

ILLINOIS WORKERS' COMPENSATION COMMISSION
DECISION SIGNATURE PAGE

Case Number	09WC044138
Case Name	Kenneth R Berglind v. City of Chicago Department of Transportation/Bridges
Consolidated Cases	
Proceeding Type	8(a)/19(h) Petition
Decision Type	<i>Corrected</i> Decision
Commission Decision Number	23IWCC0325
Number of Pages of Decision	3
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Arnold Rubin
Respondent Attorney	Craig Scarpelli

DATE FILED: 8/3/2023

/s/Maria Portela, Commissioner

Signature

STATE OF ILLINOIS)	<input type="checkbox"/> Affirm and adopt (no changes)	<input type="checkbox"/> Injured Workers' Benefit Fund (§4(d))
) SS.	<input type="checkbox"/> Affirm with changes	<input type="checkbox"/> Rate Adjustment Fund (§8(g))
COUNTY OF COOK)	<input type="checkbox"/> Reverse	<input type="checkbox"/> Second Injury Fund (§8(e)18)
		<input type="checkbox"/> Modify	<input type="checkbox"/> PTD/Fatal denied
			<input checked="" type="checkbox"/> None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KENNETH BERGLIND,

Petitioner,

vs.

NO: 09 WC 44138
23IWCC0325

CITY OF CHICAGO,

Respondent.

CORRECTED DECISION AND OPINION ON
PETITION PURSUANT TO §19(h) OF THE ACT

This matter comes before the Commission on Petitioner's 19(h) Petition, filed on July 8, 2020, requesting an award of a wage differential pursuant to Section 8(d)1 of the Act. A hearing was held before Commissioner Portela on January 18, 2023, in Chicago, Illinois, and a record was made.

Petitioner asserts he is entitled to a wage differential award based on the results of the labor market survey and his current condition of ill-being. Petitioner underwent bilateral shoulder replacements and following an FCE, was given permanent restrictions that prevented him from returning to his previous profession as a union ironworker. The labor market survey determined that Petitioner was best suited for positions such as that of a welder, fabricator and construction supply salesperson and that he was employable at a mean entry-level of \$20.87 per hour. During the 19(h) hearing, counsel for Respondent did not cross-examine Petitioner and stipulated that the amount Petitioner could earn based on the labor market survey was \$800 per week (Rx1) versus the \$2232.40 per week Petitioner would have earned had his injuries not disabled him from returning to his pre-accident job as a union ironworker. (Px13)

Although the wage differential calculation would entitle Petitioner to an award of \$954.93 per week, a wage differential award is capped by the maximum state average weekly wage in effect on the date of accident. In this case, the maximum state average weekly wage on the accident date of September 14, 2009 is \$932.25. Accordingly, Petitioner is entitled to an award of \$932.25 per week.

Section 8(d)1 states:

(d) 1. 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.

As Petitioner's accident occurred prior to 2011, the limitation of "the age of 67 or 5 years from the date the award becomes final", is not applicable, but rather the award of a wage differential shall be for the "the duration of the disability." Per the parties' stipulation, this disability shall begin on January 19, 2023, the date after the hearing on Petitioner's 19(h) Motion. Additionally, temporary total disability benefits should terminate as of January 18, 2023.

Based on the foregoing, the Commission enters an award finding that Petitioner is entitled to receive temporary total disability benefits from April 17, 2019 through January 18, 2023, with Respondent receiving credit for any payments made, and a wage differential award in the amount of \$932.25 per week, beginning on January 19, 2023 for the duration of the disability.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Petition under §19(h) is hereby granted as outlined above.

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

MEP/dmm
O: 061323
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/s/ Maria E. Portela

/s/ Amylee H. Simonovich

/s/ Kathryn A. Doerries

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	<i>Corrected</i> Decision
Commission Decision Number	<i>Corrected 23IWCC0375</i>
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)

<input checked="" type="checkbox"/> Affirm and adopt (no changes)	<input type="checkbox"/> Injured Workers' Benefit Fund (§4(d))
<input type="checkbox"/> Affirm with changes	<input checked="" type="checkbox"/> Rate Adjustment Fund (§8(g))
<input type="checkbox"/> Reverse	<input type="checkbox"/> Second Injury Fund (§8(e)18)
<input type="checkbox"/> Modify	<input type="checkbox"/> PTD/Fatal denied
	<input type="checkbox"/> 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

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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	16WC007932
Case Name	Maria Rodriguez v. Executive Mailing Services
Consolidated Cases	
Proceeding Type	
Decision Type	<i>Corrected</i> 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

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

<input type="checkbox"/>	Injured Workers' Benefit Fund (§4(d))
<input checked="" type="checkbox"/>	Rate Adjustment Fund (§8(g))
<input type="checkbox"/>	Second Injury Fund (§8(e)18)
<input type="checkbox"/>	None of the above

**ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION**

Maria Rodriguez
Employee/Petitioner

Case # **16 WC 007932**

v.

Consolidated cases: _____

Executive Mailing Services
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 **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.



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 November 12, 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 follows¹:

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