated that Petitioner did not have full use of her left arm. (T. 33; PX 7 at 87) Petitioner testified that following the FCE, she began a self-directed job search. (T. 34) Petitioner testified that she continued to receive benefits. (T. 34; PX 12)

On March 9, 2020, Petitioner presented to Dr. Yanke. (RX 6) Dr. Yanke noted that Petitioner's diagnosis of venous claudication was consistent with his examination. *Id*. Dr. Yanke opined that the work injury resulted in the DVT. *Id*. He found Petitioner to be at MMI with permanent restrictions as recommended by her FCE. *Id*.

Petitioner testified that she never had any anxiety, prior work injuries, or prior treatment for her left shoulder or left arm. (T. 27, 67, 74) Petitioner testified that she received either extended benefits, or full salary from her agency, from August 20, 2016, through August 31, 2017. (Arbitrator's Exhibit "AX" 1 at #8; T. 34, 36, 55-56) Thereafter, she was paid TTD at 66 and 2/3% of her salary from September 1, 2017, through June 15, 2018. (AX 1, at #8) Once Petitioner reached MMI, she received maintenance from June 16, 2018, through September 30, 2021. *Id*.

Petitioner testified that on November 20, 2020, Respondent conducted an initial vocational evaluation/Labor Market Survey through Creative Case Management, Inc. with Erica Rosenberg. (T. 38)

On December 18, 2020, a Labor Market Survey was conducted by Creative Case Management. (RX 3) It identified fifteen potential jobs within a one-week period in December 2020 that met Petitioner's light duty restrictions. *Id*. The report noted positive factors that would assist Petitioner with securing employment including Petitioner's work history that included transferrable skills; Petitioner's associate degree and nursing degree; Petitioner residing in an area with many employment opportunities; Petitioner's computer skills; and Petitioner's motivation to return to work. *Id*.

On February 3, 2021, Petitioner began vocational rehabilitation through Creative Case Management with Chiquita Hallom, CRC. (RX 3) Ms. Hallom's initial report dated February 3, 2021, indicated, "Ms. Hinton was employed as a Registered Nurse 1 at the State of Illinois. This is considered a Medium Physical Demand Level occupation. Medium level work expects exerting 20 to 50 pounds of force occasionally and /or 10 to 25 pounds of force frequently, and/or greater than negligible up to 10 pounds of force constantly to move objects. Due to Ms. Hinton's permanent restrictions noted above she is no longer able to work in this position." (RX 3, February 3, 2021, report at 2) The initial report also indicated that Ms. Hallom opined that Petitioner may benefit from nursing certification classes or bachelor's degree to make her more employable. *Id*. The Initial Report, dated February 3, 2021, also noted that Ms. Hallom and Petitioner discussed meeting twice monthly for 10-12 weeks. (RX 3, February 3, 2021, report) Petitioner was asked to contact 14-20 employers by the next meeting, keep a job search log, follow up with the provided leads, develop a network, check job search e-mails, and research nursing certification programs. *Id*. Petitioner was found to be at the level of light physical work per the FCE and her treating physician. (RX 3 February 19, 2021, report at 2)

Ms. Hallom prepared 17 vocational reports from February 3, 2021, to October 8, 2021. In most of the reports Petitioner was compliant with what was asked of her by Ms. Hallom. (RX 3, T. 116-125) In her last report, dated October 8, 2021, Ms. Hallom opined that vocational services should be extended for additional 10 sessions. (RX 3 October 8, 2021, report at 3)

On October 18, 2021, TRISTAR Senior Claims Examiner, Shane Cassidy sent a letter to Petitioner through her attorney indicating benefits were terminated based on the alleged decline of two separate employment offers. (PX 20)

A closing report was prepared by Ms. Hallom on October 22, 2021, indicating that TRISTAR had closed the case due to alleged non-compliance with vocational counseling. *Id*. At hearing, Ms. Hallom testified that she never contacted Petitioner again. (T. 130)

On October 26, 2021, Dr. Thometz placed Petitioner on permanent restrictions. (PX 3 at 535) Dr. Thometz indicated that Petitioner had left shoulder neuropathic pain and that she should not be lifting, pushing, pulling, or carrying with her left upper extremity. *Id*.

Petitioner testified that she continued to perform a job search following the termination of benefits (PX 13 and T. 58-60, 64) Petitioner testified that she looked for nursing job that were not detrimental to her health. (T. 59) She testified that she was going to continue to look, follow up with anybody that she knew that had a lead to land a nursing job. *Id*. Petitioner testified that the suggested jobs from October 2021 to present were not all jobs within her restrictions. (T. 60) She testified that she contacted at least 20 contacts per week. *Id*.

Petitioner testified that she recently applied for a child welfare nurse specialist, supervisor position, with the Department of Children and Family Services. (T. 61) Petitioner further testified that she applied for and interviewed for a nurse coverage supervisor position with the State of Illinois at Ludeman the Monday before the hearing date which was within her restrictions and continues to seek a job within her restrictions. (T. 62-64; PX 16) Petitioner testified that out of 17 vocational reports, 15 of them indicated that she was 100% compliant. (T. 91)

Testimony of Chiquita Hallom

Ms. Hallom testified that she is a certified rehabilitation counselor. (T. 108) Ms. Hallom testified that as a vocational case manager, she performed labor market surveys, assisted clients with vocational job searches, and managed six clients per month. (T. 97) Ms. Hallom testified that she met with Petitioner from February 2021, through October 2021, via Zoom and telephone. (T. 98) Ms. Hallom testified that she wrote reports summarizing each meeting. *Id*.

Ms. Hallom testified that, in her initial report, she indicated that Petitioner was no longer able to perform the job with she had done before, thus triggering vocational rehabilitation. (T. 113) Ms. Hallom testified that her reports did not indicate whether Petitioner was represented by an attorney. (T. 113-114)

Ms. Hallom testified that on her February 19, 2021, report of Petitioner, Ms. Hallom indicated that Petitioner did not demonstrate 100% compliance with job search activities during that reported period. (T. 100, 102) Ms. Hallom testified that she noted that Petitioner uploaded her resume to her professional account and spoke with employers through her professional account. (T. 102)

Ms. Hallom testified that she assigns homework at the end of every meeting. (T. 103) She testified that she reviewed the assignments that she gave. *Id.* Ms. Hallom testified that if all assignments were completed, the client was deemed compliant for that reporting period; if the client did not complete the assignments, the client was deemed non-compliant. *Id.*

Ms. Hallom testified that she expected her clients to follow up on all job leads provided by the vocational case manager or found by the client. (T. 105) She further testified that the expectation was

also that the clients give their best effort to find jobs and give their best effort during interviews. *Id*. Ms. Hallom testified that while she was familiar with the Code of Professional Ethics for Rehabilitation Counselors ("CRCC"), she did not know what her duties to her clients, per the CRCC. (T. 108-109)

Ms. Hallom also testified that the reports could be requested by Petitioner or by her attorney as well. (T. 113) Although Petitioner did not receive copies of the reports, Ms. Hallom would go over the prior report at the start of each meeting and the non-compliance issues noted in the reports were discussed with Petitioner. (T. 104)

Ms. Hallom testified that Petitioner was non-compliant per her initial report and that she notified Petitioner of her non-compliance. (T. 115) Ms. Hallom testified that, in her second report, she indicated that Petitioner was 100 % compliant and that she recommended that Petitioner get her bachelor's degree. (T. 117). Ms. Hallom further testified that she indicated that Petitioner was compliant in the following reports: report number 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 14, and 15. (T. 117-128)

Ms. Hallom testified that Petitioner was non-compliant in report #11 because she was unable to verify applications and communications with the employers (T. 121) Ms. Hallom testified that Petitioner was non-compliant in report #13 because Petitioner did not follow up with the vocational case manager provided job leads and that the leads were unverifiable in her email and/or Indeed account. (T. 122) Ms. Hallom testified that Petitioner was non-compliant in report #16 because Petitioner declined a prior authorization nurse position at Centene due to the location of the position and declined correspondence with employers who offered part time jobs. (T. 123) Ms. Hallom testified that she did not document this but encouraged Petitioner to take a part time job. *Id.* Ms. Hallom testified that Petitioner was non-compliant in report #17 because she allegedly had two offers but she was unable to verify the applications. (T. 128)

Ms. Hallom testified that after this report, she recommended 10 more vocational rehabilitation sessions. *Id*. She testified that she never contacted Petitioner after the last report, report #17, to notify Petitioner that TRISTAR closed her vocational rehabilitation services. (T. 131) Ms. Hallom also testified that she did not document any formal job offers. *Id*.

CONCLUSIONS OF LAW:

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law set forth below.

Decisions of an Arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e). The burden of proof is on a claimant to establish the elements of his right to compensation, and unless the evidence considered in its entirety supports a finding that the injury resulted from a cause connected with the employment, there is no right to recover. *Board of Trustees v. Industrial Commission,* 44 Ill. 2d 214 (1969).

Credibility is the quality of a witness which renders his evidence worthy of belief. The Arbitrator, whose province it is to evaluate witness credibility, evaluates the demeanor of the witness and any external inconsistencies with his testimony. Where a claimant's testimony is inconsistent with his

actual behavior and conduct, the Commission has held that an award cannot stand. *McDonald v. Industrial Commission,* 39 Ill. 2d 396 (1968); *Swift v. Industrial Commission,* 52 Ill. 2d 490 (1972).

It is the function of the Commission to judge the credibility of the witnesses and to resolve conflicts in the medical evidence and assign weight to witness testimony. *O'Dette v. Industrial Commission*, 79 Ill.2d 249, 253, 403 N.E.2d 221, 223 (1980); *Hosteny v. Workers' Compensation Commission*, 397 Ill. App. 3d 665, 674 (2009). Internal inconsistencies in a claimant's testimony, as well as conflicts between the claimant's testimony and medical records, may be taken to indicate unreliability. *Gilbert v. Martin & Bayley/Hucks,* 08 ILWC 004187 (2010).

In the case at hand, the Arbitrator observed Petitioner during the hearing and found him to be a credible witness. Petitioner was calm, well-mannered, and composed. The Arbitrator compared Petitioner's testimony with the totality of the evidence submitted and did not find any material contradictions that would deem the witness unreliable.

WITH RESPECT TO ISSUE (F), IS PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that Petitioner's current left shoulder DVT and venous claudication is causally related to her work injury. Petitioner's treating doctors, as well as Dr. Yanke, noted that Petitioner's left shoulder DVT and venous claudication diagnoses were causally connected to her August 19, 2016, injury. Furthermore, Dr. Thometz placed Petitioner on permanent restrictions for left shoulder neuropathic pain as well as other restrictions.

As such, the Arbitrator finds that Petitioner's current condition of ill-being was casually related to the August 19, 2016, work-related accident.

WITH RESPECT TO ISSUE (G), WHAT WERE PETITIONER'S EARNINGS, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that in review of Petitioner's wage statement, Petitioner earned $75,404.62 from July 31, 2015, through July 31, 2016, a period of 52 weeks. (RX 2) Per Section 10 of the Act, the average weekly wage ("AWW") refers to the "actual earnings of the employee in the employment in which he was working at the time of the injury during the period of 52 weeks ending with the last day of the employee's last full pay period immediately preceding the date of injury, illness or disablement excluding overtime, and bonus divided by 52…". *820 ILCS 305/10*.

The parties indicated at trial that there was no underpayment or overpayment of benefits during the period Petitioner was off work from August 20, 2016, through September 30, 2021. (T. 6-8) As overtime was not mandatory nor continuous, any overtime pay would not count towards Petitioner's AWW calculation pursuant to Section 10 of the Act. Therefore, after dividing Petitioner's earnings of $75,404.62 by 52 weeks, the Arbitrator finds that Petitioner's AWW to be $1,450.09.

WITH RESPECT TO ISSUE (L), WHETHER PETITIONER IS ENTITLED TO ANY TEMPORARY TOTAL DISABILITY BENEFITS, THE ARBITRATOR FINDS AS FOLLOWS:

Under Illinois law, temporary total disability is awarded for the time period between when an injury incapacitates the petitioner to the date the petitioner's condition has stabilized or the petitioner has recovered to the amount the character of the injury will permit. *Whiteney Productions, Inc. v. Industrial Comm'n*, 274 Ill.App.3d 28, 30 (1995).

Based on the Arbitrator's finding that Petitioner's current condition of ill-being was caused by the August 19, 2016, work related accident, the Arbitrator finds that Petitioner is entitled to temporary total disability ("TTD") benefits. Petitioner credibly testified that she received full pay from Respondent until September 1, 2017, when she started to receive TTD payments.

Based on the Petitioner's testimony and the evidence presented, the Arbitrator finds that Petitioner was temporarily totally disabled from September 1, 2017, to February 26, 2020. Thus, the Arbitrator finds that Respondent shall pay Petitioner TTD benefits of $1,037.20 /week for 129 5/7 weeks, commencing September 1, 2017, through February 26, 2020, as provided in Section 8(b) of the Act.

WITH RESPECT TO ISSUE (O), WHETHER PETITIONER IS ENTITLED TO VOCATIONAL REHABILITATION AND MAINTENANCE BENEFITS, THE ARBITRATOR FINDS AS FOLLOWS:

A claimant is generally entitled to vocational rehabilitation when he or she sustains a work-related injury which causes a reduction in earning power and there is evidence that rehabilitation will increase their earning capacity. *Greaney v. Industrial Comm'n*, 358 Ill. App. 3d 1002, 1019, 295 Ill. Dec. 180, 832 N.E.2d 331 (2005). Because the primary goal of rehabilitation is to return the injured employee to work, if the injured employee has sufficient skills to obtain employment without further training or education, that factor weighs against an award of vocational rehabilitation. *National Tea Co. v. Industrial Comm'n*, 97 Ill. 2d 424, 432, 73 Ill. Dec. 575, 454 N.E.2d 672 (1983) citing to *Schoon v. Industrial Comm'n*, 259 Ill. App. 3d 587, 594, 197 Ill. Dec. 217, 630 N.E.2d 1341 (1994).

Even though Petitioner was cut off from vocational rehabilitation counseling and maintenance benefits as of September 30, 2021, the Arbitrator notes that Ms. Hallom believed that Petitioner was still a candidate for vocational rehabilitation. (T. 107, RX 3)

The Arbitrator notes that Ms. Hallom failed to present evidence of either job offer at hearing or in her reports. (T.129) She also failed to present evidence of a job description, or any type of formal job offer, to confirm whether such offer was made and rejected by Petitioner. (T. 25)

Based on the above, the Arbitrator finds that Respondent shall provide further vocational rehabilitation as recommended by Ms. Hallom as provided in Section 8(a) of the Act. Furthermore, Respondent shall reinstate Petitioner's maintenance benefits as of the date of cutoff, September 30, 2021, pursuant to Section 8(a) of the Act.

Antara Nath Rivera, Arbitrator