**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 22WC021127 |
| Case Name | Toby Dearmond v.<br>United Ironworkers |
| Consolidated Cases | |
| Proceeding Type | Petition for Review under 19(b)<br>Remand Arbitration |
| Decision Type | Commission Decision |
| Commission Decision Number | 23IWCC0513 |
| Number of Pages of Decision | 15 |
| Decision Issued By | Amylee Simonovich, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Eric Kirkpatrick |
| Respondent Attorney | Miles Cahill |

DATE FILED: 12/5/2023

/s/Amylee Simonovich, 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

TOBY DEARMOND,

Petitioner,

vs. NO: 22 WC 21127

UNITED IRONWORKERS,

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 causal connection, medical expenses, and prospective medical, 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 April 17, 2023, 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 $4500.00. 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.

**December 5, 2023**
O110723
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 | 22WC021127 |
| Case Name | Toby Dearmond v. United Ironworkers |
| Consolidated Cases | |
| Proceeding Type | 19(b) Petition |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 12 |
| Decision Issued By | Linda Cantrell, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Eric Kirkpatrick |
| Respondent Attorney | Miles Cahill |

DATE FILED: 4/17/2023

**THE INTEREST RATE FOR THE WEEK OF APRIL 11, 2023 4.79%**

/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)**

**Toby Dearmond**
Employee/Petitioner

v.

**United Ironworkers**
Employer/Respondent

Case # **22** -WC-**021127**

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 8, 2023**. 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, **1/28/21**, 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 $**86,320.00**; the average weekly wage was $**1,660.00**.

On the date of accident, Petitioner was **42** years of age, ***married*** with **1** 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**.

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 medical expenses outlined in Petitioner's Exhibit 7, as provided in Sections 8(a) and 8.2 of the Act, pursuant to the medical fee schedule, except any and all bills related to Petitioner's right knee which Petitioner is not claiming was injured as a result of the work accident on 1/28/21. Specifically, Respondent is not liable for payment of medical expenses related to services provided on 1/31/23 at MRI Partners of Chesterfield in the amount of $5,957.23. Respondent shall receive credit for any and all medical expenses paid through its group medical plan, pursuant to Section 8(j) of the Act and the stipulation of the parties.

Respondent shall authorize and pay for prospective medical treatment recommended by Dr. Gornet, including, but not limited to, a three-level disc replacement versus a fusion at L5-S1 with replacements at L3-4 and L4-5, and any preoperative and postoperative treatment 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.

APRIL 17, 2023

Arbitrator Linda J. Cantrell

ICArbDec19(b)

**STATE OF ILLINOIS )**
**) SS**
**COUNTY OF WILLIAMSON )**

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

| | | |
|---|---|---|
| TOBY DEARMOND, | ) | |
| | ) | |
| Employee/Petitioner, | ) | |
| | ) | |
| v. | ) | Case No.: 22-WC-021127 |
| | ) | |
| UNITED IRONWORKERS, | ) | |
| | ) | |
| Employer/Respondent. | ) | |

## FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Herrin on March 8, 2023, pursuant to Section 19(b) of the Act. The parties stipulated that Petitioner sustained accidental injuries that arose out of and in the course of his employment with Respondent on 1/28/21. The parties stipulated that Respondent is entitled to a credit for any and all medical expenses paid through its group medical plan, pursuant to Section 8(j) of the Act.

The issues in dispute are causal connection, medical bills, and prospective medical care. All other issues have been stipulated.

## TESTIMONY

Petitioner was 42 years old, married, with one dependent child at the time of accident. Petitioner was a working foreman for Respondent. He testified that on 1/28/21 he stepped off a rafter and slipped on ice on the concrete. He fell backward and landed on his back and buttocks. He also landed on a safety ring attached to his harness. Petitioner testified he never had back pain prior to 1/28/21. Immediately after the accident he had a lot of low back pain and a little higher where he landed on the harness ring. His buttocks and upper thighs were numb. Petitioner testified he finished working his shift.

Petitioner reported his injury and Respondent referred him to Dr. Nathan Mall for treatment. Petitioner testified he continued to have symptoms until he saw Dr. Mall in March 2021. He underwent physical therapy at API Physical Therapy but could not complete it because his job location changed. In April 2021, Dr. Mall told him he did not require further treatment. Petitioner testified he continued to have low back pain with a shocking sensation in his buttocks and upper thighs that would come and go. He continued to work full duty as a foreman which

mostly involved supervising. He testified he does not work out of the union hall and is a supervisor for Respondent.

Petitioner testified that prior to seeing Dr. Gornet, Respondent told him to "take it easy". His boss assigned him to a project as a working foreman and he had to perform the physical duties of an ironworker. He testified he could not do the work and it caused severe shocking pain and numbness down his legs, his back felt like it was on fire, and he could not sleep or hardly walk. He testified that he would urinate himself when he sneezed. He believes the work assignment occurred a couple of months prior to him treating with Dr. Gornet.

Dr. Gornet prescribed additional physical therapy that Petitioner underwent through approximately March 2022. Petitioner underwent three injections by Dr. Blake that provided immediate but temporary relief. Dr. Gornet recommended a fusion at L5-S1 and disc replacements at L3-4 and L4-5. Petitioner was referred to Dr. O'Boynick for a Section 12 examination.

Petitioner continued to work full duty as a supervising foreman until he was prescribed light duty restrictions by Dr. Gornet in February 2023. Petitioner testified that Dr. Gornet put him on restrictions at that time because Respondent had him working, lifting miner panels over his head, and carrying sheets which he could not do. He denied any new accident that prompted restrictions.

Petitioner testified he cannot bend down to tie his shoes. He desires to undergo surgery recommended by Dr. Gornet. He testified that if he lost his job with Respondent as a foreman/supervisor, he would have to return to the union hall and sign up for jobs as a worker. He testified that the union hall will not assign jobs to ironworkers that are under restrictions.

On cross-examination, Petitioner agreed he told Dr. Mall his recreational activities included boating, riding, hiking, and riding a side-by-side. He agreed he told Dr. Mall in April 2021 he was back to riding a side-by-side and he boated with his boss. He did not recall Dr. Mall advising him he should not engage in those activities due to his back condition. Petitioner testified that Dr. Mall initially placed him on restrictions of no pushing or pulling over 20 pounds and released him to full duty on 4/21/21.

Petitioner testified he does not know where the history on the MRI report came from that stated the onset of an accident in February 2021. He testified the only accident he sustained was on 1/28/21. Petitioner takes a pain pill, muscle relaxer, and Ibuprofen daily. He testified that Dr. Gornet did not change his medication or order new diagnostic studies when he put him on light duty restrictions.

Petitioner testified he was in a car accident in October 2022 that caused injury to his right knee. He testified he underwent an MRI and an injection in his right knee on 1/31/23. He did not go to the hospital but treated with Dr. Bradley. Petitioner testified that Dr. Bradley did not place him on work restrictions because he told him he was a non-working foreman. He stated that Dr. Bradley would have prescribed restrictions if he had to perform labor. Dr. Bradley did not order

physical therapy. He testified he also treated with his primary care physician, Dr. Danielle Klump, for a stiff neck following the car accident. She did not prescribe any work restrictions.

Petitioner testified he has not been boating with his boss in a couple of years. He testified he did not have to lift anything when he was boating. He testified he never sustained any injuries or accidents while riding a side-by-side.

## MEDICAL HISTORY

On 3/29/21, Petitioner was examined by Dr. Nathan Mall at the referral of Respondent. (PX1). Petitioner reported he stepped off a 10-inch rafter and fell backward onto the ice. Dr. Mall reported Petitioner fell directly onto his back rather than his buttock area. Petitioner reported his pain was getting worse, with a shocking sensation into his buttocks, and no symptoms down his legs. Dr. Mall noted Petitioner was an ironworker and was hired by Respondent in 2015. He worked over 40 hours per week connecting steel, installing tiny bolts, pulling up wall sheets, running screw guns, lifting steel, etc.

Dr. Mall noted Petitioner had no history of lumbar problems and was working his regular job prior to 1/28/21. He ordered a lumbar x-ray that revealed a 2 to 3-mm anterior compression fracture at L5. He performed a physical examination and diagnosed a lumbar sprain and an age indeterminant L5 compression fracture. He opined that a compression fracture would be more likely to occur from a forwardly flexed position with axial compression. He noted Petitioner landed directly on his back and rolled onto his buttock during the accident. Dr. Mall stated that although Petitioner denied any prior accidents, he had other risk factors for a compression fracture such as boating and side-by-side riding.

Dr. Mall recommended a steroid pack, anti-inflammatories, and three weeks of physical therapy. He opined that the work injury was a factor in the development of his current lumbar spine complaints and the need for treatment. Petitioner was placed on light duty restrictions of no pushing or pulling over 20 pounds and no lifting over 20 pounds floor to waist.

Petitioner underwent physical therapy at ATI Physical Therapy from 4/1/21 through 4/12/21. (PX2) The discharge summary indicated Petitioner continued to present with impairments involving strength, pain, and lifting mechanics that limited his ability to lift from the floor, operate heavy machinery and power tools, pushing, pulling, twisting, turning, and shoveling. It was noted Petitioner was a foreman with medium demand level.

On 4/21/21, Dr. Mall noted Petitioner was doing very well. He noted Petitioner had been back to doing his normal job duties and was doing well with some dead lifts. Dr. Mall noted Petitioner had some tightness in his back but otherwise he had no problems. He noted Petitioner's "shocking" pain resolved. Examination was normal and Petitioner was placed at MMI without restrictions.

On 1/3/22, Petitioner was examined by Dr. Matthew Gornet. (PX4) Petitioner complained of bilateral low back pain and intermittent shocking pain in his bilateral buttocks and hips, with intermittent radiculopathy in his feet. Dr. Gornet reviewed Dr. Mall's records and noted

Petitioner's shocking pain improved but he continued to have back pain at that time. Dr. Gornet noted that as Petitioner resumed more normal activities and more significant lifting at work, the shocking pain returned. His symptoms progressed and became more significant two months ago and he has frequent symptoms into his feet. Petitioner reported no significant low back problems prior to 1/28/21, but he did undergo chiropractic care with the last treatment a couple of years prior to his work accident.

Dr. Gornet ordered a lumbar MRI that was performed that day and revealed some degeneration at L3-4, L4-5, and S-1, a central disc annular tear at L5-S1, a central disc at L3-4 with a tear, and a central disc tear at L4-5. (PX3) Dr. Gornet recommended anti-inflammatories with Meloxicam, physical therapy, and injections. He opined that Petitioner's fall aggravated an underlying asymptomatic degenerative condition, with a suggestion of disc injuries at L3-4, L4-5, and L5-S1. He opined that Petitioner could work full duty.

On 6/6/22, Dr. Gornet noted Petitioner underwent epidural steroid injections by Dr. Blake at L4-5, L3-4, and L5-S1, the last of which was in April 2022. (PX6) Petitioner reported temporary relief from the injections and his symptoms returned. He noted Petitioner continued to work full duty, but he had somewhat of a protected job. Dr. Gornet believed the only way to resolve Petitioner's symptoms was to operate at all three levels. He recommended a three-level disc replacement versus a fusion at L5-S1 with replacements at L3-4 and L4-5.

On 9/15/22, Petitioner returned to Dr. Gornet's office with unchanged symptoms. He had pain in both hips and buttocks and intermittent pain in his feet. Dr. Gornet ordered a CT scan that was performed that day and revealed no evidence of pathologic fracture or any contraindications to disc replacement. He noted the defect in the superior end-plate of L5 anteriorly. Petitioner stated his symptoms affected all aspects of his life and desired to undergo the recommended surgery. He was allowed to continue full duty work.

On 11/21/22, Petitioner returned to Dr. Gornet who advised he reviewed the Section 12 report of Dr. Chris O'Boynick. Dr. Gornet stated that he and Dr. O'Boynick agreed there was some level of disc degeneration and discogenic low back pain from L3 to S1. He noted that Dr. O'Boynick felt Petitioner's symptoms were related to his trauma at work and likely aggravated his pre-existing condition. Dr. Gornet did not believe a discography was necessary. Dr. Gornet continued to recommend surgery.

On 2/23/23, Dr. Gornet noted Petitioner had been working full duty as a supervisor. Petitioner reported he recently tried to return to regular work as an iron worker that caused severe pain. Dr. Gornet placed Petitioner on restrictions of no lifting over 20 pounds, no repetitive bending or lifting, and to alternate sitting and standing. He continued to recommend surgery.

The Arbitrator notes that Dr. O'Boynick's Section 12 report was not admitted into evidence.

## 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).

When a pre-existing condition is present, a claimant must show that "a work-related accidental injury aggravated or accelerated the pre-existing [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 pre-existing 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).

Respondent stipulated that Petitioner sustained accidental injuries on 1/28/21 that arose out of and in the course of his employment. There is no evidence that Petitioner had any low back issues or treatment prior to 1/28/21 and he was working full duty as a "working foreman" at the time of accident. As Dr. Mall summarized, Petitioner was an ironworker and was hired by Respondent in 2015. He worked over 40 hours per week connecting steel, installing tiny bolts, pulling up wall sheets, running screw guns, lifting steel, etc.

Petitioner treated with Dr. Mall through 4/21/21 at the referral of Respondent. He was placed on work restrictions and underwent physical therapy, a steroid pack, and anti-inflammatories. Petitioner was discharged from physical therapy on 4/12/21, nine days prior to his last visit with Dr. Mall. The therapist noted Petitioner continued to present with impairments involving strength, pain, and lifting mechanics that limited his ability to lift from the floor, operate heavy machinery and power tools, pushing, pulling, twisting, turning, and shoveling. It was noted that Petitioner was a foreman with medium demand level. On 4/21/21, Dr. Mall noted Petitioner was doing very well and he had returned to his normal activities. Dr. Mall noted

Petitioner's lumbar strain and shocking pain resolved and other than some tightness he had no problems. Petitioner was released at MMI without restrictions.

On 1/3/22, Dr. Gornet examined Petitioner for complaints of bilateral low back pain and intermittent shocking pain in his bilateral buttocks and hips, with intermittent radiculopathy in his feet. Dr. Gornet noted Petitioner attempted to resume his ironwork activities and the shocking pain returned. His symptoms progressed and began having significant symptoms two months ago with frequent symptoms into his feet. This is consistent with Petitioner's testimony that two months prior to treating with Dr. Gornet his boss assigned him to a project as a working foreman and he had to perform the physical duties of an ironworker. He testified he could not do the work and it caused severe shocking pain and numbness down his legs, his back felt like it was on fire, and he could not sleep or hardly walk. He testified that he would urinate himself when he sneezed. Petitioner testified that after his accident and up until he attempted the ironwork duties, his boss told him to "take it easy" and he was supervising.

Dr. Gornet ordered a lumbar MRI that revealed some degeneration at L3-4, L4-5, and S-1, a central disc annular tear at L5-S1, a central disc at L3-4 with a tear, and a central disc tear at L4-5. (PX3) Petitioner underwent additional physical therapy, anti-inflammatories, Meloxicam, and epidural steroid injections at L4-5, L3-4, and L5-S1, without improvement. Dr. Gornet did not place Petitioner on work restrictions until 2/23/23 when Petitioner reported he attempted to return to his regular duties as an ironworker and had to stop as it caused severe pain. Prior to that Dr. Gornet noted Petitioner had a "protected" job and did not require restrictions. Petitioner testified he did not sustain any new injury that prompted the work restrictions and there was no evidence introduced at arbitration of a new injury to Petitioner's lumbar spine.

Dr. Gornet noted conservative treatment failed to improve Petitioner's symptoms and he recommends a three-level disc replacement versus a fusion at L5-S1 with replacements at L3-4 and L4-5. Based on Dr. Gornet's summary of Dr. O'Boynick's Section 12 report, they both agree there was some level of disc degeneration and discogenic low back pain from L3 to S1. He noted that Dr. O'Boynick felt Petitioner's symptoms were related to his trauma at work and likely aggravated his pre-existing condition.

Illinois has had a long-standing legal rule: The failure of a party to produce testimony or evidence within that party's control creates a presumption that the evidence, if produced, would have been adverse to that party. Beery v. Breed, 311 Ill.App. 469, 474-78, 36 N.E.2d 591, 593-95 (2d Dist. 1941). It can be a clear error of law when the rule has not been applied. Kerns v. Lenox Machine Co., 74 Ill.App.3d 194,198-99, 392 N.E.2d 688, 692 (3d Dist. 1979); also see Antol v. Chavez-Pereda, 284 Ill.App.3d 561, 569, 672 N.E.2d 320, 326 (1st Dist. 1996).

Our Supreme Court has explicitly endorsed this long-standing rule. Schaffher v. Chicago & Northwestern Transp. Co, 129 Ill.2d 1, 22, 541 N.E.2d 643, 651 (1989). Both the Appellate Court and the Commission have held that a party's failure to call a witness or produce evidence within his control to contradict adverse testimony creates an inference that the evidence would have been unfavorable to the Respondent. REO Movers v. The Industrial Commission, 226 Ill. Ap. 3d 216 1st Dist. (1992); Barrett v. Central Grade School, 04 IIC 0631.

Rivera v Dutt, 19 IWCC 0180, addressed this identical issue in the context of partially missing video, containing the following quote from the original Andros opinion:
"In the case at bar, the Arbitrator, in his discretion, does make an adverse inference that Respondent's failure to produce the complete video of the workday of June 1, 2015 since the video was under Respondent's exclusive control and a reasonably prudent person would have produced the whole surveillance video if it were favorable to Respondent and no reasonable excuse was proffered." Citing IPI 5.01; see also Duoan v Weber, 175 Ill.App.3rd 1088, 530 N.E.2nd 1007 (1st Dist. 1988); and Kersey v Arrow Corp. 344 Ill.App.3rd 690, 800 N.E.2d 847 (2d. Dist. 2003).

Dr. Gornet opined that Petitioner's lumbar condition will not improve without surgery. There was no evidence introduced to rebut Dr. Gornet's opinions or recommendations following the lumbar MRI or to suggest that surgery is unreasonable or unnecessary. Petitioner testified that if it was not for Respondent accommodating his restrictions by allowing him to work as a non-working foreman, he would have to return to the union hall for an ironworker assignment, which he could not do with restrictions.

Based on the evidence as a whole, the Arbitrator finds that Petitioner's current condition of ill-being is causally connected to the work accident that occurred on 1/28/21.

**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 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).

Respondent did not offer the Section 12 report of Dr. O'Boynick into evidence. Based on Dr. Gornet's opinions and the Arbitrator's findings as to causation, Respondent shall pay the medical expenses outlined in Petitioner's Exhibit 7, as provided in Sections 8(a) and 8.2 of the Act, pursuant to the medical fee schedule, except any and all bills related to Petitioner's right knee which Petitioner is not claiming was injured as a result of the work accident on 1/28/21. Specifically, Respondent is not liable for payment of medical expenses related to services provided on 1/31/23 at MRI Partners of Chesterfield in the amount of $5,957.23. Respondent shall receive credit for any and all medical expenses paid through its group medical plan, pursuant to Section 8(j) of the Act and the stipulation of the parties.

The Arbitrator further finds Petitioner is entitled to receive the additional care recommended by Dr. Gornet. Despite conservative care, Petitioner has persistent symptoms that prevent him from returning to full duty work. The evidence supports that his symptoms are increased with physical activity which were not present prior to his work accident.

Therefore, Respondent shall authorize and pay for prospective medical treatment, including, but not limited to, a three-level disc replacement versus a fusion at L5-S1 with replacements at L3-4 and L4-5, and any preoperative and postoperative treatment 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**

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|---|---|
| Case Number | 18WC029379 |
| Case Name | Pedro Escutia Calderon v.<br>J&J Newell Concrete Contractor |
| Consolidated Cases | 19WC036280 |
| Proceeding Type | Petition for Review under 19(b)<br>Remand Arbitration |
| Decision Type | Commission Decision |
| Commission Decision Number | 23IWCC0514 |
| Number of Pages of Decision | 15 |
| Decision Issued By | Amylee Simonovich, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Michelle Porro |
| Respondent Attorney | Jeffrey Powell |

DATE FILED: 12/5/2023

/s/Amylee Simonovich, Commissioner

Signature

**23IWCC0514**

| | |
|---|---|
| STATE OF ILLINOIS ) | ☐ Affirm and adopt (no changes) |
| ) SS. | ☒ Affirm with changes |
| COUNTY OF COOK ) | ☐ 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

PEDRO ESCUTIA CALDERON,

Petitioner,

vs. NO: 18 WC 29379

J&J NEWELL CONCRETE CONTRACTOR,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under section 19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, prospective medical treatment, temporary total disability benefits, section 19(k) penalties, section 19(l) penalties, and section 16 attorney fees, and being advised of the facts and law, changes 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. 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).

Initially, the Commission seeks to correct the scrivener's error contained in the first paragraph of the Findings of Fact in the Decision of the Arbitrator. In said paragraph, the Arbitrator mistakenly noted that Petitioner's accident occurred on April 8, 2018. This is a clerical error. The Commission thus changes the above-referenced sentence to read as follows:

> Petitioner testified that while working for the employer on April 11, 2018, he was working with cement and putting up some plates for the sidewalks when his left knee twisted and popped.

Next, the Commission seeks to correct two scrivener's errors contained in the first paragraph of section (K) in the Decision of the Arbitrator. In this section, the Arbitrator mistakenly noted the maximum medical improvement ("MMI") date was October 2, 2018. Additionally, the Arbitrator referenced the accident date of the companion case number 19 WC 36280, mistakenly indicating it was October 14, 2018. These are also clerical errors. The Commission thus changes the above-referenced sentences to read as follows:

> Petitioner also claims he is entitled to prospective care subsequent to another claimed accident that allegedly occurred on October 14, 2019 that is the subject of case number 19 WC 36280. With regard to 18 WC 29379, Petitioner is not entitled to prospective care as he was found to be at MMI on October 2, 2019.

Lastly, the Commission vacates the sentence in the Order section of the Decision of the Arbitrator that reads:

> "Had nature and extent of the injury been an issue, the Arbitrator would have found permanency of 15% of a leg."

The Commission so vacates, as permanency was not at issue in this proceeding.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 31, 2022, as changed above, is hereby affirmed and adopted.

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner sustained an accident to his left knee on April 11, 2018 that arose out of and in the course of his employment with Respondent. Petitioner's two left knee surgeries are causally related to that date of accident.

IT IS FURTHER FOUND BY THE COMMISSION that Petitioner reached maximum medical improvement regarding the April 11, 2018 accident as of October 2, 2019.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent for the April 11, 2018 accident pay to Petitioner the sum of $1,158.79 per week for a period of 74 & 5/7ths weeks, representing May 2, 2018 through October 6, 2019, that being the period of temporary total incapacity for work under section 8(b), and that as provided in section 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.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have a credit of $118,322.07 for temporary total disability benefits paid to date.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's claims for section 19(k) penalties, section 19(l) penalties, and section 16 attorney fees are denied.

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

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 $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.

**December 5, 2023**

/s/*Stephen J. Mathis*

wde

O: 10/11/23

43

/s/*Deborah L. Simpson*

/s/*Amylee Simonovich*

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 18WC029379 |
| Case Name | Pedro Escutia Calderon v. J&J Newell Concrete Contractor |
| Consolidated Cases | |
| Proceeding Type | 19(b) Petition |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 11 |
| Decision Issued By | Charles Watts, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Michelle Porro |
| Respondent Attorney | Jeffrey Powell,<br>Zachary March |

DATE FILED: 8/31/2022

**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)**

**Pedro Escutia Calderon** Case # **18** WC **29379**
Employee/Petitioner

v.

**J&J Newell Concrete Contractor**
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 **Watts**, Arbitrator of the Commission, in the city of **Chicago**, on **October 14, 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. 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. ___ 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, 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 $**90,385.88**; the average weekly wage was $**1,738.19**.

On the date of accident, Petitioner was **52** years of age, ***married*** with **1** children under 18.

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

Respondent shall be given a credit of $**118,322.07** for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $**118,322.07**.

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

**ORDER**

The Arbitrator finds that Petitioner sustained an accident to his left knee on April 11, 2018 that arose out of and in the course of his employment with Respondent. The Arbitrator finds Petitioner's two left knee surgeries are casually related to that date of accident.

The Arbitrator finds Petitioner reached maximum medical improvement regarding the April 11, 2018 accident as of October 2, 2019. Had nature and extent of the injury been an issue, the Arbitrator would have found permanency of 15% of a leg.

Respondent for the April 11, 2018 accident is liable for TTD benefits from May 2, 2018 through October 6, 2019 and is given a credit for $118,322.07 for TTD benefits paid to date.

Petitioner's claim for penalties and attorneys' fees are 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.

**AUGUST 31, 2022**

Signature of Arbitrator

## FINDINGS OF FACT

**Testimony of Petitioner, Pedro Escutia Calderon**

Petitioner, a 52 year old male, was employed by the employer as a finisher and foreman. (Transcript, page 8; hereinafter referred to as "T.8"). In this position, Petitioner is required to finish the concrete to make sure orders are ready for the next day. (T.8). Petitioner testified that while working for the employer on April 8, 2018, he was working with cement and putting up some plates for the sidewalks when his left knee twisted and popped. (T.9). Petitioner confirmed that he reported the accident to Cary, the husband of the employer's president. (T.10). Petitioner advised he initially presented to Dr. Pinto who sent him to Silver Cross Hospital. (T.10). Petitioner testified that he was subsequently referred to Dr. David Mehl. (T.11). Throughout his treatment, Petitioner confirmed that Dr. Mehl performed two surgeries on his left knee. (T.11-12).

Petitioner testified that he was referred to Athletico for physical therapy. (T.12). He confirmed that Petitioner was released to return to work full duty without any restrictions as of October 7, 2019. (T.12). When he returned to work on October 7, 2019, Petitioner advised that he was in a little bit of pain. (T.12). He confirmed that when he returned to work on October 7, 2019, he was working again as a concrete finisher and foreman. (T.12). Petitioner did testify that during his first week back to work, he did leave a phone message for Dr. Mehl advising that his knee was still in some pain. (T.13).

Petitioner confirmed that he did see Dr. Levin and Dr. Forsythe for an IME. (T.19). Petitioner testified that he did not have any accidents between April 12, 2018 and October 7, 2019. (T.21).

On cross examination, Petitioner confirmed that he did sustain his first accident on April 11, 2018. (T.29). He confirmed that he twisted his left knee on that date and heard a pop. (T.29). He confirmed that he did return to work after undergoing two surgeries. (T.30

Petitioner confirmed that he did undergo a functional capacity evaluation at Athletico on September 25, 2019. (T.36). Petitioner confirmed that he did have some pain in his left knee prior to the examination and still only had some pain in his left knee after the evaluation. (T.39). Petitioner confirmed that he had some pain in his left knee prior to returning to work on October 7, 2019. (T.40). After he returned to work, he confirmed the pain in his knee was the same as it was prior to returning to work. (T.40). He confirmed that he called Dr. Mehl on October 11, 2019 because Dr. Mehl wanted to know if his pain did continue when returning to work. (T.41). Pursuant to Petitioner's testimony, it does not appear as though Petitioner's pain in his left knee increased in any way when he returned for that week of work.

**Medical Treatment**

Petitioner's presentation to Dr. Juan Pinto, an orthopaedic surgeon, at Parkview Orthopaedic Group on April 14, 2018. (Px. 3). Petitioner reported left knee pain with swelling for approximately two days. Significantly, Petitioner advised there was no history of trauma and this was not work related. He also noted intermittent minimal swelling in the left knee.

On physical examination, Petitioner's left knee demonstrated minimal swelling and tenderness at the medial aspect. Petitioner was assessed with pain in the left knee. Petitioner was provided with an injection to the left knee. Petitioner was advised to remain off of work. (Px. 3).

On April 18, 2018, Petitioner returned to Parkview Orthopaedic Group and was seen by Dr. David Mehl, an orthopaedic surgeon. (Px. 6). Petitioner advised that he is a cement finisher and works on his hands and knees all the time. Petitioner advised that he currently has left knee anterior pain after doing a recent job. It was noted Petitioner recently had pain and swelling and saw his family doctor. He went back to work, but his knee then became worse.

On physical examination, Petitioner had peripatellar swelling. He had full range of motion of the left knee. X-rays of Petitioner's knee were normal. Petitioner was assessed with left anterior soft tissue swelling consistent with prepatellar bursitis. Petitioner was advised to attend physical therapy and remain off of work. (Px. 6).

On April 26, 2018, Petitioner underwent an MRI of his left knee. (Px. 6). The MRI demonstrated large knee joint effusion, a horizontal cleavage tear of the posterior horn at the medial meniscus, extensive full thickness cartilage loss in the medial compartment of the knee and a grade 1 sprain of the medial collateral ligament.

On May 24, 2018, Petitioner underwent surgery to his left knee. (Px. 6). Petitioner was pre-operatively diagnosed with left knee traumatic medial meniscus tear and left knee post traumatic chondromalacia. Petitioner underwent a left knee arthroscopy, diffuse chondroplasty, partial medial meniscectomy and loose body removal.

After undergoing surgery, Petitioner attended physical therapy at a frequency of three times per week for four weeks. He returned to see Dr. Mehl on May 30, 2018. Petitioner advised that he was doing well. Dr. Mehl requested Petitioner continue to attend physical therapy. (Px. 6).

While continuing to attend physical therapy at Athletico Physical Therapy, Petitioner continued to treat with Dr. Mehl. As of August 27, 2018, Dr. Mehl advised Petitioner to remain off of work while he was recovering from his knee surgery. (Px. 6).

Petitioner continued to be held off work by Dr. Mehl. On September 24, 2018, Petitioner underwent a functional capacity evaluation at One Call Care Physical Therapy. The functional capacity evaluation demonstrated Petitioner was able to perform at the light-medium physical demand level. (Px. 6).

On October 1, 2018, Petitioner began work conditioning at Athletico Physical Therapy. As of that date, Petitioner was able to perform only one out of his 10 job demands. (Px. 12).

Petitioner returned to see Dr. Mehl on October 10, 2018. (Px. 6). It was noted Petitioner was approximately five months post left knee arthroscopy. As of that date, Petitioner had attended work conditioning for one week.

On physical examination, Petitioner's left knee demonstrated moderate crepitus throughout motion. Dr. Mehl recommended Petitioner complete his work conditioning and then undergo another functional capacity evaluation. Petitioner was advised to return in three weeks and remain off of work at that time. (Px. 6).

On October 12, 2018, Petitioner was able to complete two of the 11 job demands during his work conditioning at Athletico Physical Therapy. (Px. 12).

Petitioner returned to see Dr. Mehl on October 31, 2018. (Px. 6). It was noted Petitioner did have an IME scheduled with Dr. Jay Levin on November 7, 2018. On physical examination, Petitioner's left knee demonstrated range of motion from 0-130 degrees. It was recommended Petitioner return after undergoing the IME.

Petitioner did undergo the IME with Dr. Levin on November 7, 2018. Petitioner underwent an updated MRI of his left knee at Corporate Woods Open MRI. The updated MRI of Petitioner's left knee demonstrated a possible small linear tear of the posterior horn of the lateral meniscus along the inferior surface.

After receiving the updated MRI and Petitioner's prior MRI from Silver Cross Hospital, Dr. Levin drafted an addendum IME report dated January 25, 2019. With regard to his opinions, he diagnosed Petitioner as status post left knee arthroscopy with partial medial meniscectomy, chondroplasty and removal of loose body. He noted Petitioner currently had a linear tear of the posterior horn of the lateral meniscus. He noted that while this can be post operative, it is his opinion that it is causally related to the April 11, 2018 injury.

Specifically, Dr. Levin notes that during Petitioner's surgery for the medial meniscal tear, it was noted the lateral meniscus was fraying and was smoothed out in order to repair same. It appears that the initial fraying turned into a tear as evidenced by Petitioner's November 7, 2018 MRI. Dr. Levin believes that the fraying and subsequent tear is causally related to the April 11, 2018 injury. That is why Dr. Levin uses the term "recurrent" tear regarding the lateral meniscus.

He recommended Petitioner undergo a left knee arthroscopy with partial lateral meniscectomy. He believed Petitioner should undergo approximately 12 physical therapy visits. Dr. Levin confirmed that Petitioner's treatment to date has been reasonable and necessary.

Petitioner returned to see Dr. Mehl on April 10, 2019. (Px. 6). It was noted Petitioner had been approved to undergo a second surgery to the left knee. Dr. Mehl advised Petitioner was found to have lateral and meniscus tears show up after he had the previous surgery. It was believed Petitioner re-injured the knee either at work or during therapy.

On April 16, 2019, Petitioner underwent surgery to repair the medial meniscal injury and lateral meniscal injury. Following surgery, Petitioner returned to see Dr. Mehl on April 22, 2019. Following examination, it was recommended Petitioner attend physical therapy and remain off of work. (PX. 6).

As of Petitioner's visit with Dr. Mehl on May 6, 2019, it was noted Petitioner had completed two weeks of physical therapy. Petitioner advised his pain had improved. However, he was still walking slowly and his knee buckled occasionally when he walked. Physical examination of Petitioner's left knee demonstrated mild knee effusion. It was again recommended Petitioner continue with physical therapy and remain off of work. (Px. 6).

Petitioner continued to follow up with Dr. Mehl. As of his visit on June 17, 2019, Petitioner advised his left knee has continued to improve with physical therapy. Petitioner confirmed he was able to walk for approximately 20 minutes before feeling any pain. On physical examination, Petitioner had no tenderness to palpation at the medial or lateral joint line. His McMurray's test was negative at the medial and lateral meniscus, respectively. Petitioner was advised to continue with physical therapy and to undergo a Synvisc injection. (Px. 6).

Petitioner returned to see Dr. Mehl on July 15, 2019. (Px. 6). Petitioner again confirmed that he had been improving since his previous visit due to physical therapy. Petitioner's physical examination of his left knee did not reveal any pain or tenderness. It was recommended Petitioner begin work conditioning for four weeks. He was advised to continue to remain off of work.

On September 25, 2019, Petitioner underwent a functional capacity evaluation at Athletico Physical Therapy. (Px. 12). The functional capacity evaluation noted Petitioner was able to perform 23.8% of his job demands as a cement finisher. It was noted Petitioner was able to perform at the light physical demand level.

Petitioner returned to see Dr. Mehl on October 2, 2019. (Px. 6). Dr. Mehl opined Petitioner had reached MMI. Dr. Mehl confirmed he completely disagreed with the functional capacity evaluation. He believed Petitioner could return to regular work with the use of a hinged knee brace. He noted Petitioner's examination of his left knee demonstrated no ligament laxity. There was also no pain to palpation of the left knee. He allowed Petitioner to return to work full duty without any restrictions other than wearing the hinged knee brace. He advised Petitioner could return to the clinic if needed for a Synvisc or cortisone injection of the left knee.

**Physician's Opinions and Depositions**

**Dr. David Mehl, Petitioner's Treating Physician**

On June 9, 2020, Dr. Mehl, Petitioner's treating physician, drafted a narrative report regarding this claim. In his narrative report, Dr. Mehl opined Petitioner sustained a new progressive tear of the medial meniscus. Dr. Mehl opined that Petitioner's April 11, 2018 accident caused the need for Petitioner's first two knee surgeries.

Dr. Mehl was deposed by all of the parties on April 12, 2021. (Px. 1). In his deposition, Dr. Mehl confirmed it was his opinion that Petitioner's April 11, 2018 accident caused the need for Petitioner's first two surgeries. He confirmed Petitioner was at MMI with regard to the April 11, 2018 accident as of October 2, 2019. (Px. 1).

**Dr. Jay Levin, IME Physician**

The deposition of Dr. Jay Levin was taken on June 21, 2021. (Rx. Amerisure 7). Dr. Levin opined that Petitioner's April 11, 2018 accident caused the need for his first two surgeries to the left knee. Dr. Levin opined that Petitioner sustained a new accident on October 14, 2019 that caused a new tear to Petitioner's left knee medical meniscus.

The Arbitrator notes Dr. Levin's opinions support the opinions of Petitioner's treating physician, Dr. Mehl.

**CONCLUSIONS OF LAW**

**(F) IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?**

In a workers' compensation claim, the claimant has the burden of providing, by a preponderance of the evidence, some causal relation between his employment and his injury. *Mansfield v. Illinois Workers' Compensation Comm'n*, 999 N.E. 2d 832 (2nd Dist. 2013). In the current case, there is no dispute that Petitioner sustained an accident on April 11, 2018. The Arbitrator has reviewed all the opinions provided by Petitioner's treating physician and the three IME physicians. All four of the physicians deposed in this matter have opined that Petitioner's April 11, 2018 accident and injury to his left knee caused the need for Petitioner's two surgeries in this matter. Therefore, the Arbitrator adopts and agrees with the findings and opinions of all four physicians in this matter. The Arbitrator finds that the need for the two surgeries that Petitioner has already undergone in this matter are causally related to the April 11, 2018 accident.

According to his testimony, Petitioner confirmed that he was released to return to work full duty without any restrictions during his appointment with Dr. Mehl on October 2,

2019. Petitioner confirmed that Dr. Mehl found him at MMI as of that date. Therefore, no additional treatment was recommended for Petitioner. Petitioner testified that he did return to work on October 7, 2019. He admitted that he did have some pain when he returned to work on October 7, 2019. He confirmed that his work during the week of October 7, 2019 did not increase any of his minimal pain. He also confirmed that he did not have any swelling in his left knee when he was released to return to work. Petitioner further confirmed that he did not have any swelling in his knee during the week of work that began on October 7, 2019.

In his testimony, Petitioner confirmed that he did sustain a new accident on October 14, 2019. Petitioner credibly testified that on October 14, 2019, he was working when his left knee twisted and he heard a pop. Petitioner confirmed that he had an immediate increase in pain in his left knee and immediate swelling. The Arbitrator again notes that Petitioner did not have any swelling in his knee prior to October 14, 2019.

Petitioner credibly testified that since October 14, 2019, he has had a permanent increase in pain and permanent increase in swelling. He confirmed that his knee has never gone back to baseline of what it was prior to October 14, 2019. Petitioner confirmed that he did undergo an MRI of his left knee on November 8, 2019. The Arbitrator notes the MRI did demonstrate a progressive new tear of his medial meniscus. The Arbitrator notes that a third surgery has now been recommended for Petitioner's left knee.

The Arbitrator first examines the medical records, opinions and deposition transcript of Petitioner's treating physician, Dr. Mehl. The Arbitrator notes that Dr. Mehl has been treating Petitioner since soon after his April 11, 2018 accident. The Arbitrator notes that Dr. Mehl is the physician that performed both of Petitioner's surgeries to his left knee. Pursuant to his longstanding history with treating Petitioner, the Arbitrator does provide greater weight to the opinions of Dr. Mehl than compared to the other physicians who only served as IME physicians.

In his deposition, Dr. Mehl confirmed that Petitioner did reach MMI as of October 2, 2019. Dr. Mehl advised that although the functional capacity evaluation did not demonstrate that Petitioner could return to work full duty without any restrictions, Dr. Mehl's own physical examination of Petitioner demonstrated that Petitioner could return to work full duty without any restrictions. In fact, the Arbitrator notes that Petitioner did return to full duty work for the employer as of October 7, 2019 and only had a minimal amount of pain in his left knee during that week.

The Arbitrator next turns to Dr. Levin, one of the IME physicians in this matter. Dr. Levin testified that he agreed completely with the opinions of Petitioner's treating physician, Dr. Mehl. Dr. Levin testified that Petitioner did reach MMI as of October 2, 2019.

As noted above, the Arbitrator does provide greater weight to the testimony and opinions of Petitioner's treating physician, Dr. Mehl, as Dr. Mehl has treated Petitioner since the April 11, 2018 accident. The The Arbitrator further notes that Dr. Mehl would be in the best position to determine whether Petitioner had reached MMI as of October 2, 2019.

The Arbitrator does acknowledge that Petitioner underwent a FCE on September 25, 2019 that demonstrated he could not perform all of his job duties. Although the FCE therapist did not recommend Petitioner return to work full duty, the Arbitrator notes Petitioner's alleged ability to return to work has no bearing on whether Petitioner reached MMI. The Arbitrator notes there are several occasions when a claimant is provided with work restrictions and found to be at MMI. Additionally, just because Petitioner still had some pain in his left knee when he returned to work on October 7, 2019 does not mean Petitioner had not reached MMI. The Arbitrator agrees with Dr. Mehl that Petitioner reached MMI as of October 2, 2019.

**(K) IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE?**

Petitioner underwent two surgeries that were causally related to the April 11, 2018 accident. These two surgeries were approved and paid for by Respondent and encompass the entirety of injuries claimed under case number 18 WC 29379. Petitioner also claims he is entitled to prospective care subsequent to another claimed accident that allegedly occurred on October 14, 2018 that is the subject of case number 19 WC 36280. With regard to 18 WC 29379, Petitioner is not entitled to prospective care as he was found to be at MMI on October 2, 2018.

Nature and extent of the injury was not a disputed issue on the Request for Hearing form for 18 WC 29379 (Arb. Ex. 1). Had the Arbitrator been asked to decide this issue, an analysis of the testimony, medical record, and the five factors contained in the Act would yield a permanency finding of 15% of a leg.

**(L) WHAT TEMPORARY BENEFITS ARE IN DISPUTE? TTD?**

TTD benefits were paid from May 2, 2018 through October 6, 2019. The Arbitrator notes that Petitioner was paid TTD benefits during that entire period of time by the insurance carrier representing the employer for the April 11, 2018 accident.

The Arbitrator notes that the insurance carrier representing the employer for the April 11, 2018 accident has paid $118,322.07 in TTD benefits to Petitioner to date. Pursuant to the Arbitrator's findings in Section (F) above, the Arbitrator finds that the insurance carrier representing the employer for the April 11, 2018 accident is only liable to Petitioner for TTD benefits from May 2, 2018 through October 6, 2019, a total of 74 5/7 weeks. At Petitioner's TTD rate of $1,158.79, this equates to an award of $86,578.17.

As mentioned above, the Arbitrator finds that the insurance carrier representing the employer for the April 11, 2018 accident does have a credit in the amount of $118,322.07 for TTD benefits paid to Petitioner to date. As the insurance carrier representing the employer for the April 11, 2018 accident is only liable for TTD benefits in the amount of $86,578.17 for the period of time from May 2, 2018 through October 6, 2019, the insurance carrier for the April 11, 2018 date of accident will have a credit to be applied toward PPD benefits. Specifically, the insurance carrier representing the employer for the April 11, 2018 accident will have a credit in the amount of $31,743.90.

**(M) SHOULD PENALTIES OR FEES BE IMPOSED UPON RESPONDENT?**

The Arbitrator incorporates his findings contained in the sections above. The Arbitrator notes that the insurance carrier representing the employer for the April 11, 2018 accident reasonably relied upon the opinions of Petitioner's treating physician, Dr. Mehl, and Dr. Levin. Two surgeries were approved and performed, medical bills were paid, and TTD was issued. The Arbitrator finds the insurance carrier representing the employer in the April 11, 2018 accident did not act unreasonably or vexatiously in this matter. Therefore, Petitioner's request for attorney's fees against the insurance carrier representing the employer in the April 11, 2018 are denied.

**(N) IS RESPONDENT DUE ANY CREDIT?**

The Arbitrator reviewed the payment log of indemnity benefits paid to Petitioner by the insurance carrier representing the employer in the April 11, 2018 accident. After calculating all payments made, the Arbitrator notes that the insurance carrier representing the employer in the April 11, 2018 accident is due a credit of $118,322.07.

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 19WC036280 |
| Case Name | Pedro Escutia Calderon v.<br>J&J Newell Concrete Contractor |
| Consolidated Cases | 18WC029379; |
| Proceeding Type | Petition for Review under 19(b)<br>Remand Arbitration |
| Decision Type | Commission Decision |
| Commission Decision Number | 23IWCC0515 |
| Number of Pages of Decision | 18 |
| Decision Issued By | Amylee Simonovich, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Michelle Porro |
| Respondent Attorney | Zachary March |

DATE FILED: 12/5/2023

/s/Amylee Simonovich, Commissioner

Signature

23IWCC0515

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 Temporary Disability, Credit, Penalties &Fees | ☒ None of the above |

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

PEDRO ESCUTIA CALDERON,

Petitioner,

vs. NO: 19 WC 36280

J&J NEWELL CONCRETE CONTRACTOR,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under section 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, prospective medical treatment, temporary total disability benefits, permanent disability, and section 19(k) penalties, section 19(l) penalties, and section 16 attorney fees, and being advised of the facts and law, modifies the Corrected Decision of the Arbitrator as stated below, but otherwise affirms and adopts the Corrected 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).

*Temporary Total Disability*

Initially, the Commission seeks to correct the miscalculation contained in the Order section of the Corrected Decision of the Arbitrator. In said section, the Arbitrator mistakenly calculated Petitioner's temporary total disability period (October 18, 2019 through October 14, 2021) to be 103 & 4/7ths weeks. The Commission notes this time period equals 104 weeks, and so modifies the Corrected Decision of the Arbitrator.

In accordance with the above modification, the Commission calculates Petitioner's

temporary total disability award as $128,266.32 ($1,233.33 x 104 weeks). The Commission also modifies the temporary total disability credit awarded to Respondent in the amount of $33,757.40. The Request for Hearing form indicates the parties stipulated to a credit amount of $16,828.70. This stipulation is binding on the parties and is so awarded by the Commission. *Walker v. Industrial Commission*, 345 Ill. App. 3d 1084, 1088 (4th Dist. 2004). Thus, the outstanding temporary total disability award equals $128,266.32 minus the awarded credit of $16,828.70, a difference of $111,437.62.

*Section 19(k) penalties and section 16 attorney fees*

Lastly, in agreement with the above modifications, the Commission also modifies the section 19(k) penalties and section 16 attorney fees awarded in the Corrected Decision of the Arbitrator. Respondent shall pay section 19(k) penalties in an amount equal to 50 percent of the temporary total disability benefits due ($111,437.62), and the unpaid medical bills ($530.00). This amount equals $55,983.81. Regarding section 16 attorney fees, Respondent shall pay 20 percent of these outstanding amounts, or $22,393.52.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Corrected Decision of the Arbitrator filed September 19, 2022, as modified above, is hereby affirmed and adopted.

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner's current left knee condition is causally related to the accident date of October 14, 2019.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay the sum of $530.00 for medical expenses, as provided in section 8(a) and subject to section 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall provide and pay for prospective medical care to the left knee as recommended by the treating physicians, as provided in section 8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,233.33 per week for a period of 104 weeks, representing October 18, 2019 through October 14, 2021, that being the period of temporary total incapacity for work under section 8(b), and that as provided in section 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.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have a credit of $16,828.70 for temporary total disability benefits already paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner penalties in the amount of $55,983.81, pursuant to section 19(k) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner penalties in the amount of $10,000.00, pursuant to section 19(l) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner attorney fees in the amount of $22,393.52, pursuant to section 16 of the Act.

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

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.

**December 5, 2023**

/s/ *Stephen J. Mathis*

wde

O: 10/11/23

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/s/ *Deborah L. Simpson*

/s/ *Amylee Simonovich*

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 19WC036280 |
| Case Name | Pedro Escutia Calderon v. J & J Newell Concrete Contractors |
| Consolidated Cases | |
| Proceeding Type | |
| Decision Type | Corrected Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 14 |
| Decision Issued By | Charles Watts, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Michelle Porro |
| Respondent Attorney | Zachary March |

DATE FILED: 9/19/2022

**THE INTEREST RATE FOR THE WEEK OF SEPTEMBER 13, 2022 3.46%**

/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
# CORRECTED ARBITRATION DECISION

**Pedro Escutia Calderon** Case # **19WC036280**
Employee/Petitioner

v.

**J & J Newell Concrete Contractors**
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 **Arbitrator Charles Watts**, Arbitrator of the Commission, in the city of **Chicago**, on **10/14/2021**. 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 **prescribed medical treatment, unpaid TTD, unpaid Medical , penalties and attorney fees, and credit for benefits issued.**

**FINDINGS**

On **10/14/2019**, 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 $**96,200.00**; the average weekly wage was $**$1,850.00**.

On the date of accident, Petitioner was **54** years of age, **Married** with **1** 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 $**33,757.40 ($16,828.70 for each of the two insurers for Respondent)** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**33,757.40**.

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 services of $**530.00**, as provided in Sections 8(a) and 8.2 of the Act.

***Temporary Total Disability***
Respondent shall pay Petitioner temporary total disability benefits of **$1,233.33 /week** for **103-4/7ths** weeks, commencing **10/18/19** through **10/14/21**, as provided in Section 8(b) of the Act.

***Penalties***
Respondent shall pay to Petitioner penalties of $**22,287.81**, as provided in Section 16 of the Act; $**55,719.53**, as provided in Section 19(k) of the Act; and $**10,000.00**, as provided in Section 19(l) of the Act.

**Petitioner is entitled to prospective medical care.**

**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 19, 2022**

Signature of Arbitrator

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

| | | |
|---|---|---|
| PEDRO ESCUTIA CALDERON, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | No. 19WC 036280 |
| | ) | |
| J&J NEWELL CONCRETE CONTRACTORS, | ) | |
| | ) | |
| Respondent. | ) | |

ADDENDUM TO ARBITRATION DECISION
FINDINGS OF FACT AND CONCLUSIONS OF LAW

**FINDINGS OF FACT**

Petitioner was employed by J&J Newell Concrete Contractors on April 11, 2018. (Tr. 8). He testified that on April 11, 2018, he was working as a cement finisher and foreman. (Tr. 8). Petitioner testified that on April 11, 2018, he was working with cement and putting in plates for a sidewalk, which he needed to step on in order to set them into place. (Tr. 9). Petitioner testified that while performing this duty he twisted his body and felt a "pop" in his left knee. (Tr. 10).

Petitioner testified that he earned $46.25 per hour and worked 40 hours per week. (Tr. 9). He testified that he reported his accident to his supervisor named Cary on April 11, 2018. (Tr. 10).

Petitioner testified he presented for treatment at Silver Cross Emergency Room on April 16, 2018. (Tr. 11). Petitioner presented to the Emergency Room with complaints of bilateral knee pain, left worse than right, after laying concrete at work on April 11, 2018. (PX 2, p. 8). X-rays taken of the bilateral knees were negative and the assessment was left knee effusion. (PX 4, p. 56).

On April 18, 2018, Petitioner testified he was seen by Dr. Robert Semba at Parkview Orthopedic Group for evaluation of his left knee pain. (Tr. 11). There was pain and swelling present in the knee, and Dr. Semba diagnosed him with prepatellar swelling consistent with left knee bursitis. (PX 5, p. 12). Petitioner testified that after returning to work, at the request of the company he was seen later that same day by Dr. David Mehl. (Tr. 11).

Dr. Mehl noted Petitioner had left knee pain after performing extensive kneeling and jumping on concrete. (PX 6, p.7). Physical examination demonstrated full range of motion with a positive medial McMurray's examination along with positive effusion. (PX 6, p. 7). Dr. Mehl suspected Petitioner had a torn medial meniscus, and an MRI of the left knee was recommended. (PX 6, p. 7).

On April 27, 2018, Petitioner underwent an MRI of the left knee without contrast. (PX 1, p. 8). The left knee MRI demonstrated a large knee joint effusion, grade 1 injury of the vastus medialis and vastus lateralis muscles without organized intramuscular hematoma, horizontal cleavage tear of the posterior horn of the medial meniscus extending to the meniscal free margin, extensive full-thickness cartilage loss and degenerative subchondral marrow edema in the medial compartment of the knee, and grade 1 sprain of the medial collateral ligament. (PX 6, pp. 145-146).

At Petitioner's follow-up appointment with Dr. Mehl on May 2, 2018, the left knee MRI was reviewed and determined to show a medial meniscus tear. (PX 6, p. 9). At that time, Dr. Mehl recommended a left knee arthroscopy with medial meniscectomy and chondroplasty. (PX 6, p. 10).

On May 24, 2018, Petitioner underwent a left knee partial medial meniscectomy, diffuse chondromalacia and chondroplasty with some loose body removal, chondromalacia and debridement, grade II chondromalacia of the patella, grade IV chondromalacia of the medial femoral condyle and medial tibial plateau, and grade II chondromalacia of the lateral compartment. (PX 11). The surgery was performed by Dr. Mehl. (Tr. 36).

On May 30, 2018, Petitioner returned to Dr. Mehl for his initial postop visit after the left knee scope with partial medial meniscectomy and loose body removal. (PX 6, p. 15). Petitioner was doing well since the surgery, had minimal pain, and no new complaints. (PX 6, p. 15). On examination of the left knee there was a well-healing incision, no erythema, and mild swelling consistent with postop changes. (PX 6, p. 15). He was diagnosed with a work-related left meniscus tear status-post left knee arthroscopy. (PX 6, p. 15). Petitioner was instructed to begin weaning from crutches and to begin physical therapy. (PX 6, p. 15).

Petitioner initiated physical therapy at Athletico on June 5, 2018. (PX 14, p. 145). He continued to participate in physical therapy three times per week through July 25, 2018. (PX 14, p. 84).

On July 25, 2018, Petitioner saw Dr. Mehl for a follow-up and reported pain as well as intermittent popping and locking in the left knee. (PX 6, p. 21). He was taking Norco 7.5mg for pain control. (PX 6, p. 21). Dr. Mehl recommended continued physical therapy and estimated Petitioner would likely be at maximum medical improvement in one month. (PX 6, p. 22).

Physical therapy was continued from July 27, 2018, through August 24, 2018, with a progress note indicating he had attended a total of 36 physical therapy session. (PX 14, p. 45).

At the next follow-up visit with Dr. Mehl on August 27, 2018, Petitioner noted locking in his left knee on occasion. (PX 6, p. 24). Petitioner was diagnosed with degenerative joint disease of the bilateral knees, status-post left knee arthroscopy. (PX 6, p. 25). Petitioner was kept off work, recommended to continue physical therapy, and a cortisone injection was administered. (PX 6, p. 25).

On September 12, 2018, Petitioner was seen by Dr. Mehl for a follow-up and reported the cortisone injection provided pain relief for only 10 days. (PX 6, p. 28). Petitioner further reported intermittent pain in the left knee along with locking. (PX 6, p. 28). Dr. Mehl recommended a functional capacity evaluation, followed by four weeks of work conditioning, then a second functional capacity evaluation. (PX 6, p. 29).

Petitioner began work conditioning through Athletico on October 1, 2018. (Tr. 37). On that date, a work conditioning evaluation was performed and determined Petitioner did not demonstrate the physical capabilities and tolerances to perform all the essential job functions of his job. (PX 14, p. 35). Petitioner met 1/10 (10%) of the job demands. (PX 14, p. 35).

Work conditioning was continued at Athletico from October 2, 2018, through October 11, 2018. (PX 14, pp. 21, 33).

A work status note from Dr. Mehl dated October 10, 2018, stated Petitioner was unable to return to work and that he would return to the clinic after work conditioning was completed. (PX 6, p. 32). In addition, Dr. Mehl stated a left knee MRI would be needed if Petitioner did not improve. (PX 6, p. 32).

On October 12, 2018, a work conditioning functional status report was authored noting Petitioner had met 2/11 (18.18%) of the job demands. (PX 14, p. 15).

Petitioner continued work conditioning at Athletico on October 13, 2018, October 24, 2018, October 25, 2018, and October 26, 2018, which was noted to be his 13th session. (PX 14, p. 15).

Following the surgery, Petitioner testified he continued to have pain and discomfort in his left knee. (Tr. 36).

Petitioner was examined by Dr. Jay Levin at the request of Amerisure Insurance for purposes of an independent medical examination on November 7, 2018. (Co-RX 7, p. 8). An MRI was performed on the left knee without contrast that same day and demonstrated a possible small linear tear to the posterior horn of the lateral meniscus along the inferior surface. (Co-RX 7, p. 46). Based on Dr. Levin's review of the left knee MRI he diagnosed Petitioner with a recurrent left knee lateral meniscal tear, status post left knee arthroscopy, partial medial meniscectomy and loose body removal of May 24, 2018. (Co-RX 7, p. 23). Dr. Levin opined the diagnosis was causally related to the accident of April 11, 2018. (Co-RX 7, p. 23). Dr. Levin further opined Petitioner could either live with his left knee condition, in which case he would be at maximum medical improvement, or he could undergo a repeat arthroscopy of the left knee. (Co-RX 7, p. 8).

Petitioner returned to Dr. Mehl for a follow-up on December 31, 2018. (PX 6, p. 38). At that time, Dr. Mehl had not received the IME report authored by Dr. Levin. (PX 6, p. 38). Dr. Mehl reviewed the left knee MRI taken November 7, 2018, and stated it demonstrated

a possible new lateral meniscus injury. (PX 6, p. 38). Physical examination revealed tenderness at the medial and lateral joint line, and Dr. Mehl recommended a revision left knee arthroscopy due to failure of improvement. (PX 6, p. 39).

In a telephone note dated March 18, 2019, Dr. Mehl advised he reviewed the IME report authored by Dr. Levin and recommended proceeding with the revision arthroscopy pending authorization. (PX 6, p. 44). Dr. Mehl advised Petitioner to remain off of work and to stay off of work for 2-3 months following the revision surgery. (PX 6, p. 44).

Petitioner testified Dr. Mehl performed the revision left knee surgery on April 16, 2019. (Tr. 38). The procedure performed involved a partial medial meniscectomy, partial lateral meniscectomy, diffuse chondroplasty, grade II changes noted in the patella, grade IV changes of the medial compartment, and grade II changes in the lateral compartment. (PX 12).

On April 22, 2019, Petitioner was seen by Dr. Mehl for a follow-up 6 days after the revision surgery. (PX 6, p. 52). He denied any complaints and his pain and swelling were improving. (PX 6, p. 52). On examination, the left lower extremity demonstrated three healing arthroscopy portals without surrounding erythema, along with mild knee effusion. (PX 6, p. 53). Physical therapy was recommended and Petitioner was kept off work. (PX 6, p. 53).

At the next follow-up with Dr. Mehl on May 6, 2019, Petitioner reported completing two weeks of physical therapy, noting it was going well. (PX 6, p. 55). His left knee pain had improved but he was still walking slowly and the left knee would buckle when he walks. (PX 6, p. 55). Petitioner reported feeling 40% of normal mobility and agility. (PX 6, p. 55). Dr. Mehl recommended continued physical therapy and to remain off work. (PX 6, p. 56).

Petitioner continued to follow-up with Dr. Mehl on May 20, 2019, June 17, 2019, and on July 15, 2019, at which time he was noted to be three months status-post repeat left knee arthroscopy with partial medial and lateral meniscectomy and diffuse chondroplasty. (PX 6, p. 64). He was able to walk for 20 minutes before feeling pain. (PX 6, p. 64). He further reported pain with lateral movements in physical therapy. (PX 6, p. 64). Dr. Mehl recommended four weeks of work conditioning followed by a functional capacity evaluation. (PX 6, p. 65).

The functional capacity evaluation was performed at Athletico on September 25, 2019. (PX 10). The FCE was noted to be a valid representation of his functional abilities based on Petitioner demonstrating consistent effort. (PX 10). Petitioner demonstrated the capabilities and functional tolerances to perform within the light physical demand level, while the physical demand level of his preinjury job is classified as very heavy. (PX 10). Petitioner was determined to have met 5/24 (20.83%) of the reported job demands required to function as a cement finisher, and therefore, did not demonstrate the physical capabilities and tolerances to perform all the essential job functions of the job. (PX 10).

Petitioner testified that on October 2, 2019, he returned to Dr. Mehl to review the results of the functional capacity evaluation. (Tr. 39). Dr. Mehl reviewed the FCE report and stated

he disagreed with the findings. (PX 6, p. 67). Dr. Mehl opined Petitioner had reached maximum medical improvement and released him to return to full duty work with use of a hinged knee brace starting October 7, 2019. (PX 6, p. 67). Petitioner was advised to return to the clinic as needed for a Synvisc or cortisone injection, which would need to be approved through workers compensation. (PX 6, p. 68).

Petitioner returned to work full duty with use of the hinged knee brace on October 7, 2019. (PX 1, p. 33). He testified his left knee still had pain and did not feel as strong as his right knee. (Tr. 12). Nevertheless, Petitioner testified he returned to work as a cement finisher. (Tr. 12).

Petitioner testified that on October 11, 2019, he called Dr. Mehl's office to report his left knee was still in pain. (Tr. 13). During this call, Petitioner reported he was experiencing pain and swelling in the left knee since his return to work on October 7, 2019, and asked to be seen for an appointment as soon as possible. (PX 2, Dep. Ex. 4).

Petitioner testified that on October 14, 2019, he was working with cement when his left knee twisted, he felt a "pop", and noticed increased pain and swelling in the knee. (Tr. 14). He testified he reported his accident to his supervisor Cary on October 14, 2019. (Tr. 17).

On October 17, 2019, Dr. Mehl's office called Petitioner to inform him the Synvisc injection had been approved. (PX 6, p. 70). Petitioner testified that during this call he described sustaining an injury to his left knee at work on October 14, 2019. (Tr. 41). Petitioner stated he twisted his knee and felt a pop. (Tr. 14). An appointment was scheduled for October 18, 2019. (PX 6, p. 70).

Petitioner testified he returned to Dr. Mehl for evaluation of his left knee on October 18, 2019. (Tr. 17). At that time, he told Dr. Mehl he twisted his left knee at work and felt a pop on October 14, 2019. (PX 6, p. 71). He further reported experiencing increased pain and developed swelling in the left knee. (Tr. 14). Petitioner stated there was throbbing in the knee, it was painful to work, and the left knee felt unstable. (PX 6, p. 71). Physical examination demonstrated normal range of motion with a positive McMurray's exam along with mild swelling and pain to the medial side of the joint line. (PX 6, p. 72). Dr. Mehl suspected he sustained a medial meniscal injury and ordered an MRI of the left knee. (PX 6, p. 72).

The left knee MRI was taken at Franciscan Health MRI Olympia Fields on November 8, 2019. (PX 13, p. 369). The MRI impression was a contusion of the medial proximal tibia, progression tear of the posterior horn of the medial meniscus, and degenerative change progressed from prior exam. (PX 13, p. 369).

Regarding the 11/8/19 MRI, Dr. Mehl testified that "I saw the MRI and had performed both surgeries, so I read it as a new tear of the medial meniscus, so we might differ a little bit in our terminology between the radiologist and myself." (PX 1, pp. 50-51) My testimony here today is that that was a new tear of the medial meniscus related to a new accident from October 14th, 2019.(Id., 51) "That is the reason my opinion is that that was

a new medial meniscus tear from his work injury on October 14th, 2019 was his history of that injury and the pop and the subsequent MRI revealing the new tear." (Id., 52) He opined that the need for the third surgery would be related to the accident that occurred at work on 10/14/2019. (Id., p. 55).

Petitioner testified he presented to Dr. Jason Hurbanek at Hinsdale Orthopedics for a second opinion on December 19, 2019. (Tr. 18). Petitioner reported pain over the medial aspect of the left knee, as well as clicking, popping, and instability. (PX 7, p. 7). On examination, there was tenderness over the medial joint line and a positive medial McMurray's exam. (PX 7, p. 8). Petitioner was diagnosed with a left knee medial meniscus re-tear and was recommended to proceed with a third arthroscopic surgery. (PX 7, p. 9).

At the request of Erie Insurance, Petitioner was examined by Dr. Brian Forsythe at Midwest Orthopedics at Rush for a Section 12 independent medical examination on July 28, 2020. (RX 1, p. 6). Dr. Forsythe ultimately diagnosed Petitioner with a recurrent left knee medial meniscus tear and recommended going forward with a re-revision left knee arthroscopy with meniscal debridement. (RX 1, p. 18). Dr. Forsythe testified that the need for the surgery was causally related to the accident of April 11, 2018 and the reinjury that occurred with the October 14, 2019 accident. (RX1, p. 19-20).

At the request of Amerisure Insurance, Petitioner was re-evaluated by Dr. Jay Levin for another independent medical examination on October 28, 2020. (Co-Rx 7, pp. 9-10). Petitioner told Dr. Levin that prior to the injury on October 14, 2019, he felt his left knee was about 40-50% improved since his prior injury on April 11, 2018. (Co-RX 7, p. 14). Dr. Levin diagnosed Petitioner with a recurrent medial meniscal tear from an acute work-related injury on October 14, 2019. (Co-RX 7, p. 36). Dr. Levin stated Petitioner could either live with his current condition or undergo surgical intervention consisting of a re-revision of the left knee arthroscopy with meniscal debridement followed by physical therapy for 12 sessions over 12 weeks. (Co-RX 7, pp. 37-38). Dr. Levin opined the current condition of and need for additional treatment to the left knee was causally related solely to the accident of October 14, 2019. (Co-RX 7, p. 37).

At the request of Petitioner's attorney, Petitioner was evaluated by Dr. Pietro Tonino on March 22, 2021. (PX 2, p. 6). Petitioner reported complaints of pain, his left knee giving way, and constant discomfort in the left knee. (PX 2, p. 12). On exam, there was no effusion of the left knee, diffuse parapatellar discomfort, and some crepitus with range of motion of the left knee. (PX 2, Dep. Ex. 2). There were no signs of any ligamentous or meniscal pathology. (PX 2, Dep. Ex. 2). Dr. Tonino diagnosed Petitioner with left knee chondromalacia and recommended additional treatment consisting of viscosupplementation of the left knee with physical therapy twice a week for four weeks. (PX 2, pp. 13-14). Dr. Tonino further stated the need for further treatment is more so related to the accident of April 11, 2018. (PX 2, pp. 52-53). Dr. Tonino testified that the October 14, 2019 accident aggravated Petitioner's condition and that Petitioner's treating surgeon Dr. Mehl did not recommend additional surgery prior to October 14, 2019 while Dr. Mehl recommended additional surgery after this accident. (PX 2, pp. 53-54).

Petitioner testified there was no intervening accident between April 11, 2018, and October 7, 2019. (Tr. 22). He testified there has not been any additional accidents to the left knee since October 14, 2019. (Tr. 22). Petitioner testified that he was completely off of work from May 2, 2018, through October 6, 2019. (Tr. 27). He testified that after his return to work on October 7, 2019, he was taken completely off of work on October 18, 2019, and remained completely off of work through the date of trial (October 14, 2021). (Tr. 28).

Petitioner testified that while he was off work from May 2, 2018, through October 6, 2019, he was paid $1,200.05 per week. (Tr. 27). He testified that he has incurred medical bills for the treatment related to his left knee. (Tr. 24). On the date of trial, Petitioner had one outstanding medical bill dated December 19, 2019. (PX 15).

Petitioner testified that prior to April 11, 2018, he had no previous injuries to his left knee. (Tr. 13). He testified his left knee was painful prior to returning to work on October 7, 2019. (Tr. 12). He testified that since October 14, 2019, the pain and swelling in the left knee increased and has not resolved as of the date of trial. (Tr. 43). He testified that he can walk for approximately 15 minutes before the pain gets worse, but testified the pain is always present. (Tr. 23). Finally, Petitioner testified he wishes to proceed with the third knee surgery. (Tr. 20).

## CONCLUSIONS OF LAW

**In support of the Arbitrator's decision relating to "C," *did an accident occur that arose out of and in the course of Petitioner's employment by Respondent*, the Arbitrator makes the following conclusions of law:**

Petitioner testified he sustained an injury while at work to his left knee when his body twisted, and he felt a pop on October 14, 2019. All of the physicians who have examined Petitioner have testified that he sustained an injury on that date.

An accidental injury need not be the sole causative factor, or even the primary causative factor, as long as it is a causative factor in the resulting condition of ill-being. Sisbro, Inc. v. Industrial Commission, 797 N.E.2d 665, 672 (2003). Employers are to take their employees as they find them. A.C.&S. v. Industrial Commission, 710 N.E.2d 8347 (Ill.App. 1st Dist. 1999) citing General Electric Co. v. Industrial Commission, 433 N.E.2d 671, 672 (1982). Causal connection between work duties and an injured condition may be established by a claim of events including claimant's ability to perform duties before the date of an accident and inability to perform same duties following date of accident. Darling v. Industrial Commission, 176 Ill.App.3d 186, 530 N.E.2d 1135 (1st Dist. 1988) A claimant's prior condition need not be of a good health prior to the accident, 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 v. Illinois Workers Compensation Commission, 4-16-0192WC (4th Dist. 2017).

Respondent's insurer for the October 14, 2019 incident essentially argues that Petitioner should not have been working because his knee was not 100% and that, therefore, there cannot be an accident, or that Sisbro simply does not apply to them and Petitioner is not to be taken as he is found. The argument that there was no accident is really just a causation argument. The issue of penalties is discussed below.

The Arbitrator finds Petitioner did sustain an accident that arose out of and in the course of his employment on October 14, 2019.

**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 makes the following conclusions of law:**

The Arbitrator carefully reviewed and considered all medical evidence along with all of the testimony. The Arbitrator concludes that Petitioner has proven by the preponderance of the credible evidence that his left knee condition is causally related to Petitioner's work accident of 10/14/19.

Petitioner testified that prior to his work accident he did not suffer any injuries to his left leg. Petitioner also testified that he has not sustained any subsequent injuries to his left leg, other than the aggravation sustained at work on 10/14/19. The Arbitrator finds Petitioner's testimony credible regarding the immediate onset of left knee pain that increased while working on 10/14/19 while working, and it is consistent with the medical records.

The Arbitrator finds that all of the doctors Dr. Mehl, Dr. Tonino and Dr. Levin and Dr. Forsythe testified that Petitioner had an already bad left knee as a result of his 4/11/18 work related accident, and that his left knee condition became permanently worse as a result of his 10/14/19 work related accident. All of the doctors testified that the Petitioner's mechanism of injury was consistent with his left knee condition as it existed after his 10/14/19 accident. Petitioner did not have any left knee injuries prior to 4/11/18. All of the doctor's agreed that Petitioner require additional surgery for his left knee as a result of his work-related injuries, including 10/14/19. While Dr. Tonino and Dr. Forsythe indicate that Petitioner would have required restrictions as a result of the 4/11/18 accident, they both testified that the 10/14/19 accident could have caused a progression in the tear. That testimony is consistent with the testimony of Petitioner that his knee was weak and painful prior to the 10/14/19 date of injury, but the left knee became permanently more painful and swollen after the 10/14/19 twisting injury where he felt a pop in the left knee.

The Arbitrator finds the 10/14/19 accident is causally related to Petitioner's current condition.

**In support of the Arbitrator's decision relating to "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*, the Arbitrator makes the following conclusions of law:**

Pursuant to 8(a) of the Act, the employer shall pay all necessary first aid, medical and surgical services and all necessary medical, surgical and hospital services which are reasonable required to cure or relieve the employee from the effects of the accidental injury.

Based in part on the conclusions relating to causal connection above, the Arbitrator further finds that the treatment that Petitioner received from Dr. Hurbanek, in the amount of $530.00 is reasonable, necessary, and causally related to the accident of 10/14/19. As such, Respondent shall pay Petitioner the sum of $530.00 for the bills due to Dr. Hurbanek. The sums shall be paid pursuant to Sections 8 and 8.2 of the Act and subject to the fee schedule.

**In support of the Arbitrator's decision relating to "K," *is Petitioner entitled to any prospective medical care*, the Arbitrator makes the following conclusions of law:**

The Arbitrator concludes Petitioner is entitled to prospective medical care as recommended by Dr. Mehl, Dr. Levin, Dr. Forsythe and Dr. Tonino. The Arbitrator finds that Petitioner proved by the preponderance of the medical evidence that the treatment recommended by Dr. Mehl, Dr. Levin, Dr. Forsythe and Dr. Tonino to be supported by the objective medical evidence and reasonable, necessary, and related treatment intending to alleviate Petitioner's current state of ill-being. This award is consistent with the Supreme Court's award in Plantation Manufacturing v. Industrial Commission, 178 Ill. 2d 595, 699 N.E.2d 1037, 232 Ill. Dec. 852 (1998).

**In support of the Arbitrator's decision relating to "L," *what temporary benefits are in dispute*, the Arbitrator makes the following conclusions of law:**

A claimant is temporarily and totally disabled form the time an injury incapacitates him until such time as he is as far recovered or restored as the permanent character of his injury will permit. Westin Hotel v. Industrial Commission, 372 IllApp.3d 527 (200). In determining whether a claimant is no longer entitled to continue receiving TTD benefits, the primary consideration is whether the claimant's condition has stabilized and whether he is capable of returning to the work force. Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Commission, 236 Ill.2d132 (2010) Once a claimant has reached MMI, his condition has become permanent, and he is no longer eligible for TTD benefits. Archer Daniels Midland Co. v Industrial Commission, 138 Ill.2d 107 (1990).

Petitioner claims to be entitled to temporary total disability benefits from 5/2/18 through 10/6/19 and from 10/18/19 through 10/14/21 representing 177-4/7ths weeks. The petitioner has been authorized off work by his treating physicians pending surgery on his left knee.

The Arbitrator finds that Petitioner has proven that he has been temporarily and totally disabled from 10/18/19 through 10/14/21 and that he has not recovered or restored from the permanent character of his injury. Based upon the opinions of Dr. Mehl, Dr. Tonino, Dr. Levin and Dr. Forsythe regarding the need for additional medical treatment, the Arbitrator finds that Petitioner's condition has not stabilized to the extent that he is capable of returning to the workforce. As such, the Respondent shall pay Petitioner TTD benefits from 10/18/19 through 10/14/21.

**In support of the Arbitrator's decision relating to "M," *should penalties or fees be imposed upon Respondent*, the Arbitrator makes the following conclusions of law:**

The Petitioner worked for the same Respondent for 7 years prior to the date of the first accident on 4/11/18 to date, and the only thing that changed between 4/11/18 and 10/14/19 was the employer purchased Workers' Compensation insurance from a different carrier between the time that Petitioner sustained the accident on 4/11/18 and the time that Petitioner sustained an aggravation of that accident at work on 10/14/19. The insurance carrier for the first injury paid for two surgeries, medical bills, and TTD up to the return to work pursuant to the advice of Petitioner's treating physician and two-time surgeon. Penalties are relevant to what transpired after the 10/14/19 injury.

The Arbitrator notes that the Petitioner is temporarily and totally disabled at the present time. The Respondent has not paid TTD from 1/2/2020 through 10/14/21 with the exception of one payment of $16,828.70 from each of the two insurance carriers. (The Arbitrator finds it important to note that the insurer for the first injury who had paid for and authorized two surgeries, PT, and TTD wrote a check in the same amount as the second insurer – an act of good faith). Respondent has refused to authorize the treatment despite the fact that the Petitioner's symptoms have not abated since the accident despite conservative care. This matter is further aggravated by the vexatious and unreasonable denial of treatment to the Petitioner despite the agreement of all of the doctors that the Petitioner's condition is the result of his work for Respondent. All of the doctors agree that the Petitioner's left knee condition is the result of his employment with the Respondent as a concrete finisher and that the accident of 10/14/19 is a cause of the need for prospective medical care. The fact that the Respondent has not made the necessary authorization for treatment and payment of TTD even more vexatious given that no doctor who has examined Petitioner has indicated that there is a cause other than his work for Respondent that caused the Petitioner.

It is unreasonable and vexatious for Respondent to refuse make payments of TTD and approve the surgery when all parties agree on the treatment course, and the need for treatment being related to the petitioner's employment with respondent. No doctor testified that the need for treatment was caused by anything other than Petitioner's work for Respondent. An insurance dispute does not justify a delay in payment of benefits. McMahon v. Industrial Commission, 284 Ill.App.3d 1090, 683 N.E.2d 460 (1997). Bunnow v. Industrial Commission, 327 Ill. App. 3d 1039, 765 N.E.2d 467 (1st Dist. 2002) Central Rug & Carpet v. Industrial Commission, 361 Ill. App. 3d 684, 838 N.E.2d 39 (1st Dist. 2005).

The Respondent's failure and refusal to pay the TTD and approve the prescribed treatment has caused an unreasonable and/or vexatious delay. The Respondent's unreasonable and/or vexatious delay required the Petitioner's attorneys to expend time and costs in securing and preparing the presentation of the trial and presenting the motion for penalties pursuant to Sections 19(k), 19(l) and Section 16. The award of penalties and attorney's fees is supported by the decision of the Appellate Court in Board of Education of City of Chicago vs. Workers' Compensation Commission, 93 Ill. 2d 1, 442 N.E. 2d 861 (1982); and McMahan v. Workers' Compensation Commission, 183 Ill. 2d 499, 702 N.E. 2d 545 234 Ill.Dec. 205 (1998).

Regarding penalties, the Arbitrator finds that the Petitioner is entitled to:

Assessment of penalty against the Respondent and in favor of the Petitioner in an amount equal to 50% of the temporary total disability benefits due and payable to the Petitioner and 50% of the unpaid reasonable and necessary medical benefits.

Assessment of penalties against the Respondent and in favor of the Petitioner in the amount of $30.00 per day for each day benefits were unreasonably delayed (up to $10,000.00) pursuant to Section 19(l). The $30 per day starts on 1/2/2020.

Assessment of attorney fees against the Respondent in favor of the Petitioner in an amount equal to 20% of the temporary total disability benefits due and payable to the Petitioner and 20% of the unpaid reasonable and necessary medical expenses pursuant to Section 16.

The Respondent is ordered to pay for the reasonable and necessary medical treatment prescribed to the Petitioner as a result of the work-related injuries of 10/14/19.

**In support of the Arbitrator's decision relating to "N," *is Respondent due any credit*, the Arbitrator makes the following conclusions of law:**

The parties stipulated that a one-time advance of $16,828.70 was paid to Petitioner by both insurers of Respondent. (AX 2). Therefore, the arbitrator finds that Respondent is due a credit of $33,757.40, $16,828.70 for each of Respondent's insurers.

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 19WC013848 |
| Case Name | Charles Juarez v.<br>Illinois Secretary of State |
| Consolidated Cases | |
| Proceeding Type | Petition for Review |
| Decision Type | Commission Decision |
| Commission Decision Number | 23IWCC0516 |
| Number of Pages of Decision | 21 |
| Decision Issued By | Kathryn Doerries, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Taylor Matichak |
| Respondent Attorney | Sidney Gui |

DATE FILED: 12/7/2023

/s/Kathryn Doerries, Commissioner

Signature

DISSENT: /s/Kathryn Doerries, 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 Choose reason | ☐ Second Injury Fund (§8(e)18) |
| | ☐ PTD/Fatal denied |
| ☐ Modify Choose direction | ☐ None of the above |

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CHARLES JUAREZ,

Petitioner,

vs. NO: 19 WC 013848

ILLINOIS SECRETARY OF STATE,

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 the nature and extent of the injury, 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 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.

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

**December 7, 2023**

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

O101723

KAD/bsd
42

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

PARTIAL CONCURRENCE AND DISSENT

I concur with the majority opinion in part, except I dissent solely with respect to the permanency award which I would decrease to 50% loss of use of a person as a whole under §8(d)2. In assessing the five factors as required under §8.1b(b) to determine the level of permanent partial disability, I would alter the majority's analysis of §8.1b(b) factors as follows:

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the majority opinion notes that the record reveals that Petitioner was employed as a public services representative and is not able to return to work in his prior capacity as a result of said injury and the work restrictions he has. However, this factor should carry no weight in the permanency determination, not moderate weight assigned by the majority, because Petitioner is no longer working and did not participate in a suitable job search.

With regard to subsection (iii) of §8.1b(b), the majority opinion notes that Petitioner was 57 years old at the time of the accident. Neither party has presented evidence which tends to show how the Petitioner's permanent disability resulting from the August 24, 2018, accident is impacted by his age. Given that Petitioner has a relatively shortened work life expectancy remaining, and the lack of evidence showing how his age negatively impacts his permanency determination, this factor should carry no weight, not minimal weight assigned by the majority.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the majority opinion notes that the Petitioner's future earnings capacity is unknown at this time as he no longer works for Respondent and has not performed a suitable job search to determine his current earning capacity. The majority notes that the Petitioner earned a fairly high rate of pay and currently is not working. This factor carries medium weight in the majority's permanency determination, however, I view this evidence differently than the majority. Given the absence of evidence of a suitable job search, I would assign no weight to this factor.

Based on the above modifications of the five factors, the record taken as a whole and a review of prior Commission awards with similar injuries and similar outcomes, I find no justification for an award of 70% loss of use of a person as a whole, and I would find that Petitioner sustained permanent partial disability to the extent of 50% loss of use of the person as a whole pursuant to §8(d)2 of the Act.

Therefore, I respectfully dissent from the majority opinion with regard to the permanency award.

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

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 19WC013848 |
| Case Name | Charles Juarez v. Illinois Secretary of State |
| Consolidated Cases | |
| Proceeding Type | |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 18 |
| Decision Issued By | Paul Cellini, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Taylor Matichak |
| Respondent Attorney | Thomas Owen |

DATE FILED: 11/21/2022

**THE INTEREST RATE FOR THE WEEK OF NOVEMBER 15, 2022 4.44%**

/s/ Paul Cellini, Arbitrator

Signature

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

November 21, 2022

/s/ Michele Kowalski

Michele Kowalski, Secretary
Illinois Workers' Compensation Commission

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**

**CHARLES JUAREZ**
Employee/Petitioner
v.
**ILLINOIS SECRETARY OF STATE**
Employer/Respondent

Case # **19** WC **013848**

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 Cellini**, Arbitrator of the Commission, in the city of **Kankakee**, on **August 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 **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, in part, to the accident.

In the year preceding the injury, Petitioner earned $**31,037.50**; the average weekly wage was $**1,097.27**.

On the date of accident, Petitioner was **57** 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 $**121,699.66** for TTD, $**0** for TPD, $**10,971.74** for maintenance, and $**0** for other benefits, for a total credit of $**132,671.40**.

Respondent is entitled to a credit of $**261,265.54** under Section 8(j) of the Act.

**ORDER**

The Arbitrator finds that the Petitioner provided timely notice of the August 24, 2018 accident pursuant to Section 6(c) of the Act.

The Arbitrator finds that the Petitioner's cervical and lumbar conditions of ill-being **are causally related** to the August 24, 2018 accident. The Arbitrator finds that the Petitioner has **failed to prove** that his right shoulder condition of ill-being is causally related to the August 24, 2018 accident. No benefits are awarded relative to the Petitioner's right shoulder.

The Arbitrator finds that the Petitioner's average weekly wage in the year prior to the August 24, 2018 accident was **$1,097.27**.

Respondent shall pay Petitioner temporary total disability benefits of **$731.51 per week** for **137-5/7 weeks,** commencing **December 4, 2018 through March 19, 2020** and from **June 2, 2020 through October 7, 2021**, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner maintenance benefits of **$731.51 per week** for **26-5/7 weeks**, commencing **October 8, 2021 through April 12, 2022**, as provided in Section 8(a) of the Act.

Respondent shall be given a credit of **$132,671.40** for temporary total disability and maintenance benefits that have been paid.

Respondent shall pay reasonable and necessary medical expenses contained in Petitioner's Exhibit 8, except for the expenses of ATI Physical Therapy, as provided in Sections 8(a) and 8.2 of the Act. The medical expenses of ATI Physical Therapy are denied.

Respondent shall be given a credit of **$261,265.54**. 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.

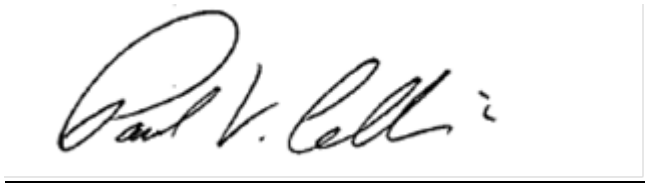
Respondent shall pay Petitioner permanent partial disability benefits of **$658.36 per week** for **350 weeks**, because the injuries sustained caused the loss of use of **70% of the person as a whole**, as provided in Section 8(d)2 of the Act.

Respondent shall pay Petitioner compensation that has accrued from **August 24, 2018** through **August 19, 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.

**NOVEMBER 21, 2022**



Signature of Arbitrator

## STATEMENT OF FACTS

Petitioner, a 30 year employee, was employed by Respondent as a public service representative. This job involves clerical work, road tests, auto titles and registrations, driver's licenses, and ID cards. Road tests included regular vehicles as well as CDL trucks and motorcycles. Petitioner's normal work hours were 8 a.m. to 5:30 p.m. four days a week and 7:30 a.m. to noon on Saturdays. He would perform CDL tests at least three days per week, for which there were three parts, including the road test, and would take about 90 minutes total. He testified he also would have to lift various items, as per his job description, up to 25 pounds, though he believed some items weighed upwards of 40 pounds.

With regard to Petitioner's treatment prior to the 8/24/18 accident date, the Arbitrator notes the following:

On 5/10/06, Petitioner was diagnosed with a left shoulder SLAP tear and underwent 1/11/07 surgery with Dr. Michalow. A prior left shoulder surgery in November 1980 was noted.

Petitioner testified he had a 2009 motor vehicle accident during a test drive with an applicant. He was diagnosed with a right SLAP tear and underwent surgery with Dr. Michalow on 9/24/09. The post-operative diagnoses

were SLAP tear, grade 4 chondromalacia of the glenoid and anterior inferior surface with some bone exposure and multiple loose bodies, as well as degenerative labrum and partial (5%) supraspinatus tears. Surgery involved arthroscopic SLAP repair, glenoid chondroplasty, removal of the loose bodies and debridement of the tears. The labrum was torn superiorly and superanteriorly. Petitioner was released on 10/4/10 to regular duty with occasional ache and use of over-the-counter medication. He was to follow up in 6 months for x-ray and possible MRI to evaluate articular changes. (Px2).

Petitioner then injured the left elbow while lifting and underwent 9/6/13 MRI which showed a ruptured distal bicep. Surgical repair was performed on 9/12/13 and after initially being released to work with no climbing into truck cabs on 11/20/13, he was released to full duty on 2/10/14 with plans to follow up in 2 months. On 4/7/14, Petitioner was released from care and to regular duties by Dr. Michalow regarding the distal left biceps tear. (Px2).

Petitioner next returned to Dr. Michalow on 4/30/17 and 5/3/17, this time complaining of the right bicep after pulling and lifting a washing machine, feeling a pop and snap. He reported doing well as to the prior shoulder surgeries. MRI showed an almost complete tear of the distal bicep. He was taken off work and surgery was performed on 6/8/17. He had some post-surgical sensory numbness in the radial forearm and thumb. He attended therapy with very gradual progress, with Dr. Michalow noting the numbness was progressing to distal "consistent with progress." On 11/6/17, it was noted that insurance would not authorize further therapy and Petitioner was given a home exercise program. On 12/11/17, the doctor noted that increased tingling was consistent with nerve regeneration. Petitioner was mainly held off work during this time because there was no light duty available and he was not able to pull himself up into truck cabs, which Michalow indicated he was not ready for. On 2/14/18, it was noted that Petitioner had undergone a hernia repair surgery. Numbness was now over the volar thumb, and the doctor indicated a likely June return to work. On 5/23/18, Petitioner reported he injured his left elbow while doing pull downs for strengthening, feeling a pop and pain. His right bicep felt good enough to return to work and he was released to do so as of 6/1/18. He continued to have left elbow soreness through 8/13/18 but this was significantly improved. (Px2).

Records of ATI Physical Therapy were submitted into evidence by Petitioner covering the period from 6/18/18 to 8/6/18, at which time the Petitioner had significant improvement and that he had returned to daily tasks pain free. The therapist indicated he had met his maximum benefit and discharged the Petitioner.

On 8/24/18, while performing a CDL road test with a driver in a dump truck, the applicant driver approached and went over a railroad crossing at 30 miles per hour without slowing down. Petitioner testified he grabbed an overhead handle with his right hand, bracing to go over the tracks. The spring-ride seat went down, pulling his right arm, then catapulted him up with his head hitting the roof of the truck, then pulled his arm again as he went back down. He testified he had immediate neck, low back, and right shoulder pain. He notified the facility manager Sorensen and office operations supervisor Terrell when he got back to the facility (see Arbx1). Petitioner did not initially complete an incident report at that time, but his pain continued to increase, and the facility manager then pulled the application of the driver involved in the incident which had documented what had occurred that day and Petitioner completed an accident report. Petitioner did not seek treatment until seeing his primary provider at the end of October for his neck and back. Between 8/24/18 and the end of October 2018 he testified he had increasing back and neck pain and stiffness in his shoulder. He denied any other accidents or new injuries in this time. Petitioner testified he waited to seek treatment, hoping he would improve, until it got increasingly difficult to perform his job duties due to the progressively worsening pain. He denied having any neck or back pain or treatment prior to this 8/24/18 incident.

A 10/31/18 Tristar accident report was completed and signed by Petitioner. While it references neck and back pain, nothing is indicated as to holding a handle above his head, injuring the right shoulder, or stretching his shoulder. (Rx2; Rx3). A Tristar medical information form completed by Dr. Goodman, who appears to be Petitioner's primary care provider, on 11/7/18 reflects only neck and back symptoms. (Px5).

Other than the medical information form, Dr. Goodman's records were not part of the evidentiary record, so it is unclear what history of accident and injury the Petitioner provided to him or her. Lumbar and cervical MRI reports indicate they were ordered by Dr. Goodman. The radiologist read the 11/20/18 lumbar MRI (history: low back pain and weakness following 8/24/18 motor vehicle accident) as showing multilevel spondylosis, an annular L5/S1 bulge with superimposed posterior central herniation causing moderate neuroforaminal and mild spinal stenosis. An L4/5 annular bulge was causing mild foraminal stenosis. The impression from the 11/23/18 cervical MRI (history: neck pain status post 8/24 car accident) was 1) Patent central canal and foramina, no herniations; 2) Multilevel mild spondylitic changes from C4 to C7; 3) Shallow annular bulges impinging the ventral thecal sac from C4 to C7; and 4) Straightening of normal cervical lordosis, which may represent muscle spasm versus strain. (Px3). Petitioner testified that Dr. Goodman referred him to Dr. Santiago-Palma.

On 12/3/18, Petitioner presented to Dr. Santiago-Palma (OAK Orthopedics) with complaints of low back and neck pain. The doctor indicated Petitioner was experiencing predominantly axial type symptoms along the cervical spine. The assessment was prolapsed lumbar intervertebral disc, lumbosacral radiculopathy, and neck pain and Petitioner was placed off work. On 1/7/19, intra-articular cervical injections were performed at the right C2-C6 facet joints, and this was repeated on the left side on 1/14/19. On 1/21/19, Petitioner underwent a right and left S1 transforaminal injection. At a 2/4/19 follow-up, Petitioner reported a 70% improvement after the injections but had persistent pain. An EMG was prescribed by Dr. Santiago Palma based on complaints of right hand numbness. (Px1).

On 2/15/19, Petitioner was evaluated by orthopedic surgeon Dr. An (Midwest Orthopaedics) at Respondent's request pursuant to Section 12 of the Act. Petitioner reported neck and low back pain into the legs and some pain in the right upper extremity in a C6/7 distribution, and that while he had some improvement with injections, he had ongoing pain. Dr. An noted Petitioner had a prior right forearm surgery and opined his complaints of right hand numbness could be related to that. The doctor's diagnosis was cervical spondylosis and mechanical neck pain with no significant upper extremity radiculopathy. Dr. An opined that Petitioner had a preexisting condition of cervical and lumbar spondylosis and that the 8/24/18 work injury aggravated these preexisting conditions beyond normal progression. He recommended conservative care of nonsteroidal anti-inflammatory medications and physical therapy. He believed treatment to date had been reasonable but did not recommend further injections. Surgery was not anticipated unless Petitioner continued to worsen. (Px5; Rx4).

On 2/19/19, Petitioner returned to Dr. Santiago-Palma with worsening symptoms along the lower back and cervical spine. Noting mainly axial-type symptoms and believing the cervical symptoms were facet-related, the doctor again recommended cervical facet injections and bilateral S1 epidurals for the low back, along with physical therapy. The epidural was performed on 3/11/19, and on 3/22/19 Petitioner reported 80% improvement. (Px1).

The 3/20/19 EMG/NCV reflected no evidence of cervical radiculopathy and evidence of mild right carpal tunnel syndrome. (Px5). Dr. Santiago-Palma reviewed the EMG and prescribed physical therapy. (Px1).

On 4/12/19, Dr. Santiago-Palma recorded a chief complaint of right shoulder pain. Following review of an x-ray which showed degenerative changes, the doctor diagnosed primary right shoulder osteoarthritis and wanted an MRI to rule out a rotator cuff tear. On 4/19/19, Dr. Santiago-Palma described Petitioner's low back complaints as predominantly axial and lumbar facet injections were prescribed. (Px1).

The 4/22/19 right shoulder MRI reflected partial thickness supraspinatus tears (3) and degenerative arthritis in the AC and glenohumeral joints. (Px2). On 4/25/19, Dr. Santiago-Palma reviewed the MRI, diagnosed a partial thickness cuff tear and referred Petitioner to surgeon Dr. Michalow. The note indicates "incomplete rotator cuff tear or rupture of unspecified shoulder, not specified as traumatic." (Px1).

Dr. An issued an addendum report on 4/30/19 after reviewing updated records of Dr. Santiago-Palma and the EMG, which he noted was negative for radiculopathy. He opined Petitioner's main source of pain was L5/S1, and that facet injection was reasonable at that level but not at the levels above it. If this failed, Petitioner would be a radiofrequency ablation (RFA) candidate. Petitioner's treatment to date had been reasonable. Noting Petitioner would likely be able to return to work on 6/19/19 at maximum medical improvement (MMI), the doctor noted if lumbar symptoms didn't improve with conservative treatment an L5/S1 TLIF surgery might be indicated. (Px5; Rx5).

On 5/1/19, Petitioner told Dr. Michalow he had done well following right shoulder surgery with minor or absent symptoms until a car accident 9 months prior: "During the accident he grabbed upwards to brace himself with the right arm and since that time he had more pain." He reported occasional clicking and popping. Dr. Michalow reviewed the MRI and found that it showed some tendinopathy but no full-thickness tear. There were significant glenohumeral degenerative changes. A steroid injection was performed, and physical therapy was prescribed. (Px2).

Petitioner underwent bilateral facet injections at L3 to S1 on 5/16/19 with Dr. Santiago-Palma. On 5/31/19, Petitioner reported no improvement. His chief complaints were low back and neck pain and, given the lack of significant improvement, Petitioner was referred to surgeon Dr. Darwish. (Px1).

On 6/5/19, Petitioner reported no real improvement with the right shoulder injection. Dr. Michalow found Petitioner to have degenerative arthritis loose bodies and impingement syndrome with achromic clavicular degeneration. Given the failure of conservative care, Petitioner elected to proceed with arthroscopic debridement surgery but noted he also was awaiting a spine surgery evaluation. (Px2).

Petitioner initially saw Dr. Darwish on 6/6/19 with complaints of low back pain (50%), leg pain (20%) and neck pain (30%). The history provided was of traveling about 30 mph with a test driver in a truck when he hit railroad tracks: "This impact caused him to bounce up and down in the seat. Patient braced himself and he hit his head on the roof of the car and jolted back into his seat." He reported his initial neck pain progressively worsened and he had onset of low back pain. Petitioner reported about 5 months of relief with January 2019 cervical facet injections and complete resolution of the right upper extremity pain he initially had after the accident, but the neck pain was again slowly increasing. He also reported low back pain into the bilateral thighs to the knees, and that he had two months of relief with each epidural but no relief with lumbar facet injections. The pending right shoulder surgery was referenced. After reviewing the MRI films and the report of Dr. An on 6/13/19, Dr. Darwish recommended a posterior lumbar fusion and a third epidural pending authorization. (Px3).

On 6/26/19, Dr. Michalow reported Petitioner was going to first undergo lumbar surgery, so a second injection was performed in the right shoulder. (Px2). On 7/23/19, Petitioner visited Dr. Santiago-Palma for neck pain. Noting axial type pain, facet injections were recommended. (Px1).

On 7/31/19, Dr. Darwish performed the transforaminal lumbar interbody fusion and decompression at L5/S1. Post-operative diagnoses were lumbar radiculopathy, spondylosis, and low back pain. The report noted that a large disc protrusion was in the foramen causing nerve root impingement. (Px3).

Dr. Santiago-Palma performed facet injections on the right (8/30/19) and the left (9/6/19) at C2 to C6. On 9/20/19, Petitioner reported 90% improvement. (Px1). On 9/25/19, Petitioner told Dr. Michalow the injection two months prior had helped to some extent. His 10/16/19 report indicates the right shoulder surgery was scheduled pending medical clearance. (Px2). At a 10/18/19 follow up at OAK, Petitioner was advised to continue a home exercise program. (Px1).

On 10/31/19, Petitioner underwent a right shoulder arthroscopy with debridement. On 11/4/19, Dr. Michalow noted he saw severe bone-on-bone glenohumeral degenerative changes during right shoulder surgery, and bicipital and rotator cuff tendinopathy with no detachment: "He feels significantly improved." Low back pain was his major problem. Petitioner continued to do well and on 12/18/19, Dr. Michalow found that Petitioner had made very good progress with motion and strength, with some ongoing aches primarily at the achromic navicular roll. Petitioner was instructed to do a home exercise program and call as needed. (Px2).

Petitioner continued to follow up with Dr. Darwish through the end of 2019 with x-rays reflecting good positioning of internal lumbar fixation and Petitioner initially reporting significant improvement. On 11/7/19 Petitioner was progressed to full lumbar motion and Dr. Darwish noted he had undergone right shoulder surgery and was treating with Dr. Santiago-Palma for the cervical spine. On 12/19/19, Petitioner was reporting 5/10 to 7/10 lumbar pain that radiated to both hips and thighs and the right foot. He was continued off work. (Px3).

On 12/2/19, Petitioner indicated "significant but temporary relief" with cervical facet injections. Cervical RFA was prescribed by Dr. Santiago-Palma on this date as well as on 1/10 /20 and 3/10/20. (Px1).

On 1/9/20, Petitioner reported slipping on ice and falling on 12/31/19. He caught himself by grabbing onto his truck mirror and had an increase in back and neck pain. He reported posterior neck and periscapular pain that radiated into the right upper extremity with numbness and tingling in the bilateral hands. He indicated that the hand numbness and tingling had been occurring since this slip and fall. Dr. Darwish stated that the hardware remained in good position and there was no structural damage. He continued therapy for the low back and added a cervical protocol. Petitioner was continued off work. (Px1 & Px3).

On 2/13/20, Dr. Darwish notes Petitioner had ongoing complaints of low back pain into the bilateral thighs. He also reported neck, right shoulder, elbow, and wrist pain along with numbness and tingling in the bilateral upper extremities and hands. Despite this, Dr. Darwish indicated Petitioner was overall doing well and advised him to begin physical therapy to be followed by an FCE at 9 months post-surgery. (Px3).

Dr. An reevaluated the Petitioner on 2/28/20. At that time, Dr. An opined Petitioner's symptoms remained causally related to his 8/24/18 work incident, and that his treatment to date, including surgery, had been reasonable There was no evidence of significant radiculopathy or neurologic deficits. Physical therapy was recommended along with cervical ablation procedure. Dr. An opined Petitioner could work with restrictions of no lifting greater than 25 pounds, avoid frequent bending, and avoid frequent twisting. Full duty was anticipated, but if there was significant residual pain an FCE could be considered. (Px5; Rx6).

On 4/9/20, Dr. Darwish noted complaints again of neck and back pain, as well as complaints or right forearm and hand numbness. Petitioner reported increased lumbar pain with therapy. After reviewing Dr. An's report, Dr. Darwish prescribed a four week work conditioning program followed by an FCE. (Px3).

Petitioner underwent cervical medial branch blocks from C2 to C6 on the right (5/13/20) and left (5/20/20). (Px1).

On 5/28/20, Dr. Darwish noted complaints of increased back pain with work conditioning. Petitioner also reported that a week after his cervical RFA procedure his pain became severe but he had complete resolution of right radicular symptoms and numbness and tingling in his left hand. Pending completion of conditioning and the FCE, Petitioner was released to return to work with restrictions (no lifting over 25 pounds and minimal bending/twisting). (Px3).

On 5/28/20, Dr. Santiago-Palma documented 90% improvement on the right with myofascial pain on the left, and he performed trigger point injections. A C6/7 epidural was prescribed on 6/11/20 and performed on 6/26/20. On 7/1/20, Petitioner reported no improvement with the epidural and a new MRI was ordered by Dr. Santiago-Palma. (Px1). The 7/27/20 cervical MRI showed mild multilevel degenerative changes with no significant foraminal or spinal stenosis. (Px1 & Px3). After reviewing the MRI, on 7/28/20, Dr. Santiago-Palma referred Petitioner back to Dr. Darwish for a cervical surgical evaluation. (Px1). On 8/13/20, Petitioner advised Dr. Darwish that he had no relief with cervical C6/7 epidural. After review of the cervical MRI, in which he identified a right C6/7 disc protrusion causing moderate foraminal narrowing, Dr. Darwish again recommended cervical fusion. On 9/24/20, the doctor noted that an exam was pending with Dr. An. He also indicated Petitioner was unable to work. (Px3). On 8/13/20, Petitioner advised Dr. Darwish that he had no relief with cervical C6/7 epidural. After review of the cervical MRI, in which he identified a right C6/7 disc protrusion causing moderate foraminal narrowing, Dr. Darwish again recommended cervical fusion. On 9/24/20, the doctor noted that an exam was pending with Dr. An. He also indicated Petitioner was unable to work. (Px3).
On 9/10/20, Dr. Santiago-Palma again indicated advised Petitioner to see Dr. Darwish and noted complaints of low back pain in the area of the sacroiliac (SI) joints, prescribing SI joint injections. (Px1).

On 10/13/20, Petitioner was again evaluated by Dr. An. Petitioner complained of low back pain and neck pain radiating down the right arm in a C7 distribution, noting an increase in neck pain during work conditioning he underwent for the low back. Noting the cervical MRI showed foraminal stenosis with disc protrusion at right C6/7 impinging on the nerve root, which would correlate with C7 radiculopathy, Dr. An believed the low back pain was residual myofascial. As the persistent right C7 radiculopathy had not responded to conservative treatment, he agreed with the cervical discectomy and fusion recommended by Dr. Darwish. He further opined that treatment to date was reasonable and that Petitioner's work duties should be restricted. (Px5; Rx7).

On 11/18/20, Dr. Darwish performed an anterior discectomy and fusion at C6/7. Post-op diagnoses were disk herniation and radiculopathy. The report notes a central and right paracentral disc herniation was removed. On 12/10/20, Petitioner was continued off work. (Px3).

On 1/14/21, Petitioner advised Dr. Darwish that his right upper extremity numbness and tingling resolved with surgery but returned into the right hand and second finger after one or two weeks. X-rays indicated good positioning of hardware in both the cervical and lumbar spine with no evidence of fusion failure. Therapy, a TENS unit and home exercise were prescribed, and Petitioner was referred back to Dr. Michalow for right shoulder and right elbow. 6/18/21 was the estimated return to work date. (Px3). Therapy began on 1/20/21 at River Valley PT. A 2/10/21 PT note states: "The clinical presentation is evolving with changing characteristics." (Px3).

Petitioner returned to Dr. Michalow on 1/18/21 reporting his right shoulder pain had returned: "The injury which initially caused this was roughly 2-1/2 years ago. Unfortunately, a portion of the report where he described the surgical findings was cut off in printing. It was noted he had been off work for an extended time due to multiple injuries. A 1/18/21 right shoulder x-ray showed glenohumeral degenerative changes of joint space narrowing and nearly bone-on-bone with a large inferior spur. The shoulder was injected and off-label Supartz viscosupplement injections were planned. The first Supartz injection was performed with a second and third performed on 2/8/21 and 2/15/21, with Petitioner reporting improvement after the first two. Dr. Michalow

at the latter visit advised Petitioner to follow up as needed. He continued to treat for his main back and neck problems. (Px2).

Petitioner did not then return to Dr. Santiago-Palma until 2/25/21. Noting low back pain with bilateral radicular symptoms, a lumbar MRI was ordered. (Px1).

On 2/25/21, Petitioner reported posterior neck pain and occasional numbness and tingling in the bilateral hands. He reported improvement in right shoulder and upper extremity pain with three injections with Dr. Michalow. Advising that Petitioner had made great progress with cervical fusion, Petitioner's therapy was advanced to include full range of motion and strengthening over the next 4 to 6 weeks while continuing lumbar therapy. Lumbar injections prescribed by Dr. Santiago-Palma had not been authorized. Petitioner remained on off work status. (Px3). A 2/24/21 PT note states that the therapist believed Petitioner was appropriate for discharge based on functional mobility and strength, noting Petitioner was independent with a home exercise program. He had not yet met the planned long term goals. The therapist advised that Dr. Darwish would determine if further therapy and/or work conditioning was indicated. (Px3).

On 3/12/21, Petitioner underwent a lumbar MRI at the request of Dr. Santiago-Palma. The radiologist's impression of the lumbar MRI indicated an L5/S1 fusion with type 1 end plate changes and mild retrolisthesis, an L5/S1 annular bulge producing minimal canal and mild right foraminal stenosis, and low-grade multi-level degenerative disc disease at additional levels producing minimal to mild canal and/or foraminal narrowing. (Px3). Following review of the MRI, Dr. Santiago-Palma prescribed an S1 lumbar epidural on 3/15/21. (Px1).

On 4/8/21, Dr. Darwish noted complaints of cervical pain with right neck rotation and, difficulty with neck range of motion and severe low back pain. His review of the lumbar MRI showed the fusion surgery with low grade multilevel degenerative disc disease and no significant stenosis. Dr. Darwish felt the fusion was stable and recommended 4 weeks of work hardening followed by a functional capacity evaluation (FCE), holding him off work pending same. Ongoing therapy reports reflect limitations mainly due to pain and pain with activities. (Px3).

On 4/12/21, Dr. Santiago-Palma performed bilateral S1 level transforaminal epidurals. On 4/26/21, Petitioner reported 50% improvement with the epidural. (Px1).

A 4/23/21 note from River Valley PT indicates Petitioner was concerned about his neck, back and shoulders and that he reported difficulty with prolonged activities. His functional progress was good, he had very good objective measures and appeared to be on progress to return to regular duties. On 5/12/21, he reported intermittent tingling in the hands. The therapist indicated he had reached all functional goals and demonstrated the capacity to return to work per the job description. It was noted that he had tolerance for about 4 hours of physical activity, and while he reported onset of symptoms, he appeared able to recover with short breaks. The report states: "(Petitioner) is appropriate for FCE for further assessment of return to work. Based on work conditioning performance (his) functional capacity seems appropriate to perform work activities." (Px3).

On 6/29/21, cervical MRI findings were reviewed and bilateral medial branch blocks were again prescribed, noting if significant relief was obtained an RFA procedure would be performed. Epidurals at S1 were repeated on 7/7/21 given Petitioner's complaints of neck pain into the bilateral upper extremities. Repeat cervical MRI was also requested. (Px1).

On 7/22/21, Dr. Santiago-Palma's report notes prior lumbar injections did not help and therapy helped a little. At this point, Petitioner was referred to Dr. Xu for psychiatric clearance in preparation for a spinal cord stimulator trial. On 7/27/21, he performed right C2 to C6 medical branch blocks, which were repeated at the

same levels on the left on 8/18/21. On 8/20/21, Petitioner was documented to have reported at least 80% improvement "during the anesthetic phase" of the branch blocks and RFA was prescribed. Petitioner was held off work. On 8/23/21, Petitioner was continued off work. (Px1).

Petitioner underwent an FCE at Illinois Bone & Joint Institute on 9/21/21. The FCE results were valid and outlined Petitioner's permanent work restrictions as follows, based on a regular 8-hour workday with regular breaks: no sitting longer than 30 minutes duration, 4 hours total; no standing for longer than 60 minutes, 6 hours total; and no walking long distances, 6-7 hours total. Petitioner was able to lift weights at a heavy physical demand level. Additionally, head/neck flexion and rotation was recommended at a minimal occasional basis (0 to .5 hours). (Px1).

On 10/7/21, Petitioner reported ongoing neck pain with numbness and tingling in the bilateral hands, as well as an onset two or three weeks prior of bilateral ankle and foot pain. Dr. Darwish reviewed the FCE with Petitioner and determined he had reached MMI as to the neck and back from a surgical standpoint. He was released to return to work per the FCE and needed continued long term pain management. He was to follow up as needed. (Px3).

On 10/8/21, Dr. Santiago-Palma reiterated his cervical and lumbar recommendations. He did indicate a tentative return to work date of 11/11/21, but at an 11/5/21 visit continued Petitioner off work through 12/3/21, but that appointment was canceled when it was noted that Petitioner had tested positive for Covid. Additional notes around this time indicate the Respondent set up a Section 12 examination prior to any authorization of the cervical RFA or lumbar stimulator trial. Medications, mainly Tramadol, continued to be prescribed and refilled. (Px1).

On 12/14/21, 1/11/22, and 2/8/22, Petitioner was continuing to complain of neck (6 to 7/10) and low back (7/10) pain. Dr. Santiago-Palma prescribed Tramadol, Gabapentin, and Tizanidine, along with ongoing home therapy and off work status while awaiting RFA and stimulator approval. On 1/11/22, Dr. Santiago-Palma noted myofascial cervical pain and trigger points, which were injected. (Px1).

Dr. An issued an addendum report on 1/21/22 after reviewing updated medical records through 12/14/21. The cervical diagnosis was herniated C6/7 disc with foraminal stenosis causing right sided radiculopathy, for which fusion surgery was appropriate and improved Petitioner's symptoms. As to the lumbar spine, he had an L5/S1 fusion with some ongoing mechanical low back pain without significant radiculopathy. Medical treatment to date was reasonable and ongoing gabapentin and tramadol was appropriate along with over the counter medication. Dr. An did not recommend any further surgery, and he recommended against a spinal cord stimulator. He agreed with Dr. Darwish that Petitioner had reached MMI as to the spine as of 10/7/21. He opined that Petitioner could continue to work within the FCE restrictions. (Rx8).

On 2/15/22 and 3/15/22, Dr. Santiago-Palma noted Petitioner had reached maximum medical improvement (MMI) but would need ongoing long term pain management. Petitioner's neurological exam was normal, and he was diagnosed with low back pain, lumbosacral radiculopathy, lumbar post-laminectomy syndrome and neck pain. He issued work restrictions per the FCE: No prolonged sitting/standing/walking and no lifting/pushing/pulling/carrying. Medication and a home exercise program were prescribed. A 5/10/22 reevaluation was consistent with the 3/15/22 note, and Petitioner was still complaining of 6/10 low back pain and 5 to 9/10 cervical pain. (Px1).

Petitioner testified that he continues to have lumbar symptoms radiating into the buttocks and both legs to the feet. After surgery, the pain diminished but he continued to have symptoms, though improved. He also continued to have popping and clicking in the right shoulder at that time. He agreed that Dr. Michalow had

previously operated on both shoulders prior to the 8/24/18 accident. Petitioner January 2020, his lumbar symptoms had significantly improved, but his neck symptoms became more prominent, and he ultimately had the C6/7 decompression and fusion on 11/18/20. After surgery, his bilateral cervical radicular complaints improved, though he had ongoing pain.

Petitioner testified that the FCE restrictions prevented him from returning to work in his regular capacity. He identified Px7 as a 3/15/22 letter from Respondent indicating that per the FCE and the report of Dr. An, he was permanently disabled from his job duties, and he had to resign by 4/15/22 to avoid being disciplined. He noted that the letter was addressed to a Mr. Richberg, and so he had Respondent revise the letter with his information and they sent a new identical letter that indicated Mr. Juarez instead a couple of weeks later.

Petitioner testified he did not want to resign but did so as of 4/12/22 to avoid discipline. He then started doing a self-directed job search. He also received a 3/23/22 letter from Tristar (Rx9) indicating his TTD benefits were being terminated. A 5/30/22 letter from Tristar (Rx10) demanded job logs with threat of benefit termination and enclosed a benefit check.

Petitioner testified he began weekly job search logs (Px6) on 5/26/22, agreeing this was at his attorney's request. He testified he submitted the logs weekly to his attorney and that he wasn't advised he needed to do 20 contacts per week. He testified he then signed up with ended up signing up with ZipRecruiter and Career Boutique, which provided him job leads within a 25 mile radius. All of his job search has taken place online and he has not obtained a job to date. He testified he wasn't certain he could be hired at his age. Petitioner attended college for two years.

Petitioner testified the Respondent never reached out to him regarding accommodation of his restrictions or vocational services, and he agreed on cross that he did not request such services. He began with Respondent in 1992 and never before had a resume. He previously had been involved with a family business and then construction before starting with Respondent.

Petitioner testified he was paid TTD biweekly at the rate of $2,302.50. As to his written wage statement (Px9), Petitioner testified it accurately depicts his wages from 8/2017 to 8/2018. He had been off work for his prior bicep injury between 6/17/17 and 6/1/18. While off work for that injury he received lost time benefits through 12/2017, then went on SERS disability when he exhausted his vacation and sick time, which is why the wage statement starts showing "$0" as of his 12/31/17 pay period. He returned to work on 6/1/18.

Currently, Petitioner finds it difficult to perform even menial home tasks because it aggravates his symptoms. It takes him twice as long to cut grass now due to taking breaks. He doesn't drive over an hour in his car and can't go shopping or pick up his granddaughter. He takes Tylenol daily as needed and at night takes the medications prescribed by Dr. Santiago-Palma.

On cross, Petitioner testified that his 2009 car accident involved tearing his right shoulder labrum from the bone with surgery. He has a prior left SLAP tear as well. After the current accident, he testified his right shoulder was stiff and sore. He acknowledged he completed and signed the Employee Notice of Injury (Rx2). When it was noted that where he was asked what body parts were injured, he indicated only neck and back, but testified the shoulder got worse over time.

Petitioner testified he was going through therapy in February or March 2019 and using therabands but was unable to due to his right shoulder. The therapist ended therapy until they determined what was going on with the shoulder. He agreed that therapy did not cause a right shoulder injury. He's had no subsequent injuries to neck, head, back or shoulder. Petitioner resigned on 4/12/22 at age 61 after reaching MMI with permanent

restrictions. He testified he planned to retire when he reached age 67 or possibly 70. As to not requesting formal vocational services, Petitioner testified it was his understanding that someone would approach him. As to his job search, he initially was contacting 3 employers per week, most within 5 miles of his home, both online and in person. He would leave his name and number and agreed he did not follow up. Asked whether the jobs he was making contacts for were within his restrictions, he testified he didn't think he could do any of the jobs he searched for due to the job requirements. Petitioner agreed Dr. Santiago-Palma added restrictions beyond what was specified in the FCE. His neck condition has worsened, noting ablation treatments had been approved this month. He continued to have weakness in the right shoulder.

Petitioner testified he did not recall receiving the letter in Rx9. He did receive the letter in Rx10, which also included a benefit check covering the period through 5/31/22. He testified he probably received this in early June, at which time he had already started doing job logs. He never got to the point of asking any prospective employers if they could accommodate his restrictions during his job search.

On redirect exam, Petitioner reiterated he was not under any active right shoulder treatment prior to 8/24/18. He did not seek shoulder treatment for a year because he was treating for his spine. He had hoped to be able to return to work and that Respondent would accommodate any restrictions he had. To his knowledge the FCE restrictions are based on his spinal condition.

Samantha Swenson, a Tristar (third party administrator) representative, testified that her company pays medical and TTD on behalf of Respondent. She testified she is a supervisor and has been with Tristar for a year, supervising 6 adjusters. Claim payments are electronically recorded and logged into their system. When an entry is made, it is automatically uploaded into the claim file and compiled. These records are kept in the regular course of business. She testified that the computer ledger showing all payments made on the Petitioner's case was contained in Rx12 and that it is a true and accurate depiction. She testified the Respondent paid maintenance totaling $15,360.44, TTD totaling $117,310.96 and medical expenses totaling $261,265.54.

In reviewing the claim notes, Ms. Swenson testified that Petitioner's cervical and lumbar injuries were accepted claims, but his right shoulder claim was disputed and denied.

Where an injured employee reaches MMI and restrictions that cannot be accommodated by Respondent, they would be put placed on maintenance benefits pending a self-administered job search or vocational rehabilitation. Notice letters are sent to the employee to get the activity started and copies of the letters are stored in the electronic claim file. Ms. Swenson was asked to review Rx9 through 11. She identified Rx9 as a notice letter indicating maintenance benefits are available but require a job search. No such logs had been submitted by Petitioner prior to this letter going out. Px10 was identified as a letter indicating Petitioner's job logs hadn't been received and if not received within 10 days, maintenance benefits would be terminated. Rx11 indicated that benefits would be terminated effective 7/5/22 because no job logs had been received. The claim file did not reflect letters from Petitioner in response to these letters. Per the letter, Petitioner was supposed to do 20 contacts per week, so the 3 contacts he was making per week was less than satisfactory.

On cross examination, Ms. Swenson agreed she is not a vocational counselor and that the claims adjuster would be the one to set up any vocational assistance. The ledger in Rx12 is an ongoing tally of what the Respondent paid in this case in TTD, maintenance, and medical expenses. She testified that Petitioner's shoulder was never considered part of the Petitioner's claim. As to the Respondent's requirement of 20 job contacts per week during a job search, she testified that this is what the vocational company they use indicates is a full time job search. She has no independent knowledge of whether this is law or not.

Various correspondences from Tristar to Petitioner were submitted into evidence. On 4/10/19, Respondent notified the Petitioner that benefits regarding the right shoulder were denied. (Px10).

Correspondence from Respondent to Petitioner dated 3/15/22 addresses the Petitioner but begins the letter with "Dear Mr. Richburg." The letter states that both a Section 12 examiner and an FCE determined that he was permanently disabled from his job, and, by Rule, he would need to submit a resignation. Failure to do so by 4/15/22 would result in discipline up to and including discharge. He was advised to contact a representative of SERS regarding disability benefits and insurance and to contact the Secretary of State Department of Personnel. (Px7). A 3/23/22 letter from Tristar to Petitioner via his attorney indicates that Petitioner was no longer entitled to TTD because he was at MMI, and that in order to receive maintenance benefits he would need to first contact his agency's workers' compensation coordinator to comply with any requests or testing for other available agency employment. Additionally, he would need to make a "sustained and systematic effort" to find employment, with at least 20 contacts per week and "on each normal workday, you must take some positive action to find work." Job search logs were to be submitted bi-weekly. (Rx9). On 5/30/22, Tristar again sent correspondence to Petitioner at his attorney's office indicating that job logs had not been submitted despite the request to do so, noting a failure to do so within 10 days could result in a termination of benefits. (Rx10). A 7/1/22 letter states that job search logs still had not been received and thus maintenance benefits were being terminated as of 7/5/22. (Rx11).

Petitioner submitted documentation of a self-directed job search as Petitioner's Exhibit 6. These records show he looked for work between 5/24/22 and 8/4/22, documenting 33 contacts. Other than this, there are pages from an internet job search site that list a number of jobs based on a search. There is no indication if any of these were actually applied to or when. (Px6).

Subsequent to the closing of proofs, Respondent on 9/9/22 filed a Motion to Reopen Proofs in order to submit amended figures in support of its TTD and maintenance credits. After discussion with the parties, the parties submitted a stipulation with attachments, including a modified Request for Hearing Form and a 9/8/22 letter from Respondent's Workers' Compensation Coordinator, Garrett Stevens, outlining the issuance of lost time benefits to Petitioner. In lieu of reopening proofs, the Arbitrator has marked this stipulation as Arbitrator's Exhibit 4. The Arbitrator notes that, in addition to modification of the credits due to Respondent, the period of TTD being requested by Petitioner was also amended.

## CONCLUSIONS OF LAW

**WITH RESPECT TO ISSUE (E), WAS TIMELY NOTICE OF THE ACCIDENT GIVEN TO THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLWS:**

The Arbitrator notes that the Respondent agreed at hearing that the Petitioner provided timely notice of his 8/24/18 accident pursuant to Section 6(c) of the Act. Respondent's basis for raising a dispute as to this issue is based on the Petitioner's alleged failure to provide notice of a right shoulder injury.

The Arbitrator finds that the Petitioner provided timely notice of his 8/24/18 accident and that he sustained injury in that accident. The issue the Respondent raises, in the Arbitrator's view, is a causation issue, not a notice issue.

**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 finds that the Petitioner has failed to prove he sustained accidental injury to the right shoulder which is causally related to the 8/24/18 accident.

The Arbitrator notes that the initial treatment records of primary care provider Dr. Goodman were not included in the evidentiary record, meaning there is no documentation available as to what Petitioner's initial complaints included. The 10/31/18 Tristar accident report completed by Petitioner references only neck and back pain, and this report was completed two months after the accident date. Nothing is indicated which would corroborate the Petitioner's testimony that he was holding an overhead handle with his right hand when he went over the tracks or stretching his right shoulder. The 11/16/18 Tristar medical information form completed by Dr. Goodman on 11/7/18 reflects only neck and back symptoms. Again, this is well after the accident date.

The first reference to right shoulder pain the Arbitrator found in the medical records was the 4/12/19 report of Dr. Santiago-Palma. This is almost eight months post-accident. The 5/1/19 report is the first time Petitioner described grabbing upwards to brace himself with the right arm before going over the tracks, which is what the Petitioner testified to at the hearing. However, this description is not corroborated by any of the earlier medical records nor the accident report/notice of injury. It is also inconsistent with the two pieces of information we do have from Dr. Goodman – the 11/16/18 medical information form, and the fact that the doctor ordered MRIs only of the neck and back, not the right shoulder. The Arbitrator further notes that this alleged history of injury only came up after the 4/10/19 letter from Respondent denying benefits as to the right shoulder.

The records of Dr. Michalow reflect that Petitioner had a prior right shoulder surgery long ago, and that at the time of surgery he was found to have virtually bone on bone. This evidences a significant preexisting post-operative degenerative condition in the right shoulder prior to the 8/24/18 accident. Dr. Michalow also did not offer an opinion as to the causal relationship of the Petitioner's right shoulder condition and did not provide a deposition. Dr. An was not asked to provide an opinion with regard to the right shoulder. This case does not involve a fact pattern where a causal connection of the right shoulder can be inferred by the chain of events. The accident date does not represent a point of demarcation where Petitioner's prior right shoulder condition became and remained symptomatic.

Based on the above, the Arbitrator finds that the Petitioner has failed to prove that he sustained accidental injury to the right shoulder related to the 8/24/18 accident.

The Petitioner has shown by the preponderance of the evidence that his cervical and lumbar conditions of ill-being are causally related to the 8/24/18 accident. This is supported by the opinions of Dr. Santiago-Palma, Dr. Darwish and Dr. An, and the Respondent has acknowledged that the injuries to these body parts are related to the 8/24/18 accident.

**WITH RESPECT TO ISSUE (G), WHAT WERE THE PETITIONER'S EARNINGS, THE ARBITRATOR FINDS AS FOLLOWS:**

The Petitioner's wage statement was submitted as Px9. This document indicates wages were paid to Petitioner between 10/16/17 and 12/15/17, and again from 6/1/18 to 10/15/18, in the year prior to the accident. The Petitioner testified that the time he was off work was due to an unrelated injury. While the Petitioner testified he was paid bi-weekly, this document makes clear that he was actually paid twice a month. In each of the bi-monthly pay periods except one, the Petitioner was paid $2,302.50. This was the case regardless of how many hours the Petitioner was indicated to have worked, which in the Arbitrator's view means he was paid a salary, not an hourly wage. The period that is the exception is the 12/1/17 to 12/15/17 pay period, for which he was paid $3,407.50. (Px9). Neither party was able to clarify why the Petitioner was paid more in the 12/1/17 to 12/15/17 pay period than in any other pay period.

Petitioner was paid $31,037.50 over the period of time he actually worked in the year prior to the accident. This covers the period from 10/16/17 through 12/15/17 (8-5/7 weeks) and 6/1/18 through 10/15/18 (19-4/7 weeks). Thus, he earned $31,037.50 over the course of 28-2/7 weeks. Using the weeks and parts thereof method, the Petitioner's average weekly wage is $1,097.27 ($31,037.50 / 28.286 = $1,097.27).

**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, THE ARBITRATOR FINDS AS FOLLOWS:**

The bills Petitioner is requesting to be paid by Respondent are submitted into evidence as Petitioner's Exhibit 8. This includes the billing of ATI Physical Therapy ($5,338.78), OAK Orthopedics ($6,080.11), Orthopedic Associates of Kankakee (OAK) ($156.00), and Hinsdale Orthopaedics/Dr. Darwish ($36,808.00).

As to the expenses of ATI, there are two separate packets of billing. The first covers the period from 6/18/18 to 8/6/18. As this billing predates the 8/24/18 accident, it is obviously unrelated to the 8/24/18 accident. This billing is denied.

The remainder of the billing contained in Petitioner's Exhibit 8 is supported by the medical records in evidence and the opinions of Dr. An as being reasonable treatment to Petitioner's cervical and lumbar spine that is causally related to the 8/24/18 accident.

While the Petitioner reached MMI prior to the hearing date, both Dr. Darwish and Dr. An have opined that ongoing pain management is reasonable and related to the 8/24/18 accident.

The Respondent is liable for the medical expenses outlined in Px8, except for the expenses of ATI Physical Therapy, for the reasons noted above.

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

Per Arbx4, Petitioner is claiming entitlement to TTD from 12/14/18 through 3/19/20 and from 6/2/20 through 4/12/22, and maintenance from 4/13/22 through the hearing date.

There is no dispute with regard to the claimed TTD period as the treating medical records of Dr. Santiago-Palma and Dr. Darwish, as well as the opinions of Dr. An, support that Petitioner was held off work and entitled to TTD from 12/14/18 through 3/19/20 and from 6/2/20 through 10/7/21. While the Petitioner claims TTD from 10/8/21 through 4/12/22, the Petitioner had already reached MMI and therefore was not entitled to TTD after 10/7/21. The issue then becomes entitlement to maintenance after 10/7/21.

As to maintenance, Section 8(a) of the Act authorizes an award of maintenance benefits only when a claimant is engaged in a prescribed vocational or physical rehabilitation program. If the claimant is not engaged in some type of physical rehabilitation program, formal job training, or a self-directed job search, there is no obligation to provide maintenance." *Greaney v Industrial Comm'n*, 358 Ill. App. 3d 1002, 832 N.E.2d 331 (2005).

In this case, Petitioner was found to be at MMI by Dr. Darwish on 10/7/21. He continued to treat and was paid benefits. He resigned from his position with Respondent on 4/12/22 when the Respondent indicated it was

unable to accommodate his restrictions. Thereafter, the Respondent advised Petitioner that he would have to perform a job search to obtain continued maintenance benefits. Despite multiple requests, the Petitioner did not forward job search logs. Eventually the benefits were terminated.

Respondent's Exhibits 9, 10, and 11 are Tristar correspondence letters requesting that Petitioner to submit at least 20 employer contacts, that as of 7/1/22 no such job logs had been received, and that if they were not received as of 7/1/22, benefits would be terminated as of 7/5/22.

Petitioner submitted job logs in this case, ranging from 5/24/22 to 8/4/22 (Px6). There is no evidence that Petitioner searched for jobs before or after this time period. Additionally, in reviewing the logs, they provide a paucity of information as to what job he was seeking or what the physical requirements of the jobs were. He also testified that he did not follow ups with the listed employers. While he testified he also performed online searches, the evidence presented involves only the results of an online search, and provides no indication that the Petitioner ever applied for the listed jobs.

The Arbitrator finds that the evidence of a job search as presented by Petitioner is insufficient to show that he was seriously engaged in a self-directed job search. The initial letter sent to him advised that he first contact his own agency While the Respondent's request for 20 contacts per week is not explained in terms of any vocational counselor expertise as to the required number, the three job contacts per week that he submitted is clearly low and does not reflect someone who is actually engaged in a job search, which is also supported by his admitted lack of follow up. Petitioner testified he did not know whether he could perform the jobs he indicated that he searched for.

Based on the above, the Arbitrator finds that Petitioner is entitled to maintenance from the day after he was found to be at MMI, 10/8/21, through 4/12/22, the day he resigned his employment with Respondent. The letter sent to him advising that Respondent could not accommodate his restrictions advised him to contact a representative of SERS regarding disability benefits and insurance, and to contact the Secretary of State Department of Personnel. There was no testimony from Petitioner in this regard and no evidence that he ever tried to make such contacts. It appears that the Petitioner essentially did nothing in order to find new employment until his benefits were terminated after several requests for job logs were made. His failure to follow up with Respondent or to conduct a job search with any reasonable effort supports the finding that maintenance benefits were properly terminated as of 4/12/22.

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

Generally, an Arbitrator is to consider the issues of permanent and total disability as well as a possible wage differential award under Section 8(d)1. In this case, evidence has not been presented which would support that the Petitioner is permanently and totally disabled. He was released to return to work with restrictions and has not performed a reasonable job search to date. While there is no evidence the Respondent offered vocational assistance, the Petitioner testified he never requested such assistance. The Petitioner also has not provided any evidence which would be sufficient to show that he sustained a loss of wages, as there was no evidence presented by a vocational expert and, again, there has not been a sufficient job search as of the date of hearing.

Pursuant to §8.1b of the Act, the following criteria and factors must be weighed in determining the level of permanent partial disability for accidental injuries occurring on or after September 1, 2011:

(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 (AMA) "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.

(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.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that neither party has presented an AMA permanent partial impairment rating or report into evidence. Therefore, this factor carries no weight in the permanency determination.

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 public services representative and is not able to return to work in his prior capacity as a result of said injury and the work restrictions he has. This factor carries moderate weight in the permanency determination.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 57 years old at the time of the accident. Neither party has presented evidence which tends to show how the Petitioner's permanent disability resulting from the 8/24/18 accident is impacted by his age. This factor carries minimal weight.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that the Petitioner's future earnings capacity is unknown at this time as he no longer works for Respondent and has not performed a suitable job search to determine his current earning capacity. However, the Arbitrator does note that the Petitioner earned a fairly high rate of pay and currently is not working. This factor carries mediumweight in the permanency determination.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that the Petitioner has undergone numerous cervical and lumbar injections, RFA procedure and both cervical and lumbar fusion surgeries. He has been left with work restrictions that are based on an FCE, restrictions which both treating surgeon Dr. Darwish and Section 12 examining surgeon Dr. An have endorsed. The Petitioner complains of ongoing symptoms and the ongoing use of medications, which are consistent with the records of Dr. Santiago-Palma. This factor carries significant weight in the permanency determination.

Based on the above factors, the record taken as a whole and a review of prior Commission awards with similar injuries similar outcomes, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of the loss of use of 70% of the person as a whole pursuant to §8(d)2 of the Act.

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 20WC016686 |
| Case Name | Brian Weinstein v.<br>Chicago Ridge Fire Department |
| Consolidated Cases | 20WC025664; |
| Proceeding Type | Petition for Review |
| Decision Type | Commission Decision |
| Commission Decision Number | 23IWCC0517 |
| Number of Pages of Decision | 18 |
| Decision Issued By | Deborah Simpson, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Patrick Serowka |
| Respondent Attorney | Kisa Sthankiya |

DATE FILED: 12/8/2023

/s/Deborah Simpson, Commissioner

Signature

DISSENT: /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

Brian Weinstein,
Petitioner,

vs. NO: 20 WC 16686

Chicago Ridge Fire Department,
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, occupational disease, permanent disability, temporary disability, permanent 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.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 31, 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.

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.

**December 8, 2023**
o10/11/23
DLS/rm
046

/s/*Stephen J. Mathis*
Stephen J. Mathis

/s/*Marc Parker*
Marc Parker

DISSENT

I respectfully dissent from the Majority which affirmed and adopted the Decision of the Arbitrator. I would have found that the Petitioner did not sustain his burden of proving his current

condition of ill-being, Histoplasmosis or Histoplasma pneumonia, was causally connected to his work as a firefighter, reversed the Decision of the Arbitrator, and denied compensation.

Our Act provides in pertinent part (820 ILCS 305 §6(f)):

> "Any condition or impairment of health of an employee employed as a firefighter, emergency medical technician (EMT), or paramedic which results directly or indirectly from any bloodborne pathogen, lung or respiratory disease or condition, heart or vascular disease or condition, hypertension, tuberculosis, or cancer resulting in any disability (temporary, permanent, total, or partial) 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. *** The changes made to this subsection by this amendatory Act of the 98th General Assembly shall be narrowly construed. "

The statutory presumption quoted above applies to Petitioner because he is a firefighter. However, the language does not specifically include the disease of Histoplasmosis, which is a fungal infection. The statutory language specifies that this presumption is to be narrowly construed. Therefore, I conclude that the condition of Histoplasmosis is not a condition that evokes the presumption that the condition was caused by Petitioner's work activities as a firefighter. Because I believe the presumption of causation is inapplicable here, Petitioner clearly has the burden of proving his condition was caused by exposure associated with his job. I do not believe he sustained that burden.

Initially, there was no evidence actually establishing what exposure Petitioner had to offending environments that could have caused Histoplasmosis. Petitioner testified that "sometimes" birds got into the firehouse through the bay doors. However, that testimony alone is not sufficient to establish exposure especially since Petitioner's co-worker testified that it happened maybe three to four times a year and Chief Bonnar testified he did not know of any such instance, that he would have been made aware of such situations, and would have addressed it aggressively knowing the dangers of Histoplasmosis as a chicken farmer.

In addition, Petitioner did not actually establish the specific offensive exposure he encountered in his firefighter/EMT calls. Petitioner testified that he often had to enter spaces that were moldy, rodent infested, or was in a generally dilapidated condition. However, that testimony was largely rebutted by the testimony of Chief Bonnar who noted that Petitioner worked as driver/operator of fire apparatus, and usually did not go into buildings. In addition, he reviewed the calls Petitioner submitted and found no instance in which he would be exposed to birds, bats or smoke. The lack of specific evidence of exposure here distinguishes the instant case from *Tolbert v IWCC*, 11 N.E.2d 453 (4th Dist. WC Div., 2014). In *Tolbert,* the claimant's job was cleaning out grain bins. The testimony and medical records noted the presence of pigeons and bird droppings and that the work activities created a lot of airborne dust. In addition, there was a specific medical opinion that the inhalation of that dust caused the claimant's Histoplasmosis.

In the instant case, I do not find the "causation opinions" of Petitioner's treating doctors persuasive. Dr. Podbielski wrote in his treatment notes while his "blood tests were negative for Histoplasmosis he did have yeast in his lungs (which is abnormal). Whether they were actually Histoplasmosis or not is less important than the fact that he did have yeast in his lungs and lymph nodes which is abnormal and required medical/surgical intervention. Although it is impossible to determine with absolute certainty that his exposure to yeast was from his job as firefighter, given that he had no other exposure history, occupational exposure seems the most likely cause of this problem." Similarly, Dr. Barry noted that Petitioner was "a firefighter and is exposed to wet,

dilapidated buildings frequently. It is very possible that patient was exposed to histoplasma in this manner." In my opinion these "opinions" are speculative and seemly based on the incorrect assumption about the times Petitioner was actually exposed to offensive environments.

It is noteworthy that Petitioner did not have issues with his lungs until his son was diagnosed with pneumonia and his wife "also became ill" presumably with a similar condition. I find the causation opinions of Dr. Go more persuasive than those of Petitioner's treaters. Unlike Dr. Podbielski and Dr. Barry, Respondent's Section 12 medical examiner, Dr. Go, specifically looked at the exposure Petitioner actually experienced. Dr. Go did not believe that Petitioner "was exposed to histoplasma of sufficient degree during his work as to develop clinical infection" because there was "no specific proximate exposure to conditions that would lead to histoplasmosis." He noted that histoplasmosis is "exceedingly common" in the US, particularly in the Midwest. "In the Ohio and Mississippi River Valleys, a region that included Chicago, skin testing has shown that up to 90% of adults have been exposed to the fungus." He also believed there was no causal connection between Petitioner's work and his pneumonia. While Dr. Go did not believe Petitioner caught pneumonia from his son, they both could have had the same exposure to histoplasma, which would not likely be in the firehouse or on any firefighter/EMT calls on which Petitioner was sent.

In my opinion, Petitioner did not sustain his burden of proving sufficient work-related exposure to offending environments that would have caused his Histoplasmosis or Histoplasma pneumonia. Based on the opinions of Dr. Go, I do not believe Petitioner was at greater risk of developing Histoplasmosis or Histoplasma pneumonia than any other Midwesterner and the risk of developing that condition was not associated with his occupation as firefighter. Therefore, I would have found that the Petitioner did not sustain his burden of proving his current condition of ill-being, Histoplasmosis or Histoplasma pneumonia, was causally connected to his work as a firefighter, reversed the Decision of the Arbitrator, and denied compensation. Accordingly, I respectfully dissent from the Majority.

/s/*Deborah L. Simpson*

o10/11/23
DLS/dw

Deborah L. Simpson

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 20WC016686 |
| Case Name | Brian Weinstein v. Chicago Ridge Fire Department |
| Consolidated Cases | |
| Proceeding Type | Corrected |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 14 |
| Decision Issued By | Rachael Sinnen, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Patrick Serowka |
| Respondent Attorney | Kisa Sthankiya |

DATE FILED: 1/31/2023

**THE INTEREST RATE FOR THE WEEK OF JANUARY 31, 2023 4.68%**

/s/ Rachael Sinnen, Arbitrator

Signature

TATE 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**

**Brian Weinstein**
Employee/Petitioner

v.

**Chicago Ridge Fire Department**
Employer/Respondent

Case # **20** WC **16686**

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 **10.26.22.** 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 **Admissibility of Px 4**

**FINDINGS**

On **7.8.20**, 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 $***89,555.96***; the average weekly wage was $***1,722.23***.

On the date of accident, Petitioner was ***42*** years of age, ***single*** with ***4*** 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 $**14,115.23** for other benefits, for a total credit of $**14,115.23.**

Respondent is entitled to a credit of **$89,997.04** under Section 8(j) of the Act.

**ORDER**

See Arbitration Decision for Case No. 20WC25664 incorporated herein.

**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 31, 2023**

Signature of Arbitrator

STATE OF ILLINOIS )
) SS
COUNTY OF COOK )

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

| | | |
|---|---|---|
| Brian Weinstein | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | |
| | ) | Case No. 20WC16886 |
| Chicago Ridge Fire Department | ) | *consolidated with* |
| | ) | Case No. 20WC25664 |
| | ) | |
| Respondent. | ) | |

**CORRECTED FINDINGS OF FACT**

This matter proceeded to hearing on October 26, 2022, in Chicago, Illinois before Arbitrator Rachael Sinnen on Petitioner's Request for Hearing under the Occupational Diseases Act "ODA". Issues in dispute include accident, causation, average weekly wage "AWW," unpaid medical bills, temporary total disability "TTD" benefits, Respondent's credit, and penalties. Arbitrator's Exhibits "Ax" 1 and 2.

***Job Duties***

In 2019 and 2020 (including the date of accident March 23, 2020), Petitioner was a firefighter/EMS for the Respondent and had been since February 2, 2004. (Transcript "TA" 17). Petitioner's primary duties were to respond to emergency calls, ambulance calls, and fire calls out of a firehouse in Chicago Ridge, Illinois. In addition, Petitioner inspected single-family residences, for the purpose of rentals in multifamily buildings and commercial buildings.

Petitioner would inspect for various code violations and look for rodent harboring, the presence of mold, openings in the drywall and in the ceilings, electrical hazards, and fire department violations. (TA 62). Petitioner would inspect for pests or rat abatement in attics, basements, crawl spaces and similar spaces with exposed soil.

Petitioner testified that it was not mandatory to wear supplementary oxygen or facemasks upon entering buildings for purposes of inspection or for EMS calls. During EMS calls there is no respiratory protection afforded. (TA 58-59).

***The Firehouse***

The firehouse is located at 10063 Virginia Avenue in Chicago Ridge, Illinois. (TA 26). Petitioner testified extensively regarding the firehouse, surrounding buildings and their locations. A

recycling plant called Resource Management was located across the right, approximately 400 feet from the firehouse. Garbage trucks would line up on the side of the street, going in and out of the plant, to dump the garbage to be sorted. (TA 37-38). Pawsitively Heaven is a dog daycare/boarding facility located 200 feet from the firehouse. (TA 38-40). Petitioner testified that animal food and feces/urine were located on the outside of that facility. Petitioner testified to noticed noxious smells emanating from these facilities as well as the presence of birds and mice. (TA 43).

Petitioner testified that, weather permitting, the firehouse bay doors (which are 20 feet tall) were left open. Birds would fly into the firehouse. Bird droppings around and inside the firehouse were common. Droppings were found on the floor, on the vehicles, and on the gear racks. (TA 44-45). Outside the firehouse, bird droppings collect on the driveway, the vehicle pad leading into the firehouse and the parking lot. (TA 47-48).

Petitioner testified that he tried to clean the base at least once a month which involves spraying down the areas with water but not using a disinfectant. Petitioner testified that the droppings get on the bottom of duty boots which are left on when entering the living quarters of the firehouse (including where the firefighters sleep), which are carpeted. (TA 46-47).

In addition to bird droppings, Petitioner testified to the presence of mice around the firehouse (more so in the winter). (TA 48). Traps are set for the mice and are then thrown in the garbage. Petitioner testified that mouse droppings are swept up and floors are mopped but not disinfected. Petitioner witnessed mouse droppings in the stairwell and up in the bunk area where the firefighters set traps. (TA 52).

Christopher Schemlzer testified on behalf of Petitioner. He is employed by Respondent as Captain and EMS coordinator. He's worked with Respondent for 27 years and with Petitioner, on and off, for about 17-18 years. Petitioner and Cpt. Smeltzer both worked from the firehouse at 10063 Virginia Avenue in Chicago Ridge. Cpt. Smeltzer's regarding the condition of the firehouse and surrounding area was like Petitioner's testimony.

William Bonnar, Jr. testified on behalf of Respondent. He is the Chief of Chicago Ridge for the last 4 years. (TA 238). He indicated all the operations are handled by captains, lieutenants, and firefighters, and that he mainly administrates. (TA 253). Chief Bonnar testified that Petitioner notified him that he was sick but never mentioned it was due to bird droppings and wasn't sure how to investigate as Petitioner's condition was non-cancerous. (TA 241-242; 245). Chief Bonnar found no evidence that Petitioner was exposed to birds or bats. Chief Bonnar testified that he has not witnessed a bird fly into or out of the bay. (TA 252). There were no histoplasmosis outbreaks in his department. (TA 260). He has never seen bird droppings in a firehouse or in the mezzanine area although he has never cleaned the mezzanine area. (TA 268).

***Run Reports / NIFFERS***

Petitioner collected run reports (aka NIFFERS) reflecting calls he went on between June 2019 and March 2020. (TA 67; Px 3). The run reports reflect about 269 different residences that Petitioner responded to. Petitioner documented the address of the location, who was present on

the call, what vehicles responded, and a brief description in the narrative portion of what was encountered.

Both Petitioner and Cpt. Schemlzer testified about the quality control of the run reports and confirmed that they were kept in the normal and usual course of business. Cpt. Schemlzer testified that some of his job duties was to confirm that the run reports were properly completed, submit them to the Department of Homeland Security on a monthly basis, and ensured that Freedom of Information Act requests were completed. (TA 69-81). Cpt. Schemlzer confirmed that run reports can only be amended by a specific number of people including himself and one other captain. If a report was amended, it would be flagged for resubmission to the Department of Homeland Security. Cpt. Schemlzer confirmed that Petitioner's Exhibit 3 was in the same or substantially same condition as they were when they were last compiled. (TA 192-195; See TA 81, PX 3).

Petitioner testified that he cross referenced the run reports with official inspection reports from the City of Chicago Ridge inspections and found many violations within the places he went to during that time period. (TA 88, PX 4). Petitioner testified that it was the normal course of business and Respondent's policy to produce inspection reports of the addresses that had been inspected. The inspection reports are kept by Respondent in a database called "ESO Suite." Petitioner's Exhibit 4 was a collection of inspection reports (where violations were reported) that matched with Petitioner's run reports. Petitioner testified that each the inspection reports was in the same or substantially same condition as they were when pulled from the ESO Suite. (TA 101-102, PX 4).

Based on Petitioner's Exhibits 3 and 4, Petitioner testified that he entered 28 places (out of 241) from June 1, 2019, through March 2020 that had reports of mold and dilapidated conditions. (TA 109). Petitioner testified that after reviewing Petitioner's Exhibits 3 and 4, his memory was refreshed, and he recalled that most places were multi-family dwellings that were unsanitary. He recalled one home where the owner allowed animals to urinate and defecate on pads located inside the home and there was mold from improper ventilation. He also recalled a specific event in February 2020 where a patient he transported that was lying in a soiled home hospital bed. (TA 105-109).

***Summary of Medical Records***

The March 11, 2020, records of Dr. Chemello reflect Petitioner was in a good condition of health. (PX 6, 23-28). The February 27, 2020, Palos records document an annual physical examination for Petitioner as a firefighter/paramedic and note a normal examination with approval for full duty without restrictions and for respirator use. (RX 5, p. 61).

On March 23, 2020, Petitioner presented to Dr. Chemello reporting a runny nose, sore throat, swollen glands, and minimal non-productive cough. Subsequent visits in late March with Dr. Chemello reflect continued coughing with occasional white yellow sputum wheezing with forced expiration. On March 27, 2020, Dr. Chemello diagnosed acute bronchitis with bronchospasm. An April 6, 2020, chest x-ray reflected a history of cough the past 4 to 5 weeks, bronchitis, and a nodular opacity in the right midlung field and hazy infiltrates into the right lower lobe, findings

likely related to pneumonia. (PX 7, 22). On April 6th, 2020, Dr. Chemello documented that Petitioner may return to work once all his symptoms resolve. (PX 6, 33-51). On April 11th, 2020, Dr. Chemello stated that Petitioner could return to work on April 20, 2020, if Petitioner was asymptomatic. (PX 6, 57-58).

A May 12, 2020, Chest CT reflected a right upper lobe pulmonary nodule along the horizontal fissure (PX 7, 27-28) and on May 28, 2020, Dr. Podbielski noted the lung nodule, enlarged lymph nodes and abnormal CT scan of chest and a subsequent referral was made for thoracic surgical evaluation for RUL lung nodule, mediastinal and hilar adenopathy. It was noted that the CT scan demonstrated 1.5 cm spiculated mass in anterior segment of the right upper lobe of lung as well as two small hepatic hemangiomas and scarring in the parenchyma of the right lower lobe. Further, a PET/CT scan performed May 20, 2020, showed multiple hypermetabolic lymph nodes in the cervical, mediastinal, and right hilar region. A bronchoscopy was to be performed by Dr. Nawa of Advocate Christ along with a bronchial biopsy and a formal pulmonary function test. (PX 7, 31-35; PX 6, 60-63).

On June 4, 2020, Petitioner underwent a bronchoscopic biopsy with postoperative diagnosis of right upper lobe nodule and mediastinal and hilar lymphadenopathy. (PX 6, 66-68).

On June 11, 2020, Dr. Podbielski noted chief complaints as right upper lobe lung nodule and mediastinal adenopathy. This is the first time Dr. Podbielski describes Petitioner as a 42 y/o Lockport firefighter. The procedure showed no evidence of malignancy. The notes indicate that Petitioner was anxious about cancer and deciding on a surgical resection for right thoracotomy and lung resection at Palos Hospital. He indicated he shares an email from his attorney regarding a workers' compensation claim. (PX 7, 66).

On July 8, 2020, Petitioner underwent wedge resection of right upper lung nodule and resection of mediastinal lymph nodes, histoplasmosis unspecified, encapsulated. The operative report reflected that Petitioner was a 42-year-old firefighter with a significant exposure history to dust and inhalation of fumes. (PX 7, 90).

A July 10, 2020, addendum by Sheila Barry, M.D. of Metro Infectious Disease Consultants reflected that Petitioner was a firefighter, had a history of histoplasma pneumonia in March, and noted that that the histoplasma identified in pathology is an isolated pulmonary nodule. Petitioner was described as young, otherwise healthy, and not immunocompromised. (PX 7, 38)

The July 30, 2020, note of Dr. Podbielski notes that Petitioner's employment as a firefighter with significant inhalation exposure is consistent with his final diagnosis. Petitioner was advised not to return to work until after his October appointments. (PX 7, 128).

The September 4, 2020, record of Dr. Barry notes a suspicion of acquired histoplasma pneumonia through entering dilapidated buildings/old fire locations including any place that is damp, moldy and soil is disturbed. Dr. Barry noted that Petitioner's solitary nodule does not likely require therapy but will require follow-ups for any new nodule formation or active pulmonary histoplasmosis. (PX 9, 12-13).

On October 15, 2020, Dr. Podbielski cleared Petitioner to full duty work starting October 22, 2020. He advised that Petitioner follow up with repeat chest scans every 6 months for the next 3-4 years. It was noted that (while impossible to know exactly) Petitioner's occupational exposure (exposure to yeast as a firefighter) was most likely the cause of his problems given that he had no other exposure history.

On October 22, 2020, Dr. Barry saw Petitioner as a follow up on possible pulmonary histoplasmosis. Dr. Barry's assessment was histoplasmosis. Dr. Barry opined that Petitioner had an isolated pulmonary nodule reflecting evidence of histoplasmosis. It was explained that Petitioner's histoplasmosis was not a systemic infection, which likely explains why his serology was negative. The record notes that it is possible that the initial pneumonia of March 2020 was acute histoplasma pneumonia and that the patient recovering from levofloxacin was coincidental. Dr. Barry commented that there was no imaging available from prior to March of 2020 to determine if the pulmonary nodule existed prior to this acute symptomatic pneumonia of March 2020. Dr. Barry documented that Petitioner is a firefighter and is exposed to wet, dilapidated buildings frequently and possibly to histoplasma as a result. No further treatment was recommended. (PX 9, 21-22)

***Respondent's Record Review***

On March 17, 2022, Respondent commissioned a record review with Leonard Go, M.D. In addition to records, Dr. Go documents his review of four run reports from March 15-21, 2020 as well as an "incident type report" from January 2015-2020 showing 369 incidents and an "incident list" from January 1, 2020, through March 23, 2020, showing 694 incidents.

Dr. Go opined that Petitioner had histoplasma pneumonia initially, which later resolved, leaving behind a lung nodule, and enlarged thoracic lymph biopsied on July 8, 2020. Dr. Go concluded there was no reported specific proximate exposure to conditions that would lead to histoplasmosis. As a result, Dr. Go did not believe Petitioner was exposed to histoplasma of sufficient degree during his work to develop a clinical infection. It should be noted that Dr. Go did not believe Petitioner caught pneumonia from his son. Dr. Go opined that Petitioner's treatment was both reasonable and necessary.

## CORRECTED CONCLUSIONS OF LAW

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

For clarity, Petitioner filed two claims. One alleges a date of accident of March 23, 2020 (Case No. 20WC25664) reflecting when Petitioner first presented to Dr. Chemello with symptoms of pneumonia and the second date of accident of July 30, 2020 (Case No. 20WC16686) reflects when Petitioner underwent surgery.

Rulings on evidentiary objections to Petitioner's Exhibit 4 were reserved at hearing. As discussed in further detail under Issue O, the Arbitrator overrules Respondent's objections and considers said exhibit in the following conclusions of law.

***Issue C, whether the accident arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds as follows:***

Section 1(d) of the Illinois Workers Compensation Act, reads in relevant part:

> In this Act the term "Occupational Disease" means a disease arising out of and in the course of the employment or which has become aggravated and rendered disabling as a result of the exposure of the employment. Such aggravation shall arise out of a risk peculiar to or increased by the employment and not common to the general public.
>
> A disease shall be deemed to arise out of the employment if there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is performed and the occupational disease. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin or aggravation in a risk connected with the employment and to have flowed from that source as a rational consequence.
>
> An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when, for any length of time however short, he or she is employed in an occupation or process in which the hazard of the disease exists…
>
> - - -
>
> Any condition or impairment of health of an employee employed as a firefighter, emergency medical technician (EMT), … which results directly or indirectly from any bloodborne pathogen, lung or respiratory disease or condition … to the employee shall be rebuttably presumed to arise out of and in the course of the employee's … employment and, further, shall be rebuttably presumed to be causally connected to the hazards or exposures of the employment.

820 ILCS 310/1.

Petitioner's work as a firefighter/EMS for Respondent grants him the rebuttable presumption afforded in Section 1(d) of the Act as the Arbitrator finds that histoplasmosis (a lung infection) qualifies as a "lung or respiratory disease or *condition*." See 820 ILCS 310/1 (Emphasis added).

Regardless of Petitioner's rebuttable presumption, the Arbitrator finds that Petitioner has met his burden of proof. The Arbitrator finds the testimony of Petitioner and Cpt. Schemlzer to be credible regarding Petitioner's exposure to droppings in and around the firehouse. The Arbitrator places less weight on the testimony of Chief Bonnar who stood alone in denying the presence of droppings. Further, regardless of the admission of Petitioner's Exhibits 3 and 4, Petitioner testified credibly to visiting multiple locations with dampness, mold, and dilapidated facilities from June 1, 2019, through March 2020.

Respondent's expert, Dr. Go, agrees with the diagnosis and treatment of Petitioner's treaters but opined that there was no reported specific proximate exposure to conditions that would lead to histoplasmosis. However, Petitioner need not identify a particular exposure to conclusively prove a hazardous exposure. See Freeman United Coal Mining Co. v. Industrial Comm'n (lefler), 188 Ill. 2d 243, 720 N.E.2d 1063 (1999). It is clear to the Arbitrator that a causal connection exists between the conditions under which Petitioner's work was performed and the occupational disease.

**The Arbitrator finds that the alleged accident/exposure 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:***

Petitioner's work as a firefighter/EMS for Respondent grants him the rebuttable presumption afforded in Section 1(d) of the Act.

Regardless of Petitioner's rebuttable presumption, the Arbitrator finds that Petitioner has met his burden of proof. Dr. Barry suspected acquired histoplasma pneumonia from entering dilapidated buildings including locations that are damp, moldy and soiled and suspected acquired. Dr. Go, on behalf of Respondent, did not disagree with the diagnosis and treatment of Petitioner's treaters but did not see a specific exposure that could cause histoplasmosis. As discussed above, Petitioner need not show a specific exposure for a compensable claim. Moreover, Dr. Barry's understanding of Petitioner's work conditions correlates with Petitioner's testimony at trial. As a result, the Arbitrator places more weight on the opinions of Dr. Barry and his treating physicians over those of Dr. Go.

**The Arbitrator finds that Petitioner's current condition of ill-being is causally related to the injury.**

***Issue G, Petitioner's earnings, the Arbitrator finds as follows:***

**Relying on Petitioner's testimony and payroll records submitted into evidence, the Arbitrator finds that in the year preceding the injury, Petitioner earned $89,555.96 and the average weekly wage was $1,722.23.**

***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 treaters to be credible, the Arbitrator also notes that Respondent's examiner, Dr. Go, did not dispute Petitioner's treatment.

The parties stipulated that Respondent is entitled to a credit under Section 8(j) of the Act of $89,997.04 for related care paid by Respondent's Group carrier Blue Cross Blue Shield as reflected in PX 14.

**Overall, the Arbitrator 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 $28,241.81 in outstanding medical services and $84.30 in out-of-pocket expenses, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act.**

**Respondent shall hold Petitioner harmless from any claims by any providers of the services (including Blue Cross Blue Shield lien as reflected in PX14) for which Respondent is receiving a credit provided in Section 8(j) of the Act.**

***Issue K, whether Petitioner is entitled to temporary total disability benefits, the Arbitrator finds as follows:***

In determining whether a claimant remains entitled to receiving TTD benefits, the primary consideration is whether the claimant's condition has stabilized and whether he 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, he is no longer eligible for TTD benefits. Archer Daniels Midland Co. v. Indus. Comm'n, 138 Ill.2d 107, 118 (1990).

The medical records of Dr. Chemello restricted Petitioner from work as of April 6, 2020 through his release on April 20, 2020, a period of 2 weeks. Petitioner was restricted by Dr. Podbielski from the date of the wedge resection surgery of July 8, 2020 through October 22, 2020, a period of 15-1/7 weeks.

**The Arbitrator relies on the medical records and Petitioner's testimony and finds Respondent liable for 17 1/7 weeks of TTD benefits (4.6.20 through 4.20.20 and 7.8.20 through 10.22.20) at a weekly rate of $1,148.15.**

***Issue L, the nature and extent of the injury, the Arbitrator finds as follows:***

In determining PPD benefits, Section 8.1b(b) of the Act directs the Commission to consider: "(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." 820 ILCS 305/8.1b(b); Con-Way Freight, Inc. v. Illinois Workers' Compensation Comm'n, 2016 IL App (1st) 152576WC, ¶ 22, 67 N.E.3d 959. "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b).

Under Section 8.1b(b)(i), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The statute does not require the claimant to submit an impairment rating. It only requires that the Commission consider such a report if in evidence and regardless of which party submitted it. See Continental Tire of the Americas, LLC v. Illinois Workers' Compensation Comm'n, 2015 IL App (5th) 140445WC, ¶ 17, 43 N.E.3d 556. Therefore, the Arbitrator gives no weight to this factor.

Under Section 8.1b(b)(ii), the occupation of the injured employee, the Arbitrator notes that Petitioner was a Firefighter/Paramedic for the Respondent which is laborious and will likely result in repeated inhalational exposure. Petitioner testified to being out of breath at times although he has no medical restrictions. The Arbitrator therefore gives moderate weight to this factor in favor of Petitioner.

Under Section 8.1b(b)(iii), the age of the employee at the time of the injury, the Arbitrator notes that Petitioner was 42 years old at the time of the accident and has many working years ahead of him. The Arbitrator gives great weight to this factor in favor of Petitioner.

Under Section 8.1b(b)(iv), the employee's future earning capacity, the Arbitrator notes that there is no evidence of diminished earning capacity. The Arbitrator gives moderate weight to this factor in favor of Respondent.

Under Section 8.1b(b)(iv), evidence of disability corroborated by the treating medical records, the Arbitrator gives moderate weight to this factor in favor of Petitioner. Petitioner had histoplasma pneumonia, bronchoscopic biopsy of the lymph nodes and a removal of a wedge of his upper right lung lymph nodes of the mediastinum and subcarinal space. Except for Petitioner's testimony of sporadic shortness of breath there is no medical evidence of respiratory deficit.

**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 10% loss of person as a whole pursuant to §8d2 of the Act which corresponds to 50 weeks of permanent partial disability benefits at a weekly rate of $813.87.**

***Issue M, whether penalties or fees should be imposed upon Respondent, the Arbitrator finds as follows:***

The Arbitrator declines to impose penalties or fees upon Respondent finding that its reliance on Dr. Go's opinions was reasonable and in good faith.

***Issue N, whether Respondent is due any credit, the Arbitrator finds as follows:***

Respondent claims a credit for the salary paid to Petitioner from June 7, 2020, to October 12, 202 totaling $21,797.87. (RX9). Chief Bonnar testified that any benefits coded "work comp" on his payroll would be workers' compensation benefits and are not part of sick or vacation time. (Tr. 270) Said payments reflect his regular pay. (Tr. 271). Petitioner testified that he was paid weekly benefits after June 7, 2020. (See Tr. 116).

While examination of Respondent's payroll records shows some payment for sick and vacation pay, Respondent's Exhibit 9 reflects workers compensation pay from July 5, 2020 through October 24, 2020. However, pursuant to Section 8(j)(2) of the Act, Respondent's credit is limited to the amount of TTD due for his two week pay periods, which in this case is $2,296.30.

**As a result, the Arbitrator finds that Respondent is entitled to a credit of $14,115.23.**

***Issue O, the admissibility of Petitioner's Exhibit 4, 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 objects to various pages of Petitioner's Exhibit 4 as hearsay and Petitioner maintains that said documents are admissible as Public Records and Business Records. See TA 294-302; Ill. R. Evid. 803; Ill. Sup. Ct. R. 236.

Under Rule 803(8), records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, ... or (C) in a civil case or against the State in a criminal case, factual findings from a legally authorized investigation, but not findings containing expressions of opinions or the drawing of conclusions, unless the opposing party shows that the sources of information or other circumstances indicate lack of trustworthiness. Ill. R. Evid. 803.

Under Rule 803(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).

Cpt. Schemlzer testified extensively on the foundation of Petitioner's Exhibit 3 but not Exhibit 4. Petitioner testified that he was an inspector for Respondent, and it was Respondent's policy to produce an inspection report for any address that had been inspected. (TA 97). He testified that the inspection reports are kept in the normal course of business through a database called "ESO Suite." (TA 98). Petitioner testified that each inspection report was in the same or substantially same condition as they were when pulled from the ESO Suite. (TA 101-102, PX 4). The

Arbitrator finds that sufficient foundation has been laid for the admission of Petitioner's Exhibit 4[1].

It is so ordered:

Arbitrator Rachael Sinnen

[1] The parties agreed to redact all copies of post-it notes on Exhibit 4.

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 20WC025664 |
| Case Name | Brian Weinstein v.<br>Chicago Ridge Fire Department |
| Consolidated Cases | 20WC016686; |
| Proceeding Type | Petition for Review |
| Decision Type | Commission Decision |
| Commission Decision Number | 23IWCC0518 |
| Number of Pages of Decision | 18 |
| Decision Issued By | Deborah Simpson, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Patrick Serowka |
| Respondent Attorney | Kisa Sthankiya |

DATE FILED: 12/8/2023

/s/ Deborah Simpson, Commissioner

Signature

DISSENT: /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

Brian Weinstein,
Petitioner,

vs. NO: 20 WC 25664

Chicago Ridge Fire Department,
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, occupational disease, permanent disability, temporary disability, permanent 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.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 31, 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.

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.

**December 8, 2023**
o10/11/23
DLS/rm
046

/s/*Stephen J. Mathis*
Stephen J. Mathis

/s/*Marc Parker*
Marc Parker

DISSENT

I respectfully dissent from the Majority which affirmed and adopted the Decision of the Arbitrator. I would have found that the Petitioner did not sustain his burden of proving his current

condition of ill-being, Histoplasmosis or Histoplasma pneumonia, was causally connected to his work as a firefighter, reversed the Decision of the Arbitrator, and denied compensation.

Our Act provides in pertinent part (820 ILCS 305 §6(f)):

> "Any condition or impairment of health of an employee employed as a firefighter, emergency medical technician (EMT), or paramedic which results directly or indirectly from any bloodborne pathogen, lung or respiratory disease or condition, heart or vascular disease or condition, hypertension, tuberculosis, or cancer resulting in any disability (temporary, permanent, total, or partial) 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. *** The changes made to this subsection by this amendatory Act of the 98th General Assembly shall be narrowly construed. "

The statutory presumption quoted above applies to Petitioner because he is a firefighter. However, the language does not specifically include the disease of Histoplasmosis, which is a fungal infection. The statutory language specifies that this presumption is to be narrowly construed. Therefore, I conclude that the condition of Histoplasmosis is not a condition that evokes the presumption that the condition was caused by Petitioner's work activities as a firefighter. Because I believe the presumption of causation is inapplicable here, Petitioner clearly has the burden of proving his condition was caused by exposure associated with his job. I do not believe he sustained that burden.

Initially, there was no evidence actually establishing what exposure Petitioner had to offending environments that could have caused Histoplasmosis. Petitioner testified that "sometimes" birds got into the firehouse through the bay doors. However, that testimony alone is not sufficient to establish exposure especially since Petitioner's co-worker testified that it happened maybe three to four times a year and Chief Bonnar testified he did not know of any such instance, that he would have been made aware of such situations, and would have addressed it aggressively knowing the dangers of Histoplasmosis as a chicken farmer.

In addition, Petitioner did not actually establish the specific offensive exposure he encountered in his firefighter/EMT calls. Petitioner testified that he often had to enter spaces that were moldy, rodent infested, or was in a generally dilapidated condition. However, that testimony was largely rebutted by the testimony of Chief Bonnar who noted that Petitioner worked as driver/operator of fire apparatus, and usually did not go into buildings. In addition, he reviewed the calls Petitioner submitted and found no instance in which he would be exposed to birds, bats or smoke. The lack of specific evidence of exposure here distinguishes the instant case from *Tolbert v IWCC*, 11 N.E.2d 453 (4th Dist. WC Div., 2014). In *Tolbert,* the claimant's job was cleaning out grain bins. The testimony and medical records noted the presence of pigeons and bird droppings and that the work activities created a lot of airborne dust. In addition, there was a specific medical opinion that the inhalation of that dust caused the claimant's Histoplasmosis.

In the instant case, I do not find the "causation opinions" of Petitioner's treating doctors persuasive. Dr. Podbielski wrote in his treatment notes while his "blood tests were negative for Histoplasmosis he did have yeast in his lungs (which is abnormal). Whether they were actually Histoplasmosis or not is less important than the fact that he did have yeast in his lungs and lymph nodes which is abnormal and required medical/surgical intervention. Although it is impossible to determine with absolute certainty that his exposure to yeast was from his job as firefighter, given that he had no other exposure history, occupational exposure seems the most likely cause of this problem." Similarly, Dr. Barry noted that Petitioner was "a firefighter and is exposed to wet,

dilapidated buildings frequently. It is very possible that patient was exposed to histoplasma in this manner." In my opinion these "opinions" are speculative and seemly based on the incorrect assumption about the times Petitioner was actually exposed to offensive environments.

It is noteworthy that Petitioner did not have issues with his lungs until his son was diagnosed with pneumonia and his wife "also became ill" presumably with a similar condition. I find the causation opinions of Dr. Go more persuasive than those of Petitioner's treaters. Unlike Dr. Podbielski and Dr. Barry, Respondent's Section 12 medical examiner, Dr. Go, specifically looked at the exposure Petitioner actually experienced. Dr. Go did not believe that Petitioner "was exposed to histoplasma of sufficient degree during his work as to develop clinical infection" because there was "no specific proximate exposure to conditions that would lead to histoplasmosis." He noted that histoplasmosis is "exceedingly common" in the US, particularly in the Midwest. "In the Ohio and Mississippi River Valleys, a region that included Chicago, skin testing has shown that up to 90% of adults have been exposed to the fungus." He also believed there was no causal connection between Petitioner's work and his pneumonia. While Dr. Go did not believe Petitioner caught pneumonia from his son, they both could have had the same exposure to histoplasma, which would not likely be in the firehouse or on any firefighter/EMT calls on which Petitioner was sent.

In my opinion, Petitioner did not sustain his burden of proving sufficient work-related exposure to offending environments that would have caused his Histoplasmosis or Histoplasma pneumonia. Based on the opinions of Dr. Go, I do not believe Petitioner was at greater risk of developing Histoplasmosis or Histoplasma pneumonia than any other Midwesterner and the risk of developing that condition was not associated with his occupation as firefighter. Therefore, I would have found that the Petitioner did not sustain his burden of proving his current condition of ill-being, Histoplasmosis or Histoplasma pneumonia, was causally connected to his work as a firefighter, reversed the Decision of the Arbitrator, and denied compensation. Accordingly, I respectfully dissent from the Majority.

/s/*Deborah L. Simpson*

o10/11/23
DLS/dw

Deborah L. Simpson

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 20WC025664 |
| Case Name | Brian Weinstein v. Chicago Ridge Fire Department |
| Consolidated Cases | |
| Proceeding Type | Corrected |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 14 |
| Decision Issued By | Rachael Sinnen, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Patrick Serowka |
| Respondent Attorney | Kisa Sthankiya |

DATE FILED: 1/31/2023

**THE INTEREST RATE FOR THE WEEK OF JANUARY 31, 2023 4.68%**

/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
## CORRECTED ARBITRATION DECISION

**Brian Weinstein**
Employee/Petitioner

v.

**Chicago Ridge Fire Department**
Employer/Respondent

Case # **20** WC **25664**

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 **10.26.22.** 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 **Admissibility of Px 4**

**FINDINGS**

On **3.23.20**, 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 $***89,555.96***; the average weekly wage was $***1,722.23***.

On the date of accident, Petitioner was ***42*** years of age, ***single*** with ***4*** 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 $**14,115.23** for other benefits, for a total credit of $**14,115.23.**

Respondent is entitled to a credit of **$89,997.04** under Section 8(j) of the Act.

**ORDER**

Respondent shall pay Petitioner directly $28,241.81 in outstanding medical services and $84.30 in out-of-pocket expenses, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act. Respondent shall hold Petitioner harmless from any claims by any providers of the services (including Blue Cross Blue Shield lien as reflected in PX14) for which Respondent is receiving a credit provided in Section 8(j) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $1,148.15 per week for 17 1/7 weeks, commencing 4.6.20 through 4.20.20 and 7.8.20 through 10.22.20, as provided in Section 8(b) of the Act.

The Arbitrator makes an award of 10% loss of use of the person as a whole under Section 8d2 which corresponds to 50 weeks of permanent partial disability benefits at a weekly rate of $813.87. See Conclusions of Law for Arbitrator's considerations under §8.1b(b) 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.

**JANUARY 31, 2023**

Signature of Arbitrator

STATE OF ILLINOIS )
) SS
COUNTY OF COOK )

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

| | | |
|---|---|---|
| Brian Weinstein | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | |
| | ) | Case No. 20WC16886 |
| Chicago Ridge Fire Department | ) | *consolidated with* |
| | ) | Case No. 20WC25664 |
| | ) | |
| Respondent. | ) | |

## CORRECTED FINDINGS OF FACT

This matter proceeded to hearing on October 26, 2022, in Chicago, Illinois before Arbitrator Rachael Sinnen on Petitioner's Request for Hearing under the Occupational Diseases Act "ODA". Issues in dispute include accident, causation, average weekly wage "AWW," unpaid medical bills, temporary total disability "TTD" benefits, Respondent's credit, and penalties. Arbitrator's Exhibits "Ax" 1 and 2.

***Job Duties***

In 2019 and 2020 (including the date of accident March 23, 2020), Petitioner was a firefighter/EMS for the Respondent and had been since February 2, 2004. (Transcript "TA" 17). Petitioner's primary duties were to respond to emergency calls, ambulance calls, and fire calls out of a firehouse in Chicago Ridge, Illinois. In addition, Petitioner inspected single-family residences, for the purpose of rentals in multifamily buildings and commercial buildings.

Petitioner would inspect for various code violations and look for rodent harboring, the presence of mold, openings in the drywall and in the ceilings, electrical hazards, and fire department violations. (TA 62). Petitioner would inspect for pests or rat abatement in attics, basements, crawl spaces and similar spaces with exposed soil.

Petitioner testified that it was not mandatory to wear supplementary oxygen or facemasks upon entering buildings for purposes of inspection or for EMS calls. During EMS calls there is no respiratory protection afforded. (TA 58-59).

***The Firehouse***

The firehouse is located at 10063 Virginia Avenue in Chicago Ridge, Illinois. (TA 26). Petitioner testified extensively regarding the firehouse, surrounding buildings and their locations. A

recycling plant called Resource Management was located across the right, approximately 400 feet from the firehouse. Garbage trucks would line up on the side of the street, going in and out of the plant, to dump the garbage to be sorted. (TA 37-38). Pawsitively Heaven is a dog daycare/boarding facility located 200 feet from the firehouse. (TA 38-40). Petitioner testified that animal food and feces/urine were located on the outside of that facility. Petitioner testified to noticed noxious smells emanating from these facilities as well as the presence of birds and mice. (TA 43).

Petitioner testified that, weather permitting, the firehouse bay doors (which are 20 feet tall) were left open. Birds would fly into the firehouse. Bird droppings around and inside the firehouse were common. Droppings were found on the floor, on the vehicles, and on the gear racks. (TA 44-45). Outside the firehouse, bird droppings collect on the driveway, the vehicle pad leading into the firehouse and the parking lot. (TA 47-48).

Petitioner testified that he tried to clean the base at least once a month which involves spraying down the areas with water but not using a disinfectant. Petitioner testified that the droppings get on the bottom of duty boots which are left on when entering the living quarters of the firehouse (including where the firefighters sleep), which are carpeted. (TA 46-47).

In addition to bird droppings, Petitioner testified to the presence of mice around the firehouse (more so in the winter). (TA 48). Traps are set for the mice and are then thrown in the garbage. Petitioner testified that mouse droppings are swept up and floors are mopped but not disinfected. Petitioner witnessed mouse droppings in the stairwell and up in the bunk area where the firefighters set traps. (TA 52).

Christopher Schemlzer testified on behalf of Petitioner. He is employed by Respondent as Captain and EMS coordinator. He's worked with Respondent for 27 years and with Petitioner, on and off, for about 17-18 years. Petitioner and Cpt. Smeltzer both worked from the firehouse at 10063 Virginia Avenue in Chicago Ridge. Cpt. Smeltzer's regarding the condition of the firehouse and surrounding area was like Petitioner's testimony.

William Bonnar, Jr. testified on behalf of Respondent. He is the Chief of Chicago Ridge for the last 4 years. (TA 238). He indicated all the operations are handled by captains, lieutenants, and firefighters, and that he mainly administrates. (TA 253). Chief Bonnar testified that Petitioner notified him that he was sick but never mentioned it was due to bird droppings and wasn't sure how to investigate as Petitioner's condition was non-cancerous. (TA 241-242; 245). Chief Bonnar found no evidence that Petitioner was exposed to birds or bats. Chief Bonnar testified that he has not witnessed a bird fly into or out of the bay. (TA 252). There were no histoplasmosis outbreaks in his department. (TA 260). He has never seen bird droppings in a firehouse or in the mezzanine area although he has never cleaned the mezzanine area. (TA 268).

***Run Reports / NIFFERS***

Petitioner collected run reports (aka NIFFERS) reflecting calls he went on between June 2019 and March 2020. (TA 67; Px 3). The run reports reflect about 269 different residences that Petitioner responded to. Petitioner documented the address of the location, who was present on

the call, what vehicles responded, and a brief description in the narrative portion of what was encountered.

Both Petitioner and Cpt. Schemlzer testified about the quality control of the run reports and confirmed that they were kept in the normal and usual course of business. Cpt. Schemlzer testified that some of his job duties was to confirm that the run reports were properly completed, submit them to the Department of Homeland Security on a monthly basis, and ensured that Freedom of Information Act requests were completed. (TA 69-81). Cpt. Schemlzer confirmed that run reports can only be amended by a specific number of people including himself and one other captain. If a report was amended, it would be flagged for resubmission to the Department of Homeland Security. Cpt. Schemlzer confirmed that Petitioner's Exhibit 3 was in the same or substantially same condition as they were when they were last compiled. (TA 192-195; See TA 81, PX 3).

Petitioner testified that he cross referenced the run reports with official inspection reports from the City of Chicago Ridge inspections and found many violations within the places he went to during that time period. (TA 88, PX 4). Petitioner testified that it was the normal course of business and Respondent's policy to produce inspection reports of the addresses that had been inspected. The inspection reports are kept by Respondent in a database called "ESO Suite." Petitioner's Exhibit 4 was a collection of inspection reports (where violations were reported) that matched with Petitioner's run reports. Petitioner testified that each the inspection reports was in the same or substantially same condition as they were when pulled from the ESO Suite. (TA 101-102, PX 4).

Based on Petitioner's Exhibits 3 and 4, Petitioner testified that he entered 28 places (out of 241) from June 1, 2019, through March 2020 that had reports of mold and dilapidated conditions. (TA 109). Petitioner testified that after reviewing Petitioner's Exhibits 3 and 4, his memory was refreshed, and he recalled that most places were multi-family dwellings that were unsanitary. He recalled one home where the owner allowed animals to urinate and defecate on pads located inside the home and there was mold from improper ventilation. He also recalled a specific event in February 2020 where a patient he transported that was lying in a soiled home hospital bed. (TA 105-109).

***Summary of Medical Records***

The March 11, 2020, records of Dr. Chemello reflect Petitioner was in a good condition of health. (PX 6, 23-28). The February 27, 2020, Palos records document an annual physical examination for Petitioner as a firefighter/paramedic and note a normal examination with approval for full duty without restrictions and for respirator use. (RX 5, p. 61).

On March 23, 2020, Petitioner presented to Dr. Chemello reporting a runny nose, sore throat, swollen glands, and minimal non-productive cough. Subsequent visits in late March with Dr. Chemello reflect continued coughing with occasional white yellow sputum wheezing with forced expiration. On March 27, 2020, Dr. Chemello diagnosed acute bronchitis with bronchospasm. An April 6, 2020, chest x-ray reflected a history of cough the past 4 to 5 weeks, bronchitis, and a nodular opacity in the right midlung field and hazy infiltrates into the right lower lobe, findings

likely related to pneumonia. (PX 7, 22). On April 6th, 2020, Dr. Chemello documented that Petitioner may return to work once all his symptoms resolve. (PX 6, 33-51). On April 11th, 2020, Dr. Chemello stated that Petitioner could return to work on April 20, 2020, if Petitioner was asymptomatic. (PX 6, 57-58).

A May 12, 2020, Chest CT reflected a right upper lobe pulmonary nodule along the horizontal fissure (PX 7, 27-28) and on May 28, 2020, Dr. Podbielski noted the lung nodule, enlarged lymph nodes and abnormal CT scan of chest and a subsequent referral was made for thoracic surgical evaluation for RUL lung nodule, mediastinal and hilar adenopathy. It was noted that the CT scan demonstrated 1.5 cm spiculated mass in anterior segment of the right upper lobe of lung as well as two small hepatic hemangiomas and scarring in the parenchyma of the right lower lobe. Further, a PET/CT scan performed May 20, 2020, showed multiple hypermetabolic lymph nodes in the cervical, mediastinal, and right hilar region. A bronchoscopy was to be performed by Dr. Nawa of Advocate Christ along with a bronchial biopsy and a formal pulmonary function test. (PX 7, 31-35; PX 6, 60-63).

On June 4, 2020, Petitioner underwent a bronchoscopic biopsy with postoperative diagnosis of right upper lobe nodule and mediastinal and hilar lymphadenopathy. (PX 6, 66-68).

On June 11, 2020, Dr. Podbielski noted chief complaints as right upper lobe lung nodule and mediastinal adenopathy. This is the first time Dr. Podbielski describes Petitioner as a 42 y/o Lockport firefighter. The procedure showed no evidence of malignancy. The notes indicate that Petitioner was anxious about cancer and deciding on a surgical resection for right thoracotomy and lung resection at Palos Hospital. He indicated he shares an email from his attorney regarding a workers' compensation claim. (PX 7, 66).

On July 8, 2020, Petitioner underwent wedge resection of right upper lung nodule and resection of mediastinal lymph nodes, histoplasmosis unspecified, encapsulated. The operative report reflected that Petitioner was a 42-year-old firefighter with a significant exposure history to dust and inhalation of fumes. (PX 7, 90).

A July 10, 2020, addendum by Sheila Barry, M.D. of Metro Infectious Disease Consultants reflected that Petitioner was a firefighter, had a history of histoplasma pneumonia in March, and noted that that the histoplasma identified in pathology is an isolated pulmonary nodule. Petitioner was described as young, otherwise healthy, and not immunocompromised. (PX 7, 38)

The July 30, 2020, note of Dr. Podbielski notes that Petitioner's employment as a firefighter with significant inhalation exposure is consistent with his final diagnosis. Petitioner was advised not to return to work until after his October appointments. (PX 7, 128).

The September 4, 2020, record of Dr. Barry notes a suspicion of acquired histoplasma pneumonia through entering dilapidated buildings/old fire locations including any place that is damp, moldy and soil is disturbed. Dr. Barry noted that Petitioner's solitary nodule does not likely require therapy but will require follow-ups for any new nodule formation or active pulmonary histoplasmosis. (PX 9, 12-13).

On October 15, 2020, Dr. Podbielski cleared Petitioner to full duty work starting October 22, 2020. He advised that Petitioner follow up with repeat chest scans every 6 months for the next 3-4 years. It was noted that (while impossible to know exactly) Petitioner's occupational exposure (exposure to yeast as a firefighter) was most likely the cause of his problems given that he had no other exposure history.

On October 22, 2020, Dr. Barry saw Petitioner as a follow up on possible pulmonary histoplasmosis. Dr. Barry's assessment was histoplasmosis. Dr. Barry opined that Petitioner had an isolated pulmonary nodule reflecting evidence of histoplasmosis. It was explained that Petitioner's histoplasmosis was not a systemic infection, which likely explains why his serology was negative. The record notes that it is possible that the initial pneumonia of March 2020 was acute histoplasma pneumonia and that the patient recovering from levofloxacin was coincidental. Dr. Barry commented that there was no imaging available from prior to March of 2020 to determine if the pulmonary nodule existed prior to this acute symptomatic pneumonia of March 2020. Dr. Barry documented that Petitioner is a firefighter and is exposed to wet, dilapidated buildings frequently and possibly to histoplasma as a result. No further treatment was recommended. (PX 9, 21-22)

***Respondent's Record Review***

On March 17, 2022, Respondent commissioned a record review with Leonard Go, M.D. In addition to records, Dr. Go documents his review of four run reports from March 15-21, 2020 as well as an "incident type report" from January 2015-2020 showing 369 incidents and an "incident list" from January 1, 2020, through March 23, 2020, showing 694 incidents.

Dr. Go opined that Petitioner had histoplasma pneumonia initially, which later resolved, leaving behind a lung nodule, and enlarged thoracic lymph biopsied on July 8, 2020. Dr. Go concluded there was no reported specific proximate exposure to conditions that would lead to histoplasmosis. As a result, Dr. Go did not believe Petitioner was exposed to histoplasma of sufficient degree during his work to develop a clinical infection. It should be noted that Dr. Go did not believe Petitioner caught pneumonia from his son. Dr. Go opined that Petitioner's treatment was both reasonable and necessary.

## CORRECTED CONCLUSIONS OF LAW

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

For clarity, Petitioner filed two claims. One alleges a date of accident of March 23, 2020 (Case No. 20WC25664) reflecting when Petitioner first presented to Dr. Chemello with symptoms of pneumonia and the second date of accident of July 30, 2020 (Case No. 20WC16686) reflects when Petitioner underwent surgery.

Rulings on evidentiary objections to Petitioner's Exhibit 4 were reserved at hearing. As discussed in further detail under Issue O, the Arbitrator overrules Respondent's objections and considers said exhibit in the following conclusions of law.

***Issue C, whether the accident arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds as follows:***

Section 1(d) of the Illinois Workers Compensation Act, reads in relevant part:

> In this Act the term "Occupational Disease" means a disease arising out of and in the course of the employment or which has become aggravated and rendered disabling as a result of the exposure of the employment. Such aggravation shall arise out of a risk peculiar to or increased by the employment and not common to the general public.
>
> A disease shall be deemed to arise out of the employment if there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is performed and the occupational disease. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin or aggravation in a risk connected with the employment and to have flowed from that source as a rational consequence.
>
> An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when, for any length of time however short, he or she is employed in an occupation or process in which the hazard of the disease exists…
>
> - - -
>
> Any condition or impairment of health of an employee employed as a firefighter, emergency medical technician (EMT), … which results directly or indirectly from any bloodborne pathogen, lung or respiratory disease or condition … to the employee shall be rebuttably presumed to arise out of and in the course of the employee's … employment and, further, shall be rebuttably presumed to be causally connected to the hazards or exposures of the employment.

820 ILCS 310/1.

Petitioner's work as a firefighter/EMS for Respondent grants him the rebuttable presumption afforded in Section 1(d) of the Act as the Arbitrator finds that histoplasmosis (a lung infection) qualifies as a "lung or respiratory disease or *condition*." See 820 ILCS 310/1 (Emphasis added).

Regardless of Petitioner's rebuttable presumption, the Arbitrator finds that Petitioner has met his burden of proof. The Arbitrator finds the testimony of Petitioner and Cpt. Schemlzer to be credible regarding Petitioner's exposure to droppings in and around the firehouse. The Arbitrator places less weight on the testimony of Chief Bonnar who stood alone in denying the presence of droppings. Further, regardless of the admission of Petitioner's Exhibits 3 and 4, Petitioner testified credibly to visiting multiple locations with dampness, mold, and dilapidated facilities from June 1, 2019, through March 2020.

Respondent's expert, Dr. Go, agrees with the diagnosis and treatment of Petitioner's treaters but opined that there was no reported specific proximate exposure to conditions that would lead to histoplasmosis. However, Petitioner need not identify a particular exposure to conclusively prove a hazardous exposure. See Freeman United Coal Mining Co. v. Industrial Comm'n (lefler), 188 Ill. 2d 243, 720 N.E.2d 1063 (1999). It is clear to the Arbitrator that a causal connection exists between the conditions under which Petitioner's work was performed and the occupational disease.

**The Arbitrator finds that the alleged accident/exposure 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:***

Petitioner's work as a firefighter/EMS for Respondent grants him the rebuttable presumption afforded in Section 1(d) of the Act.

Regardless of Petitioner's rebuttable presumption, the Arbitrator finds that Petitioner has met his burden of proof. Dr. Barry suspected acquired histoplasma pneumonia from entering dilapidated buildings including locations that are damp, moldy and soiled and suspected acquired. Dr. Go, on behalf of Respondent, did not disagree with the diagnosis and treatment of Petitioner's treaters but did not see a specific exposure that could cause histoplasmosis. As discussed above, Petitioner need not show a specific exposure for a compensable claim. Moreover, Dr. Barry's understanding of Petitioner's work conditions correlates with Petitioner's testimony at trial. As a result, the Arbitrator places more weight on the opinions of Dr. Barry and his treating physicians over those of Dr. Go.

**The Arbitrator finds that Petitioner's current condition of ill-being is causally related to the injury.**

***Issue G, Petitioner's earnings, the Arbitrator finds as follows:***

**Relying on Petitioner's testimony and payroll records submitted into evidence, the Arbitrator finds that in the year preceding the injury, Petitioner earned $89,555.96 and the average weekly wage was $1,722.23.**

***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 treaters to be credible, the Arbitrator also notes that Respondent's examiner, Dr. Go, did not dispute Petitioner's treatment.

The parties stipulated that Respondent is entitled to a credit under Section 8(j) of the Act of $89,997.04 for related care paid by Respondent's Group carrier Blue Cross Blue Shield as reflected in PX 14.

**Overall, the Arbitrator 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 $28,241.81 in outstanding medical services and $84.30 in out-of-pocket expenses, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act.**

**Respondent shall hold Petitioner harmless from any claims by any providers of the services (including Blue Cross Blue Shield lien as reflected in PX14) for which Respondent is receiving a credit provided in Section 8(j) of the Act.**

***Issue K, whether Petitioner is entitled to temporary total disability benefits, the Arbitrator finds as follows:***

In determining whether a claimant remains entitled to receiving TTD benefits, the primary consideration is whether the claimant's condition has stabilized and whether he 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, he is no longer eligible for TTD benefits. Archer Daniels Midland Co. v. Indus. Comm'n, 138 Ill.2d 107, 118 (1990).

The medical records of Dr. Chemello restricted Petitioner from work as of April 6, 2020 through his release on April 20, 2020, a period of 2 weeks. Petitioner was restricted by Dr. Podbielski from the date of the wedge resection surgery of July 8, 2020 through October 22, 2020, a period of 15-1/7 weeks.

**The Arbitrator relies on the medical records and Petitioner's testimony and finds Respondent liable for 17 1/7 weeks of TTD benefits (4.6.20 through 4.20.20 and 7.8.20 through 10.22.20) at a weekly rate of $1,148.15.**

***Issue L, the nature and extent of the injury, the Arbitrator finds as follows:***

In determining PPD benefits, Section 8.1b(b) of the Act directs the Commission to consider: "(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." 820 ILCS 305/8.1b(b); Con-Way Freight, Inc. v. Illinois Workers' Compensation Comm'n, 2016 IL App (1st) 152576WC, ¶ 22, 67 N.E.3d 959. "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b).

Under Section 8.1b(b)(i), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The statute does not require the claimant to submit an impairment rating. It only requires that the Commission consider such a report if in evidence and regardless of which party submitted it. See Continental Tire of the Americas, LLC v. Illinois Workers' Compensation Comm'n, 2015 IL App (5th) 140445WC, ¶ 17, 43 N.E.3d 556. Therefore, the Arbitrator gives no weight to this factor.

Under Section 8.1b(b)(ii), the occupation of the injured employee, the Arbitrator notes that Petitioner was a Firefighter/Paramedic for the Respondent which is laborious and will likely result in repeated inhalational exposure. Petitioner testified to being out of breath at times although he has no medical restrictions. The Arbitrator therefore gives moderate weight to this factor in favor of Petitioner.

Under Section 8.1b(b)(iii), the age of the employee at the time of the injury, the Arbitrator notes that Petitioner was 42 years old at the time of the accident and has many working years ahead of him. The Arbitrator gives great weight to this factor in favor of Petitioner.

Under Section 8.1b(b)(iv), the employee's future earning capacity, the Arbitrator notes that there is no evidence of diminished earning capacity. The Arbitrator gives moderate weight to this factor in favor of Respondent.

Under Section 8.1b(b)(iv), evidence of disability corroborated by the treating medical records, the Arbitrator gives moderate weight to this factor in favor of Petitioner. Petitioner had histoplasma pneumonia, bronchoscopic biopsy of the lymph nodes and a removal of a wedge of his upper right lung lymph nodes of the mediastinum and subcarinal space. Except for Petitioner's testimony of sporadic shortness of breath there is no medical evidence of respiratory deficit.

**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 10% loss of person as a whole pursuant to §8d2 of the Act which corresponds to 50 weeks of permanent partial disability benefits at a weekly rate of $813.87.**

***Issue M, whether penalties or fees should be imposed upon Respondent, the Arbitrator finds as follows:***

The Arbitrator declines to impose penalties or fees upon Respondent finding that its reliance on Dr. Go's opinions was reasonable and in good faith.

***Issue N, whether Respondent is due any credit, the Arbitrator finds as follows:***

Respondent claims a credit for the salary paid to Petitioner from June 7, 2020, to October 12, 202 totaling $21,797.87. (RX9). Chief Bonnar testified that any benefits coded "work comp" on his payroll would be workers' compensation benefits and are not part of sick or vacation time. (Tr. 270) Said payments reflect his regular pay. (Tr. 271). Petitioner testified that he was paid weekly benefits after June 7, 2020. (See Tr. 116).

While examination of Respondent's payroll records shows some payment for sick and vacation pay, Respondent's Exhibit 9 reflects workers compensation pay from July 5, 2020 through October 24, 2020. However, pursuant to Section 8(j)(2) of the Act, Respondent's credit is limited to the amount of TTD due for his two week pay periods, which in this case is $2,296.30.

**As a result, the Arbitrator finds that Respondent is entitled to a credit of $14,115.23.**

***Issue O, the admissibility of Petitioner's Exhibit 4, 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 objects to various pages of Petitioner's Exhibit 4 as hearsay and Petitioner maintains that said documents are admissible as Public Records and Business Records. See TA 294-302; Ill. R. Evid. 803; Ill. Sup. Ct. R. 236.

Under Rule 803(8), records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, ... or (C) in a civil case or against the State in a criminal case, factual findings from a legally authorized investigation, but not findings containing expressions of opinions or the drawing of conclusions, unless the opposing party shows that the sources of information or other circumstances indicate lack of trustworthiness. Ill. R. Evid. 803.

Under Rule 803(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).

Cpt. Schemlzer testified extensively on the foundation of Petitioner's Exhibit 3 but not Exhibit 4. Petitioner testified that he was an inspector for Respondent, and it was Respondent's policy to produce an inspection report for any address that had been inspected. (TA 97). He testified that the inspection reports are kept in the normal course of business through a database called "ESO Suite." (TA 98). Petitioner testified that each inspection report was in the same or substantially same condition as they were when pulled from the ESO Suite. (TA 101-102, PX 4). The

Arbitrator finds that sufficient foundation has been laid for the admission of Petitioner's Exhibit 4[1].

It is so ordered:

Arbitrator Rachael Sinnen

[1] The parties agreed to redact all copies of post-it notes on Exhibit 4.

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 19WC030547 |
| Case Name | Jerry Conner v.<br>Standard Forwarding |
| Consolidated Cases | |
| Proceeding Type | Petition for Review |
| Decision Type | Commission Decision |
| Commission Decision Number | 23IWCC0519 |
| Number of Pages of Decision | 13 |
| Decision Issued By | Marc Parker, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Kevin Morrisson |
| Respondent Attorney | Stephen Klyczek |

DATE FILED: 12/8/2023

/s/Marc Parker, 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

JERRY CONNER,

Petitioner,

vs. NO: 19 WC 30547

STANDARD FORWARDING,

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 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 2, 2023, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner permanent total disability benefits of $971.77 per week for life, commencing on March 15, 2023, 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 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 $36,600.00. 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.

**December 8, 2023**
MP:mck
o 11/15/23
68

/s/ *Marc Parker*
Marc Parker

/s/ *Deborah L. Simpson*
Deborah L. Simpson

/s/ *Stephen J. Mathis*
Stephen J. Mathis

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 19WC030547 |
| Case Name | Jerry Conner v. Standard Forwarding |
| Consolidated Cases | |
| Proceeding Type | |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 10 |
| Decision Issued By | Jeanne AuBuchon, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Kevin Morrisson |
| Respondent Attorney | Stephen Klyczek |

DATE FILED: 6/2/2023

**THE INTEREST RATE FOR THE WEEK OF MAY 31, 2023 5.29%**

/s/ Jeanne AuBuchon, 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**
**NATURE AND EXTENT ONLY**

**Jerry Conner**
Employee/Petitioner

v.

**Standard Forwarding**
Employer/Respondent

Case # **19** WC **030547**

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 **Jeanne L. AuBuchon**, Arbitrator of the Commission, in the city of **Urbana**, on **March 14, 2023**. By stipulation, the parties agree:

On the date of accident, **9/25/2019**, 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 $**75,798.32**, and the average weekly wage was $**1,457.66**.

At the time of injury, Petitioner was **52** years of age, ***married*** with **0** dependent children.

Necessary medical services and temporary compensation benefits have been provided by Respondent.

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 permanent and total disability benefits of $971.77/week for life, commencing 3/15/2023, 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.**

**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.

Jeanne L. AuBuchon

Signature of Arbitrator

**JUNE 2, 2023**

## PROCEDURAL HISTORY

This matter proceeded to trial on March 14, 2023, on all disputed issues. The sole issue in dispute is the nature and extent of the Petitioner's injury. The parties stipulated that, if Petitioner was still working for Respondent in the same job position, he would be earning $1,849.36 a week. Additionally, the parties stipulated that if there are any related medical expenses that have not been paid, the Respondent will pay them or hold Petitioner harmless.

## FINDINGS OF FACT

At the time of the accident, the Petitioner was 52 years old, a member of Teamsters Union for 32 years with a commercial driver's license (CDL) and working for the Respondent for about seven years as a linehaul driver hauling freight from terminal to terminal. (AX1, T. 10-12, 15) On September 25, 2019, he tripped on a wheel chock, causing him to fall forward. hitting his head against a metal support going into the dock and catching his left arm while supporting himself with his right hand. (T. 13).

Petitioner was seen at Decatur Memorial OccHealth & Wellness Partners on September 30, 2019, complaining of pain in both shoulders and that he believed he could not perform his job. (PX2) Petitioner was diagnosed with a contusion of the rotator cuff and was told to take Ibuprofen, to not lift more than 5 pounds, to perform no overhead work and to perform no commercial driving. (Id.) He was referred to Dr. John Kefalas, an orthopedic surgeon at Central Illinois Bone & Joint Center. (Id.)

The Petitioner was seen by Dr. Kefalas on October 4, 2019, and Dr. Kefalas recommended an MRI of the left shoulder. (PX3) The MRI was performed on October 28, 2019, and showed a probable recurrent full-thickness tear of the entire supraspinatus tendon (one of the rotator cuff

tendons) with superior migration of the humeral head (ball at the top of the humerus not in its proper position), severe acromioclavicular (AC) joint (joint connecting the collar bone and shoulder bade) degeneration, and a sloping Type II acromion (bony tip of the outer edge of the shoulder blade) which could have attributed to impingement. (PX4) Dr. Kefalas performed a left rotator cuff repair, subacromial decompression, and removal of loose anchors on February 27, 2020. (PX3) The Petitioner underwent physical therapy and reported to Dr. Kefalas at follow-up visits that his shoulder was not improving. (Id.) On July 10, 2020, Dr. Kefalas injected the left glenohumeral joint (the ball-and-socket joint connecting the humerus and shoulder blade) and later prescribed a nerve medication. On October 7, 2020, Dr. Kefalas referred the Petitioner to a shoulder specialist. (Id.)

On December 16, 2020, the Petitioner saw Dr. Jay Keener, an orthopedic surgeon at Washington University, who ordered a CT arthrogram that confirmed some arthritic change in the left glenohumeral joint as well as possible non-healing of the rotator cuff tendons. (PX7, PX3) Petitioner returned to see Dr. Kefalas on January 20, 2021. (PX3) Dr. Kefalas did not feel the Petitioner was a surgical candidate, given the Petitioner's age and recommended a functional capacity evaluation (FCE). (PX3)

The FCE was performed on March 10, 2021, at Athletico Physical Therapy. (PX8) The Petitioner was reported to have given consistent effort. (Id.) The Petitioner was found to not demonstrate the physical capabilities and functional tolerances to perform all the essential functions of his job. (Id.) Physical therapist Eric Sparks reported that the Petitioner demonstrated capabilities and functional tolerances to function within the medium physical demand level from waist height and below, being able to lift 50 pounds. (Id.) From shoulder height and above, the Petitioner fell within the sedentary demand level, while the physical demand level of his job was

heavy. (Id.) Mr. Sparks found that, based on the disparity between current physical abilities and required job demands, there may be a probability the Petitioner would not reach required job demands which will impact returning to work to work at full duty without restrictions. (Id.)

On April 26, 2021, the Petitioner began vocational rehabilitation with Dave Patsavas at Independent Rehab Services. (PX9) In his initial report, Mr. Patsavas noted that the Petitioner graduated high school in 1985 and took two years of general studies in college, where his grades were below average. (Id.) As a union member, he had served as president, recording secretary and treasurer. (Id.) Regarding computer skills, the Petitioner was familiar with Microsoft products, could use the internet and email and keyboarded using the "hunt and peck" style. (Id.) The Petitioner was open to schooling or retraining. (Id.) He had previously taken some online classes. (Id.) Vocational testing scores placed the Petitioner in the average range for reading and comprehension, below average in math, end of the average range in abstract problem solving, average in mechanical/electrical and at the high end of average in clerical/organizational skills. (Id.) After performing a transferrable skills analysis, Mr. Patsavas identified various positions that would be appropriate. He anticipated that the Petitioner's earning potential without any additional education or training would be $11-$16 per hour.

The Petitioner also underwent a CDL examination on October 5, 2021, by Dr. David Fletcher at Safeworks Illinois. (PX6) Dr. Fletcher noted a profound loss of range of motion in the Petitioner's left shoulder, along with weakness of the left shoulder girdle (area composed of the collar bone and shoulder blade). (Id.) He noted that Dr. Kefalas's permanent work restrictions eliminated overhead work, which put an end to the Petitioner's trucking job – as it required him to climb ladders, including getting into a truck cab or pull-down tarps. (Id.) Dr. Fletcher found the

restrictions appropriate based on his review of the FCE, the surgical history and his clinical exam. (Id.)

The Petitioner performed job searches – applying for 1,511 jobs from May 25, 2021, through March 1, 2023. (PX10, PX11) He applied for jobs in the fields of administration, dispatching, driving, logistics, factory/assembly/machine operator, clerk, data entry/scanning, customer service and sales. (Id.) He applied for jobs in the Bloomington, Champaign, Springfield, Decatur, Normal and Urbana areas. (Id.) The Petitioner's job logs and Mr. Patsavas's reports indicated that the Petitioner had several job interviews but was not offered a job. (PX10, PX11, PX9) During this time, the Petitioner was provided job readiness, job-seeking skills training and job placement activities by Independent Rehab Services and was given job leads. (PX9)

In June 2021, the Petitioner interviewed at JB Enterprises, a firm providing transition work for former prisoners, and was informed of another upcoming position. (T. 24-25) In an email, the Petitioner's attorney informed the Respondent's attorney that there was a $13 per hour full-time job opportunity and asked if the Petitioner should accept the job. (RX1) The Respondent's attorney replied: "It's not up to me if Petitioner accepts an offer." (Id.) The Petitioner testified that he applied for the job, but the employer never got back to him. (T. 24-25)

In his final report on March 3, 2022, Mr. Patsavas concluded that a viable and stable labor market did not exist for the Petitioner. (PX9) The parties had agreed to suspend vocational services. (Id.)

Mr. Patsavas testified consistently with his reports at arbitration. He said that Petitioner's efforts to find a job were a valid effort to find employment, that the Petitioner wanted to find a job, that the Petitioner complied with all Mr. Patsavas's efforts to find him a job and that throughout the process Petitioner never refused an offer of employment. (T. 67) Mr. Patsavas testified that

his opinion that a viable and stable labor market did not exist for the Petitioner was based on the duration of the job search, the 1500 job searches, the fact that the Petitioner had not worked in over three-and-a-half years and the Petitioner's advanced age. (Id.)

The Petitioner acknowledged that he pleaded guilty on February 5, 2016, to a federal charge of making false entries in financial records for the Teamsters while serving as president of the local chapter. (T. 36)

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

## CONCLUSION

**What is the nature and extent of the Petitioner's injury?**

As a preliminary issue, the Arbitrator finds the Petitioner to be credible. Although the Petitioner had pleaded guilty to a federal charge of making false entries in financial records for the Teamsters, there was no evidence that any of the Petitioner's representations to the Arbitrator, his doctors, the FCE examiner or his vocational counselors were false or misleading. His statements have been consistent throughout this case.

The Petitioner is seeking a finding of permanent total disability, while the Respondent contends the appropriate award would be a wage differential between his earnings as a truck driver an a $15 per hour job that he would be capable of earning in a fast-food restaurant or retailer.

An employee 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. Ind. Comm'n,* 95 Ill.2d 278, 286 (1983). An employee need not be reduced to total physical incapacity to be entitled to PTD benefits. *E.R. Moore Co. v. Ind. Comm'n,* 71 Ill.2d 353, 360 (1978). Evidence that an employee is able to earn occasional wages or perform certain useful services does not

preclude a finding of PTD nor requires a finding of partial disability. *Id.* at 361. Rather, a person is totally disabled when he or she is incapable of performing services except those for which there is no reasonably stable market. *Id.* at 360-361. If an employee's disability is limited and it is not obvious that the employee is unemployable, the employee may nevertheless demonstrate an entitlement to PTD by proving that he or she fits within the "odd lot" category. *Id.* The odd lot category consists of employees who, "though not altogether incapacitated for work, [are] so handicapped that [they] will not be employed regularly in any well-known branch of the labor market." *Valley Mould & Iron, Co. v. Ind. Comm'n*, 84 Ill.2d 538, 547 (1981).

An employee meets the burden of proving that he or she falls into the odd-lot category in one of two ways: 1) by showing a diligent but unsuccessful job search; or 2) by demonstrating that the disability coupled with the employee's age, training, education, and experience does not permit the employee to find gainful employment. *ABB C-E Servs. v. Industrial Comm'n*, 316 Ill.App.3d 745, 750 (5th Dist. 2000).

One stumbling block to finding a job would be the Petitioner's felony conviction. However, this impediment pre-existed the injury, and the Respondent takes an employee as he finds him.

As to the first method of determining if the Petitioner falls into the odd-lot category, the Arbitrator finds that the Petitioner showed a diligent but unsuccessful job search. Although the total number of job applications over the nearly two years during which the Petitioner looked for work would average only two per day, the total number of applications made was enough to show sufficient effort. Other than an allegation that the Petitioner's job search was deficient, there was no evidence presented that the Petitioner missed any job opportunities that were available during that two-year period.

In addition, the Arbitrator finds the Petitioner has met his burden of proof as to the second manner of proving an odd-lot disability. The Petitioner was 52 years old at the time of the injury and 55 at the time of arbitration. The Arbitrator finds that, from a practical standpoint, employers are unlikely to hire a man in his late 50s with work restrictions, two years of post-high school education from 30 years ago and limited computer skills. The Petitioner's job experience for the past 30+ years has been as a truck driver – a job he cannot physically perform. He did apply for less physical driving jobs and dispatching positions to no avail.

Once the employee makes the showing that he falls into the odd-lot category, the burden of proof shifts to the employer to show that some kind of suitable work is regularly and continuously available to the claimant. *Ceco Corp*, 95 Ill.2d at 287. To meet its burden, the employer must show more than a theoretical possibility of an available job and cannot rely on speculative testimony that the employee has the potential for employment. *Pittman v. Beverly Farm*, 22 IWCC 0111 (March 21, 2022) citing *Walliser v. Waste Mgmt. East*, 12 ILWC 2451 (September 29, 2017). The Respondent offered no evidence that some kind of suitable work was regularly and continuously available to the Petitioner.

Mr. Patsavas's opinion that there was no viable and stable job market for the Petitioner was unrebutted. A finding to the contrary would be speculative. As to the Respondent's position that the Petitioner could work in fast food or retail, the Arbitrator notes that these occupations would require the Petitioner to lift, carry and stock product and merchandise, which would exceed his restrictions.

For these reasons, the Arbitrator finds that the Petitioner is permanently and totally disabled.

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 20WC019557 |
| Case Name | Dejan Lazarevski v.<br>Dauntless Delivery, LLC |
| Consolidated Cases | |
| Proceeding Type | Petition for Review |
| Decision Type | Commission Decision |
| Commission Decision Number | 23IWCC0520 |
| Number of Pages of Decision | 33 |
| Decision Issued By | Deborah Simpson, Commissioner |

| | |
|---|---|
| Petitioner Attorney | James Coogan |
| Respondent Attorney | Junira Castillo |

DATE FILED: 12/11/2023

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DEJAN LAZAREVSKI,

Petitioner,

vs. NO: 20 WC 19557

DAUNTLESS DELIVERY, LLC.,

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, calculation of average weekly wage, permanent partial disability, credit for paid temporary total disability benefits, and whether the Arbitrator abused his discretion in denying Respondent's motion for continuance immediately prior to arbitration in order to obtain a Section 12 medical exam 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 Arbitrator found that Petitioner sustained his burden of proving he sustained a work-related accident on July 30, 2020 while moving items in the delivery truck he was driving. He also found that the accident caused Petitioner's current vascular condition of ill-being, namely thoracic outlet syndrome/DVT diagnoses, for which he had 1st rib resection surgery. The Arbitrator found that Petitioner's average weekly wage was $640.00, and awarded him 23 weeks of temporary total disability benefits, $157,706.15 in medical expenses, and 50 weeks of permanent partial disability benefits representing loss of the use of 10% of the person-as-a-whole.

Initially, the Commission notes that although Respondent preserved the issues of accident and credit for paid temporary total disability benefits, Respondent stipulated to accident and that it did not pay any indemnity benefits for which it is entitled credit prior to, and at, arbitration. Therefore, the Commission affirms and adopts the Decision of the Arbitrator on the issues of accident and credit. In addition, the Commission finds the Arbitrator's calculation that Petitioner's average weekly wage of $640.00 was correct, his award of 23 weeks of temporary total disability benefits was correct, his award of 50 weeks of permanent partial disability was appropriate for the injuries Petitioner sustained, and that the Arbitrator's denial of Respondent motion for a continuance to obtain a Section 12 medical report was not an abuse of discretion when Respondent had two years to obtain the examination/report and could have brought up the issue at a pre-trial, but did not.

However, the Commission notes that on examination of the medical records, bills, and payments, we found some discrepancies. While the Arbitrator awarded medical expenses in the amount of $157,706.15, the Commission finds that the actual medical award should be $159,162.15, obviously subject to the lower of the applicable medical fee schedule or negotiated rate pursuant to §8.2. In this regard, the Commission identifies a bill from Superior Ambulance in the amount of $6,620.00, which must be paid pursuant to the fee schedule. In addition, the Commission notes that Northshore University Health System billed $95,396.90 for services rendered from July 31, 2020 through August 4, 2020, for which an adjustment of $43,996.74 was made, leaving an outstanding balance of $51,400.16. These charges should be paid pursuant to the fee schedule or at the negotiated rate of $51,400.16, whichever is less. Similarly, the Commission notes additional bills from Northshore Health in the amount of $57,145.25, of which the group carrier paid $2,919.12, and for which Respondent is liable. Thereafter, Northshore Health's remaining dates of service of November 19, 2020, November 23, 2020, and November 24, 2020, do not reflect payments, and for which there remains a balance of $44,845.25, which also needs to be paid pursuant to the fee schedule.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator dated January 23, 2023, is hereby modified as specified above and is otherwise affirmed and adopted, and is attached hereto and made a part hereof.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $426.67 per week for a period of 23 weeks, that being the period of temporary total incapacity for work under §8(b).

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $159,162.15 for medical expenses subject to §§8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $384.00 per week for 50 weeks, because the injuries sustained cause the loss of 10% of the use of person-as-a-whole, as provided in §8(d)2 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.

**December 11, 2023**
DLS/dw
O-10/11/23
46

/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 | 20WC019557 |
| Case Name | Dejan Lazarevski v. Dauntless Delivery, LLC |
| Consolidated Cases | |
| Proceeding Type | |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 29 |
| Decision Issued By | Joseph Amarilio, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | James Coogan |
| Respondent Attorney | Junira Castillo |

DATE FILED: 1/23/2023

**HE INTEREST RATE FOR THE WEEK OF JANUARY 18, 2023 4.68%**

/s/ Joseph Amarilio; 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

**DEJAN LAZAREVSKI**
Employee/Petitioner

v.

**DAUNTLESS DELIVERY, LLC**
Employer/Respondent

Case No. **20 WC 019557**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was e-mailed to each party. The matter was heard by the Honorable **Joseph Amarilio**, **Arbitrator** of the Commission, in the city of **Chicago**, on **9/28/2022** and **10/24/2022**. 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 the date of accident, **7/30/20**, 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 **7/30/20** date, Petitioner ***did sustain an accident while 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 **$5,993.00 from June 4, 2020 (start of employment) to July 31, 2020**; the average weekly wage was **$640.00**.

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

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 $**0.00** 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 $426.67 per week for 23 weeks, from July 31, 2020 through January 7, 2021, as provided in Section 8(a) of the Act.

Respondent shall pay reasonable and necessary medical services as the following bills: Superior Ambulance Service - $6,620.00; Northshore University Healthsystem / Evanston Hospital / Glenbrook Hospital / Vascular Surgery Skokie - $151,086.15, as provided in Sections 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.

Respondent shall pay Petitioner permanent partial disability benefits of $384.00 per 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.

Penalties are not awarded. Respondent is not liable to pay Petitioner penalties under Section 19(k) and 19(l).

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.

Joseph D. Amarilio

/S/_____ **JANUARY 23, 2023**

Signature of Arbitrator JOSEPH D. AMARILIO

# THE ILLINOIS WORKERS' COMPENSATION COMMISSION
## Attachment to Arbitration Decision

| | | |
|---|---|---|
| DEJAN LAZAREVSKI | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | Case No. 20 WC 019557 |
| | ) | |
| DAUNTLESS DELIVERY, LLC | ) | |
| | ) | |
| Respondent. | ) | |

## STATEMENT OF FACTS AND CONCLUSIONS OF LAW

### I. PROCEDURAL HISTORY

Mr. Dejan Lazarevski (Petitioner), by and through his attorney, filed an Application for Adjustment of Claim for benefits under the Illinois Workers' Compensation Act (Act). Petitioner alleged that he sustained an accidental injury on July 30, 202 while employed by Dauntless Delivery, LLC (Respondent). **(PX 1)**

On October 16, 2020, Petitioner filed a Motion and Petition For Immediate Hearing under Section 19(b). On June 9, 2021, Petitioner filed another Motion and Petition For Immediate Hearing under Section 19(b) and claimed penalties under Section 19(k) and Section 19 (l) of the Illinois Workers' Compensation Act. A supporting Petition For Penalties was not attached. At trial, the nature and extent of Petitioner's alleged injury was placed at issue which Respondent agreed was disputed and at issue. **(Arb. X. 1)**

This matter was heard on September 28, 2022 and October 24, 2022 before the Arbitrator in the City of Chicago and County of Cook. Petitioner testified in support of his claim for benefits. No witnesses testified at the request of Respondent. The submitted exhibits and the trial transcript of the testimony were examined by the Arbitrator in reaching this Arbitration Decision.

Based on the jointly submitted Request for Hearing **(Arb. X 1),** the parties stipulated that on July 30, 2020 Petitioner and Respondent were operating un the Illinois Workers' Compensation Act and their relationship was one of employee and employer. The parties stipulated that on July 30, 2020 sustained accidental injuries that arose out of his and the course of his employment and that Respondent was given notice of the accident within the time limits stated in the Act. The parties stipulated that at the time of injury, Petitioner was 41 years old, single with no dependent children. The parties stipulated that Respondent did not pay any medical bills for which it may be entitled to credit under Section 8(j) of the Act. And, finally, the parties stipulated that Respondent

did not pay any temporary total disability benefits or other benefits for which credit may be allowed under Section 8(j) of the Act.

The parties proceeded to hearing on the following six (6) disputed issues: (1) Whether Petitioner's current condition of ill-being is causally connected to the work accident; (2) Whether Petitioner's average weekly wage was $640.00 as claimed by Petitioner or $523.73 as alleged by Respondent; (4) Whether Respondent is liable for the medical treatment and medical bills incurred; (4) Whether Petitioner is entitled to temporary total disability; (5) What is the nature and extent of injury; and (6) Whether Petitioner is entitled to penalties under Sections 19(k) and Section 19 (l) of the Act. **(Arb. X. 1)**

At the start of the trial, Respondent requested leave to file a response to Petitioner's claim for penalties under Sections 19(k) and 19(l) under the Act. The Arbitrator granted Respondent leave to file its response within14 days from date of hearing and Petitioner 21 days from date of hearing to file his reply. Petitioner's testimony was heard on September 28, 2022 and this matter was continued to October 24, 2022 to close proofs on the penalties pleadings. Respondent also filed a "supplemental brief" to Petitioner's response which was admitted into the record without objection. Petitioner's Penalties Petition was submitted into the record as a Group Exhibit: Exhibit A, Exhibit B, Exhibit C, Exhibit D, Exhibit E, and Exhibit F. Petitioner's Reply to Respondent's Response to the Petition for Penalties was marked as Exhibit G. Respondent's responses were submitted into the record as Δ (Delta) Exhibit 1 and Δ Exhibit 2.

**Respondent's Request for Continuance to obtain a Section 12 Examination was Denied For Its Failure to Comply with Section 12 of the Act and The Rules Governing Practice Before The Illinois Workers' Compensation Commission.**

At trial, Respondent requested a continuance of the trial in order to schedule and obtain a Section 12 examination. Respondent asserted that a denial of a continuance would violate Respondent's due process rights. Respondent had not filed a written motion for a continuance. Petitioner objected to the continuance on the basis that Respondent had not paid TTD benefits, had not shown good cause for a continuance, had not paid any medical bills which were substantial, and had neither scheduled nor made a written request for an examination prior to trial and yet had two years in which to do so and failed to do so. **(Tr.13-15)**

Section 12 of the Illinois Workers' Compensation Act 820ILCS305/12 provides as follows:

"An employee entitled to receive disability payments shall be required, if requested by the employer, to submit himself, at the expense of the employer, for examination to a duly qualified medical practitioner or surgeon selected by the employer, at any time and place reasonably convenient for the employee, either within or without the state of Illinois, for the purposes of determining the nature, extent, and probable duration of the injury received by the employee, and for the purpose of ascertaining the amount of compensation which may be due the employee from time to time for disability according to the provisions of this act…..

An employer requesting such an examination, of an employee residing within the state of Illinois, shall deliver to the employee with a notice of the time and place of examination sufficient money to defray the necessary expense of travel by the most convenient means to and from the place of examination, and the cost of meals necessary during the trip, and if the examination or travel to and from the place of examination causes any loss of working time on the part of the employee, the employer shall reimburse him for such loss of wages upon the basis of his average weekly wage."

Section 9020.00 Medical Examinations of the Rules Governing Practice Before the Illinois Workers' Compensation Commission states that the process to secure a Section 12 medical examination begins with Respondent providing petitioner written notice of the examination. This notice shall be provided to the injured worker at a reasonable time period before the examination and shall provide the name and address of the examining physician so that the injured worker can attend the examination. Additionally, Respondent is required to tender travel expenses to defray petitioner's expenses at time of the request.

The words of a statute are given their plan and commonly understood meanings. *King v. Industrial Comm'n,* 301 Ill. App. 3d (1998), *See also, King v. Industrial Comm'n*, 189 Ill.2nd 167 (2000) Section 12 of the Act specifically uses the word "shall" provide written notice and tender expenses as a condition in obtaining an examination. The Arbitrator applied the plain meaning of the words set forth by the Illinois legislature and in doing so denied Respondent's motion for a continuance. *See also, Navistar Int'l Transp. Corp. v. Indus. Comm'n (Mayes)*, 331 Ill. App. 3d 405 (2002) (the employee not required to attend a Section 12 examination when travel expenses have not been tendered with written notice of the examination.) In the case a bar, it is undisputed that Respondent had not complied with the requirements of Section 12 of the Act. The Arbitrator is mindful that workers are entitled to "prompt, sure, and definite compensation, together with a quick and efficient remedy" with industry bearing the "costs of such injuries" rather than the injured worker. *O'Brien v. Rautenbush*, 10 Ill.2d 167, 174 (1956). Therefore, the Arbitrator, as required by law and within judicial discretion, sustained Petitioner's objection to a continuance, and denied Respondent's request for a continuance to schedule a Section 12 examination. Furthermore, the Arbitrator finds that Respondent's request for a continuance failed to comply with Rules Governing Practice Before The Illinois Workers' Compensation Commission.

## II. FINDINGS OF FACT

Respondent operates as a delivery service provider on behalf of Amazon. Petitioner is 44 years old and was 41 years old at the time of his injury, His highest level of education is a General Education Development (GED®). **(Tr. 20).** Petitioner began his employment for Respondent in

June 2020, as a delivery driver. **(Tr. 21).** Petitioner initially began working 5 days a week for Respondent and transitioned to working 6 days a week halfway through July 2020. **(Tr. 24).**

***Petitioner's job duties***

Petitioner started every shift by arriving to a parking lot located in Niles, Illinois where he would leave his personal vehicle and pick up a sprinter van that was provided by Respondent. **(Tr. 28).** Upon arrival, Petitioner would be provided with a pouch containing an android telephone to use as a GPS system and for scanning deliveries, a card to use for gas, and a battery charger pack for his phone. **(Tr. 28-29).** He would then be told which sprinter van to use and drive that sprinter van to a storage facility called Amazon Last Mile Warehouse that was located in Morton Grove, Illinois. **(Tr. 29).** Once there, he would park the delivery van and walk to the staging area where he would be told which carts were designated to him. **(Tr. 30).** Each cart was filled with packages that were previously designated for him to deliver on his route. **(Tr. 30).** Other than his first week on the job, he would always have at least two carts designated to him on each shift. **(Tr. 67).** One cart would be filled with approximately nine tote bags, each weighing about 50 pounds and each containing small to large packages. **(Tr. 32-33).** The second cart was called an overflow cart and it was filled with 10 to 35 heavy packages that did not fit into a tote bag. Those packages included dog food, kitty litter, and cases of water and each these cases weighed between 20 to 40 pounds. **(Tr. 34-35).** In total, Petitioner would be assigned to deliver at least 170 packages on a given shift. **(Tr. 35).**

Petitioner would then drag each cart to the delivery van, lift each package and tote bag out of the cart, and carry them into the vehicle one by one. **(Tr. 36).** He would organize the packages within the vehicle by lifting and stacking them on top of one another. **(Tr. 37).** Once finished, he would start his deliveries, following the direction of the GPS on his android telephone. After completing his deliveries, he would drive back to the warehouse facility to return tote bags and undelivered packages; and then he would drive to the parking lot in Niles, Illinois to drop off the delivery van and pick up his vehicle. **(Tr. 59).**

***Facts surrounding July 30, 2020***

On July 30, 2020 Petitioner had a scheduled shift to work for Respondent. He arrived at the parking lot at 11:00 am, received his pouch and keys to a delivery van, and drove to Amazon Last Mile Warehouse. **(Tr. 46-47).** He was assigned two package filled carts, estimating at about 175 packages, to be delivered. **(Tr. 46-47).** He lifted each package and tote bag from the cart and carried them into the delivery van. **(Tr. 49).** His assigned route that day was within Park ridge, Illinois. **(Tr. 53).**

Petitioner testified that, at approximately 4:30 pm, he arrived at an apartment where he was assigned to complete two deliveries. **(Tr. 54).** In his right arm, he cradled one package of dog food and in his left arm he carried a six panel round sided box that he held tight in between his left hand and lower bicep that he described as "carrying like a football". **(Tr. 54-55, 56).** While carrying both packages, he walked towards the building and when he was about halfway from the door and delivery van, he felt a feeling of discomfort in the lower bicep of his left arm. **(Tr. 54-55).** Petitioner completed that delivery and walked back to his vehicle. **(Tr. 58).**

Petitioner testified that, although he did not feel immediate pain, he did feel an *unusual feeling* in his left bicep that he described as discomfort, like something was off with his left arm. **(Tr. 58).** He has never experienced that feeling before. **(Tr. 58).**

Petitioner completed the rest of the deliveries for that shift despite feeling a *steady discomfort* in his left arm that he described as a pinching feeling. **(Tr. 58).** He drove back to the amazon warehouse and seen his manager, Eliza Parry, who offered Petitioner a $25.00 bonus to deliver 30 packages in Gurnee, Illinois, to which he agreed to do. **(Tr. 60).** Once those deliveries were completed, Petitioner drove to the parking lot in Morton Grove, Illinois, dropped off the delivery van, got into his personal vehicle, and went straight home. **(Tr. 62)**. He did not stop anywhere on the way home. **(Tr. 62).** Other than lifting and carrying packages and tote bags throughout his work shift, Petitioner did not lift anything or exercise at all that day or night. **(Tr. 62-63)**. Once home, he made dinner, took Tylenol, and went to bed. **(Tr. 63).** There were no incidents that occurred over the course of that night. **(Tr. 63).**

***Facts surrounding July 31, 2020***

On July 31, 2020, Petitioner had a scheduled shift to work for Respondent. **(Tr. 64).** His shift began similar to the day prior. He arrived to the parking lot in Niles, Illinois at 11:00 am, received his pouch and keys to a delivery van, and drove to the amazon warehouse in Morton Grove, Illinois. **(Tr. 65).** At that time, the feeling of discomfort in his lower left bicep persisted and was in the same exact location as the day prior. **(Tr. 66).**

Petitioner testified that he was designated two carts to deliver that day, totaling over 170 packages. **(Tr. 68).** He rolled the carts to his delivery van and lifted each tote bag up from the ground level and into the van. **(Tr. 69).** He stacked the tote bags on top of one another, lifting some up as high as the level of his neck. **(Tr. 69).** Petitioner did the same for the packages that were not in tote bags. It took him 10 minutes to place all of the packages and tote bags into his vehicle. Petitioner testified that, towards the end of loading the packages, the discomfort feeling in his left bicep turned into a feeling of pain. **(Tr. 71)**. At the time, he thought to himself that his pain could be serious, but he also felt lucky to have brought Tylenol with him. **(Tr. 71-72)**. The

route he was assigned that day was within Glenview, Illinois. **(Tr. 73).** After loading up the van, Petitioner began driving to his first delivery.

Throughout his deliveries Petitioner noticed that the packages he carried felt heavier than usual and that the driver's side door that he would open with his left arm to get out of the delivery van felt heavier and heavier, to the point where he felt like he was opening the door of a tank rather than a vehicle. **(Tr. 75).** At about 4:00 pm, after completing approximately 100 deliveries, the mild discomfort in his left lower bicep turned into *severe pain* that traveled into his upper bicep and triceps. **(Tr. 74).** Petitioner testified that he had his hands in the 11:00 o'clock and 1:00 o'clock position on the steering wheel and noticed that his left hand was purplish in color and noticeably swollen. **(Tr. 75-76).**

Petitioner than called his operations manager, Eliza Parry, and told her that he was unable to finish his route, and that someone would need to meet him down the street at the urgent care center in Glenview where he was going to get his arm checked out. **(Tr. 79).**

***Petitioner's Medical Treatment***

Petitioner immediately drove to Glenview Urgent Care Clinic where he was seen by a nurse who quickly decided that Petitioner's situation was too serious for them to handle and directed him to Northshore Hospital's Emergency Room. Petitioner was asked what happened at the Urgent Care clinic and he testified as follows:

*Q. When you got to the urgent care clinic in Glenview, what happened?*
*A. I was seen by a nurse. I told her that I had severe pain in my left lower bicep, that it actually started moving to my upper bicep and to my forearm. And I asked to be check out.*

*Q. Were you seen by a doctor at the urgent care?*

*A. I was not seen by a doctor. The nurse made a quick decision that the situation was serious, and it was not something that they could handle. She offered to give me an EKG before I left. And she pointed me to the Northshore emergency room, which was actually down the street in Glenview as well.* **(Tr. 79-80).**

Petitioner immediately drove himself to Northshore Hospital (also known as Glenbrook Hospital), and went to the Emergency Room. **(PX4).** There, he complained of swelling and pain in his left bicep that spreads down his left arm. **(PX4 P.20)**.

Petitioner was asked if he had told the doctors at Glenbrook Hospital's emergency room what had occurred, and he testified as follows:

*Q. And did you tell the doctor the same thing that you had just described of what occurred the day before?*

*A. Yes, I did. Everybody asked me, including the doctor what happened, and I described the day prior on July 30th that I had felt some mild discomfort while delivering packages to Amazon.* **(Tr. 83).**

Petitioner's history noted that he has "*complaints of left arm pain. Is amazon driver, states was lifting non heavy packages yesterday and felt sharp pain. Does not resolve with Tylenol. Has slight swelling to hand.*" **(PX4 P.27).** Petitioner was placed on continuous cardiac monitoring and underwent arterial and venous dopplers. **(PX4 P.26).**

Petitioner was asked what happened after undergoing an x-ray and doppler exam and he testified as follows:

*Q. And what happened next after taking those exams?*

*A. After the exams were over, the nurse came back. I don't remember if it was the nurse or the doctor, but they told me that I had thoracic outlet syndrome. I had deep vein thrombosis. The pain that I was feeling in my arm was a severe clot that needed to be taken care of immediately.* **(Tr. 84).**

Upon review of the dopplers, Sapana Shah, MD diagnosed Petitioner with deep vein thrombosis (hereinafter "DVT"). **(PX4 P.24).** She discussed her findings with Dr. Tafur, a vascular surgeon, and noted "*discussed with Dr. Tafur from vascular and he wants to transfer patient to Evanston because he feels that as a delivery man, he probably got the clot from thoracic outlet syndrome, and since young, is a candidate for thrombolysis.*" **(PX4 P.23).** Petitioner was then started on heparin drip per the DVT protocol until 9:38 pm that night, where he was then cleared to be transported to Evanston Hospital by ambulance. **(PX4 P.30).**

On the night of July 31, 2020, an ambulance took Petitioner to Evanston Hospital's intensive care unit where he was initially seen by Dr. Jacob Oberwetter.

Dr. Oberwetter reported the history of the illness as follows; "*41-year-old male with PMH of anxiety who presents with left arm discomfort. He notes that the day prior to presentation around 5 pm while delivering packages for amazon, he felt a pulling discomfort in his left bicep which he though was potentially a strain. It worsened that evening and began to include his triceps.*

*Everything felt overall "full and sore". He took Tylenol that evening with some relief and slept well, woke up feeling ok. While at work this morning he noticed that pain was worsening and he felt like his arm was swollen. After realizing left hand was also swollen, he decided he needed to come to urgent care – then he was sent to ER. He has never had this before, never had a blood clot before. In the ER, found to have left subclavian DVT.*" **(PX4 P.31).**

Petitioner was asked what happened when he got to the emergency room at Evanston Hospital, and he testified as follows:

*Q. When you got to the ER at Evanston Hospital, what happened?*

*A. I was immediately administered to the ICU. I was put on several different IV's, and I was also given what was referred to me as a Heparin drip, which was a means to kill the clot, to dissolve the clot so the clot would not break off and go into my lung causing a pulmonary embolism.* **(Tr. 85-86).**

On August 1, 2020 Petitioner underwent a left venogram and was diagnosed with left subclavian DVT. **(PX4 P.40).** Dr. John Wolf recommended that he continue left arm catheter directed tumor lysis, continue heparin and tPA [a thrombolytic or a "Clot Buster" drug] gtt [continuous medication drips], and plan for repeat venogram tomorrow to assess for clot burden and possible thrombectomy/angioplasty. **(PX4 P.40).** Petitioner was also seen by vascular surgeon, Dr. Omar Morcos, for an evaluation of venous thoracic outlet syndrome decompressive surgery. Dr. Morcos agreed with Dr. Wolf's plan. **(PX4 P.51)**. Petitioner was subsequently taken to the I R where he underwent a left arm venogram and catheter directed thrombolysis. **(PX4 P.69).**

On August 2, 2020, Petitioner underwent a second left arm venogram and catheter directed thrombolysis. Upon review of the venogram, Dr. Tafur recommended that he go an extra day of catheter directed thrombolysis. **(PX4 P.90).**

On August 3, 2020, Petitioner underwent a third left arm venogram and catheter directed thrombolysis. Upon completion, it was shown that there was no residual thrombus, however, he did have persistent stenosis at the level of the first rib for which he underwent balloon dilation. **(PX4 P.71).**

When asked about the results of the examinations that he underwent, Petitioner testified as follows:

*Q. After having taken those exams to check your veins, what do you remember the doctors telling you with regards to the results?*

*A. Every morning there was an evaluation of how I was doing. I would basically be taken down into the basement of the hospital where the specialist would look on a camera that they stuck in my arm with the progress of the clot, and I remember having an object stuck into my left forearm, going up into my bicep that was going to spray the clot directly with either Heparin or something else to kill the clot.* **(Tr. 88-89).**

Petitioner was discharged from Evanston Hospital on August 4, 2020. The following is noted as a summary of his hospitalization:

"*Dejan lazarevski is a 41-year-old male with primary history of anxiety who presented with left arm discomfort. The patient is a delivery driver for Amazon and reports that he had left arm pain the day prior to admission that he initially attributed to muscle strain from work. His pain progressively worsened and was not relieved with acetaminophen. The patient then developed associated left arm swelling and numbness that prompted him to present to the ED* [Emergency Department*] for evaluation. Found to have left subclavian DVT. Vascular medicine was consulted and started on heparin drip. Patient went to IR [*Interventional Radiology] *for left arm venogram and thrombolysis. Symptoms approved after thrombolysis. ICU* [Intensive Care Unit] *monitoring post op. He underwent 2 further venograms to evaluate for clot burden and finally on 8/3/20, he no longer had any clot burden. He had persistent stenosis at the level of first rib for which he underwent balloon dilatation. Vascular med and vascular surgery were consulted. Recommended left 1st rib resection/scalenectomy and neurolysis planning to take place about 4-5 weeks. Vascular recommended continuing Xarelto and OP follow up in 2-4 weeks.*" **(PX4 P.42).**

Petitioner was asked about his prolonged stay at Evanston Hospital, and he testified as follows:

*Q. Why did you have to stay in the hospital for five nights?*

*A. It took at least three days to kill the clot, which they told me might be a possibility. They said looking at how bad it was, it was going to take 48 hours or more to clear the clot out.* **(Tr. 88).**

Petitioner was asked about his treatment plan after having been discharged from Evanston Hospital and he testified as follows:

*Q. From your understanding, what was the treatment plan moving forward upon discharge?*

*A. The treatment plan was to have the first rib resection. My first rib needed to be removed from my body because... I was told the more I was lifting and the more that I was carrying was clamping down on a vein, a vein that runs from the first rib, the collar bone down all the way into my wrist area. And if I did not get that first rib resection, it was going to happen again guaranteed.* **(Tr. 89-90).**

Petitioner was asked about his ability to return to work upon discharge and he testified as follows:

*Q. And when you were released from Evanston Hospital on August 4th, what did the doctors tell you about your ability to return to work?*

*A. They told me not to return to work. They told me not to continuously lift more than 10 pounds on my left arm.* **(Tr. 90).**

Petitioner was asked if he communicated his inability to return to work to Respondent and he testified as follows:

*Q. Did you communicate your inability to return to work to anyone at Dauntless Delivery?*

*A. I communicated my inability to work with Shelly Shugarts who I knew to be human resources as well as Eliza Parry, who I reported to as my manager.* **(Tr. 91).**

Petitioner did not receive any pay from Respondent for the days that he was placed on restrictions not to work. **(Tr. 91).**

Petitioner returned to see Dr. Morcos for a follow up at Evanston Hospital on August 12, 2020. Dr. Omar Morcos examined the patient and diagnosed acute DVT of other vein of left upper extremity due to effort thrombosis. **(PX4 P.4)**. He further recommended a left first rib resection surgery to decompress the space where Petitioner's vein is impinged. **(PX4 P.7)**.

Petitioner was asked about his ability to return to work on August 12, 2020 and he testified as follows:

*Q. In your follow-up with Dr. Morcos on August 12th, did he keep your restrictions the same in regard to your inability to return to work?*

*A. My restrictions were the same because the problem was still there. In order for me to carry on with the rest of my life as someone who is going to be able to lift*

*more than ten pounds with their left arm continuously, the first rib resection needed to happen.* **(Tr. 94).**

Petitioner presented to Evanston hospital on November 19, 2020 for pre-operative testing and again on November 20, 2020 for a pre-procedure covid exam. **(PX6 P.263 and 266).**

On November 23, 2020 Petitioner presented to Evanston Hospital where he was taken to the operating room and underwent a left first rib resection scalenectomy. **(PX6 P.138-139).** Post-surgery, he was taken to the recovery area where a post-operative chest x-ray was ordered. **(PX6 P.140).** After the procedure, Petitioner complained of left shoulder pain and was given Tylenol for pain relief. **(PX6 P.145).** He remained in the hospital the night of the surgery. **(Tr. 94).**

On November 24, 2020, Petitioner was discharged from Evanston Hospital. At discharge, he was given Norco due to his complaints of pain and told to follow up in a few days. **(PX6 P.145).** Petitioner testified that he was recommended to be on a very low-fat diet, that he not continuously lift anything more than 10 pounds, and that he continues using blood thinners. **(Tr. 94).**

Petitioner returned to Evanston Hospital on November 27, 2020 for a post-surgery evaluation. He complained of anxiety and an inability to sleep well since his surgery. **(PX6 P.124).** Dr. Morcos examined the patient and placed an order for physical therapy and recommended that he follow a low-fat diet, stay on Xarelto, take Mobic as needed for pain, and placed him on restrictions not to return to work until re-evaluated at the end of December 2020. **(PX6, P.125-126).**

Petitioner returned to Evanston Hospital for a follow up with Dr. Morcos on December 9, 2020. Upon examination, Dr. Morcos recommended that Petitioner continue Xarelto, limit heavy lifting in physical therapy, and follow up in three months to undergo a venous duplex. **(PX6 P.101).**

Petitioner presented to Evanston Hospital for a physical therapy evaluation on December 11, 2020. There, he was treated primarily for his left shoulder pain. **(PX6 P.90).** With regard to the left shoulder, his history notes *"left shoulder pain onset with work events at end of shift he felt a pinch at the biceps on July 30th of 2020, by the end of the night he felt better with Tylenol. The next morning his pain got worse and his bicep became more painful. He drove himself to the ER, at Northshore Glenbrook. He was hospitalized and was told he had a blood clot.*" **(PX6 P.92).** It is further noted that Petitioner "*presents with left upper extremity weakness and scapular dysrhythmia secondary to surgical interventions.*" **(PX6 P.93)**. He was recommended to limit heavy lifting no more than 20 pounds and a plan was then conducted for him to undergo physical therapy 1-2 times a week for 5-6 weeks. **(PX6 P.93)**.

Petitioner presented to Evanston Hospital for physical therapy on January 14, 2021. At that time, he has completed eight (8) sessions of physical therapy. There, Petitioner reported "*if I reach*

*out with my left arm to put on my blanket then I get a sharp pain. It isn't getting any better, and it's not getting any worse.*" **(PX6 P.60).** Petitioner was examined by Jesus Dominguez who recommended that he continue physical therapy in order to progress towards his prior level of function. **(PX6 P.61)**.

On January 7, 2021, Petitioner presented to Evanston Hospital for a physical therapy session. At that time, he was released of his work restrictions. **(PX6 P.71).**

Petitioner presented to Evanston Hospital's Emergency Department on February 25, 2021. At Evanston Hospital, Petitioner complained of left arm pain and soreness of the antecubital fossa that has been present for the past few days as well as tightness over the left chest over surgery scar. **(PX6 P.28-29).** Petitioner further reported that his symptoms have been present since his surgery for thoracic outlet syndrome. **(PX6 P.29).** Petitioner was examined by Dr. Christopher Kurian who noted Petitioner's history as "*a 42-year-old male with primary history diagnosis for left sided thoracic outlet syndrome status post 1st rib resection in 11/23. DVT RUE July 2020 who presents with chest and arm pain. Patient stated since his thoracic outlet surgery in November, he has felt upper left sided chest discomfort/tightness and right forearm pain. Chest pain is non-radiating. Both are worse with lifting heavy objects and alleviated by rest. His forearm pain feels similar to his DVT in July."* **(PX6 P.32)**. Petitioner underwent a chest x-ray and ultrasound for both upper extremities and was negative for DVT. Dr. Kurian diagnosed thoracic outlet syndrome and recommended that he continue follow up with Dr. Morcos. **(PX6 P.33).**

Petitioner was asked why he went to the hospital on February 25, 2021 and he testified as follows:

*Q. Why did you go to the hospital that day?*

*A. On February 25, 2021 it was I would say approximately ten days to two weeks of me returning back to work, and I had an issue with my left arm again that was very concerning. After about ten to fourteen days of delivering, everything feeling okay, I had a really bad pain in the middle of my arm, smack dab in the middle between my lower bicep and forearm. And I was worried that this happened again...* **(Tr. 94).**

Petitioner returned to Evanston Hospital for a follow up with Dr. Morcos on May 26, 2021. After examining the patient, Dr. Morcos recommended that Petitioner stop taking Xarelto and start taking aspirin instead, and to follow up in six months. **(PX6 P.332).**

Petitioner returned to Evanston Hospital on January 19, 2022 for a follow up with Dr. Morcos where he underwent a venous duplex. Upon completion and review of a venous duplex,

Dr. Morcos noted minimal venosclerosis [hardening of the veins] and no deep vein thrombosis [no blood clots in a deep vein]. **(PX6 P.316).**

***Petitioner's Work Status and Lost Earnings***

On August 4, 2020 Petitioner was discharged from Evanston Hospital and was placed on restrictions *not to return to work until further evaluation*. **(PX4 P.289).** Petitioner testified that he was still on restrictions not to work leading up to his surgery on November 23, 2020. **(Tr. 94)**. On November 27, 2020, post-surgery, Petitioner was advised not to return to work until re-evaluated at the end of December 2020. **(PX6 P.126).** On December 11, 2020, his restrictions were modified to lift no more than 20 pounds. **(PX6 P.91).** Petitioner testified that he was required to lift more than 10 pounds working for Respondent. **(Tr. 90).** On January 7, 2021, Petitioner's lifting restrictions were released. **(PX6 P.71)**. Petitioner returned to work for Respondent on February 14, 2021. **(Tr. 101).** Respondent has never paid any benefits.

***Petitioner's Current Medical Status***

Petitioner has a permanent scar from the rib resection surgery located on the left side of his body underneath his collar bone. It is a two-and-a-half-inch scar, non-keloid, faint, it's at a 45-degree angle starting at what would be the collar bone towards the sternum, and it's about a quarter inch wide. **(Tr. 109).**

Petitioner was asked if he does anything different with his left arm currently and he testified as follows:

*Q. I want to ask you about now. Do you do anything different with your left arm now that you didn't have to do prior to July 30, 2020?*

*A. Yes, I changed the way that I carry things. I stopped carrying things in my left arm if I can because I'm fearful that something like this could possibly happen again. I don't squeeze packages like I do anymore. I'm way more conscious of how I'm delivering and lifting.* **(Tr. 105-106).**

On cross examination, Respondent attorney inquired regarding a history contained in Evanston Hospital Resident Emergency Room note dated July 31, 2020 at 5:50 PM. (RX 2). The note states that Petitioner presented with a chief complaint of an "arm injury". The history of present illness records that Petitioner is a 41 year old male with no past medical history of left upper arm pain. A four factor COVID protocol was not recorded one way or another. The resident went on to record that Petitioner reported his being normally healthy. Family history is positive for myocardial infarction and mental health issues. Mom had various veins. No history of blood

clots in family. Notes he works as an Amazon driver. Notes he worked out Wednesday [Arbitrator takes judicial notice that Wednesday was July 29, 2020] doing pushups, pull ups, dips. He noticed upper bicep and tricep pain and left-hand swelling. He went to the IC [ Immediate Care] today was told to come into the emergency department today. Still has significant left arm pain. No other complaints at this time. (RX 2)

Petitioner testified that he did not provide this history of working out. That the note is not true and accurate **(Tr 152**). Petitioner admitted to working at a local gym pre-COVID. He explained that he had not done so since the mid- March 2020 COVID shut down **(Tr. 156)** and also was not inclined to work out after performing his duties as an Amazon driver 8 hours a day. Following COVID he would jog in the park on weekends. He did not lift weights between the March 2020 COVID shutdown and his July 30, 2020 accident. He testified that he did recall one time that he tried to so some pullups, some dips and some pushups because he had lost so much weight and he wanted to see if he would be able to it. Petitioner testified that he was not currently taking any medication for pain. That he returned to work full duty and that he started working for FedEx on September 12,2021. When asked why he resigned from Respondent, Petitioner stated he could not handle the workload anymore. He explained that Amazon has a computer algorithm that assigns workload. The harder you work; the more delivers are assigned to you. He was completely wiped out and exhausted. He could not handle it anymore. **(Tr 156-159)**

## III. 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 Petitioner 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 or her claim *O'Dette v. Industrial Commission,* 79 Ill. 2d 249, 253 (1980) including that there is some causal relationship between the employment and the injury. *Caterpillar Tractor Co. v. Industrial Commission*, 129 Ill. 2d 52, 63 (1989). And, yet it also 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). The Act is a remedial statute which should be liberally construed to provide financial protection for injured workers. *McAllister v. IWCC*, 2020 IL 124848 ¶ 32. The Act's provisions are to be read in harmony to achieve that goal. *Vaught v. Industrial Commission,* 52 Ill.2d 158, 165 (1972). Workers are entitled to "prompt, sure, and definite compensation, together with a quick and efficient remedy" with industry bearing the "costs of such injuries" rather than the injured worker. *O'Brien v. Rautenbush*, 10 Ill.2d 167, 174 (1956). Decisions of an Arbitrator shall

be based exclusively on stipulation of the parties, the evidence in the record of proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e) The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law set forth below.

**Credibility Assessment:** 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 The Arbitrator viewed Petitioner's demeanor under direct examination and under cross-examination. His testimony was direct, candid and not evasive. The Arbitrator considered the testimony of Petitioner with the other evidence in the record and finds Petitioner to be credible

**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 is satisfied that the Petitioner has proven a causal connection to his condition of ill being as it related to his venous thoracic outlet syndrome, deep vein thrombosis (hereinafter "DVT") and left shoulder pain, as being caused as a result of his work accident on July 30, 2020.

To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence – more probably true than untrue – all of the elements of his 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). A causal connection between a condition of ill-being and a work-related accident can be established by showing a chain of events wherein an employee has a history of prior good health, and, following a work-related accident, the employee is unable to carry out his duties because of a physical or mental condition. *BMS Catastrophe v. Industrial Commission*, 245 Ill. App. 3d 359, 365 (1993). Medical testimony is not necessarily required to either establish causation and disability. *Heston v. Industrial Commission*, 164 Ill. App. 3d 178, 181 (1987).

The Arbitrator notes that "chain of events" analysis has been applied by The Illinois Workers 'Compensation Commission in thoracic outlet syndrome cases without a medical causation opinion. By operation of law, the Arbitrator is bound to follow the decisions of the Commission and finds the matter of *Robin K. Lomelino v. Whitehouse Manufacturing*, 2 IIC 576, 2002 Ill. Wrk. Comp LEXIS 667 to be instructive. In *Lomelino*, the arbitrator found and concluded that petitioner's condition of bilateral thoracic outlet syndrome had not been credibly proven. The Commission modified the arbitrator's decision and found a causal connection between the

petitioner's thoracic outlet syndrome and his accident based on the chain of events, Petitioner's testimony, and the medical records.

The Arbitrator finds that the facts in *Lomelino* to be substantially similar in relevant facts and law to the case at bar. The Arbitrator finds that Petitioner has proven by a preponderance of the evidence that the injuries sustained by him, specifically his diagnosis of thoracic outlet syndrome, deep vein thrombosis, and left shoulder pain, are causally connected to his work accident on the date of July 30, 2020. The Arbitrator is satisfied that the Petitioner has proven a causal connection to his condition of ill being as it related to his aforementioned diagnosis and his work accident of July 30, 2020 based on the chain of events, Petitioner's credible testimony and the medical records which demonstrated Petitioner's previous condition of good health and ability to perform a physically demanding job, his accident, and a subsequent injury resulting in disability.

Petitioner testified that never had a blood clot prior to July 30, 2020. (Tr. 105). He never experienced pain in either one of his hands prior to that date. (Tr. 105). He never sought medical attention for pain or discomfort in either one of his biceps. (Tr. 105). Petitioner testified in detail about the feeling he experienced when he carried a package in his left arm on July 30, 2020 and further stated that he has never experienced that feeling before. (Tr. 57-58). No evidence was introduced to the contrary nor any evidence of an intervening cause.

"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." *Int'l Harvester v. Indus. Comm'n*, 93 Ill. 2d 59, 63-64. "When the claimant's version of the accident is uncontradicted and his testimony is unimpeached, his recital of the facts surrounding the accident may be sufficient to sustain an award. *Id.* at 64.

No evidence whatsoever was produced at trial to show that the Petitioner had any vascular or left shoulder issues prior to July 30, 2020. Nor was any evidence produced at trial to show that the Petitioner had any pre-existing vascular or blood clot conditions prior to the July 2020 incident. This fact is corroborated by the medical records. Petitioner relayed this fact to all of his doctors. Petitioner was entirely consistent across the board with regard to the history of the beginning of his left arm discomfort and relayed to everyone that all of his issues started while carrying a package in his left arm and walking towards a door to deliver that package on July 30, 2020. Respondent never scheduled and provided written notice that Petitioner undergo a Section 12 Medical Evaluation.

The Arbitrator finds that the Petitioner has established through his testimony that his vascular condition was in a previous condition of good health. The Petitioner also testified credibly regarding a subsequent and disabling condition which he felt immediately while carrying

squeezing a heavy six panel round sided box like a football with his left arm which he described as a discomfort feeling and, while not immediately painful, was certainly painful, swollen, and discolored, while delivering packages the next day. **(Tr 54) As** a result, the Petitioner's testimony was sufficient to establish a chain of events that demonstrated a causal connection between his work accident and his vascular condition (to wit – thoracic outlet syndrome and DVT).

Petitioner first complained of left shoulder pain on November 24, 2020, the day after undergoing a left first rib resection surgery. **(PX6 P.145)**. On November 27, 2020, Dr. Morcos referred Petitioner for physical therapy to evaluate and treat his DVT and thoracic outlet syndrome. **(PX6 P.126)**. Petitioner began physical therapy on December 11, 2020 where he presented with *left upper extremity weakness and scapular dysrhythmia secondary to surgical interventions* and was treated *primarily for his left shoulder pain*. **(PX6 P.90, 93)**.

The causal connection between carrying a package in his left arm by tightly squeezing it on July 30, 2020 and the Petitioner's subsequently diagnosed thoracic outlet syndrome and deep vein thrombosis on July 31, 2020 is further supported by the medical records. After having reviewed the history, physical exam, and results of Petitioner's venous imaging taken on July 31, 2020, Dr. Sapana Shah had a discussion with Dr. Alfonso Tafur, a vascular surgeon, and noted the following:

*"Discussed with Dr. Tafur form vascular and he wants to transfer patient to Evanston because he feels that* ***as a delivery man****, he probably got the clot from thoracic outlet syndrome …"* **(PX4 P.23)**. [Emphasis added]

On August 12, 2020, Petitioner presented to Dr. Omar Morcos, a vascular surgeon, who noted that Petitioner's left upper extremity deep vein thrombosis is due to *effort thrombosis*. **(PX4 P.4)**.

Petitioner testified that lifting was a part of his day-to-day activities on a given shift while working for Respondent. (Tr. 38). He would deliver 170 plus packages a day, which required him to lift every package at least twice. (Tr. 39). There was never a day where Petitioner did not lift heavy packages while working for Respondent. (Tr. 40). Other than the strenuous activities that the Petitioner endured delivering packages for Respondent, Petitioner testified that he was not involved in any other strenuous activities, nor did he exercise or work out at all within a week prior to July 30, 2020. (Tr. 41). He did not experience any type of pain or discomfort within a week prior to July 30, 2020. (Tr. 41). Petitioner's testimony that he felt discomfort while carrying a case of food like football and squeezing the case like a football is consistent with his job duties and with the medical records.

The Arbitrator favors the opinion that the accident as described by the Petitioner, and as stated and described by various medical doctors throughout the Petitioner's medical records, can cause the pathology of his vascular condition – to with deep vein thrombosis and thoracic outlet syndrome as well as his left shoulder pain.

**WITH RESPECT TO ISSUE (G), WHAT WERE THE PETITIONER'S EARNINGS, THE ARBITRATOR FINDS AS FOLLOWS:**

While Petitioner was in training when he started working for Respondent in June of 2020, he worked less than a forty-hour week. At the time of the accident, he was working full time. In such situations, the rate of pay at the time of the injury is applicable. *ABF Freight Systems v. Illinois Workers' Compensation Commission*, 2015 Ill App. (1st) 141306 WC. This is consistent with the remedial purposes of the act to compensate or "make whole" an injured employee. *Hasler v. Industrial Commission*, 97 Ill.2nd 46, 52 (1983) The evidence is unrebutted that at the time of the injury, Petitioner worked at least five (5) days a week working and at some point before the accident transitioned to six (6 days per week **(Tr. 24**). On average, he worked eight (8) hours a day. (Tr. 24). Petitioner clearly established that he worked at least 5 days per week and 8 hours per day at the time of his injury. Petitioner's hourly pay rate was $16 per hour. **(Tr. 25).** Thus, Petitioner proved by a preponderance of the evidence that his average weekly wage at the time of the injury was $640.00.[1]

Respondent disputes Petitioner's claimed average weekly wage without providing any persuasive evidence in support of its position. Respondent's Rejected Exhibit 1 entitled "Legal Referral of Claim – General Case Information" which Respondent attempted to introduce into evidence in support of its alleged AWW was rejected as hearsay document and furthermore the Arbitrator notes that that document merely contained a conclusionary AWW without supporting documentation and without even stating hours worked nor the hourly rate. Petitioner's contention that his average weekly wage is $640.00 is unrebutted and is consistent with the evidence. The Arbitrator finds the Petitioner's average weekly wage to be $640.00.

**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, THE ARBITRATOR FINDS AS FOLLOWS:**

The Arbitrator finds that the medical services provided to Petitioner were reasonable and necessary, Respondent has not paid any charges. The Arbitrator having found Petitioner sustained an accident while engaged in his employment as a delivery driver for Respondent and having found

[1] (8 x 5) x $16.00 = $640.00

that his thoracic outlet syndrome and deep vein thrombosis was causally connected to his work accident, also finds that all of the medical services provided to Petitioner for his injuries were reasonable and necessary.

The Respondent has not paid any charges for reasonable and necessary medical services relative to Petitioner's injuries. Section 8(a) of the Act provides that an "employer shall provide and pay the negotiated rate, if applicable, or the less of the health care provider's actual charges or according to a fee schedule, subject to 8.2 . . . for all necessary first aid, medical and surgical services, an all necessary medical, surgical and hospital services thereafter incurred . . ." 820 ILCS 305/8(a).

The Arbitrator finds that all medical treatment Petitioner received relative to his vascular condition and left shoulder were both reasonable, necessary and causally related to his work injury. Therefore, the Arbitrator orders Respondent to pay reasonable and necessary medical services, pursuant to the medical fee schedule as provided in Sections 8(a) and 8.2 of the Act for any and all treatment undergone by Petitioner relative to his thoracic outlet syndrome, deep vein thrombosis, and left shoulder injuries to include the following: - all treatment undergone by Petitioner at and through Superior Air-Ground Ambulance Service, Glenbrook Urgent Care, Northshore University Healthsystem, which includes Evanston Hospital and Glenbrook Hospital (also known as Northshore Hospital), his November 2020 surgery and all subsequent follow up, all physical therapy treatment commenced by Petitioner after his November 2020 surgery, except for physical therapy treatment rendered specifically for his right shoulder, and any and all treatment by Dr. Morcos.

The following medical charges were submitted into evidence:

| | | | |
|---|---|---|---|
| 1. | 07/31/20 | Superior Ambulance Service | $6,620.00 |
| 2. | 07/31/20 –08/04/20 | Northshore University HealthSystem/ Evanston Hospital/Glenbrook Hospital Vascular Surgery Skokie | $95.573.90 |
| 3. | 0/12/20-01/19/22 | Northshore University HealthSystem/ Evanston Hospital/Glenbrook Hospital Vascular Surgery Skokie | $55.512.25 |
| | | TOTAL | $157,706.15 |

Respondent shall therefore pay to Petitioner the sum of $157,706.15 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. does not contain the fee schedule for the bills nor has

Respondent submitted a fee schedule evaluation of Petitioner's claimed medical charges. Therefore, Respondent is entitled to any and all discounts as contained in the Illinois Fee Schedule.

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

In light of the Arbitrator's finding of Petitioner's average weekly wage to be $640.00, as well as the accident and causal connection analysis explained above, the Arbitrator addresses Petitioner's claim for temporary total disability benefits for the period of July 31, 2020 to February 13, 2021.

As to temporary total disability, the Arbitrator finds that Petitioner was restricted from working until further notice when admitted to Evanston Hospital on July 31, 2020 and was continued on August 4, 2020, when Petitioner was discharged from Evanston Hospital and was placed on restrictions *not to return to work until further evaluation*. **(PX4 P.289).** Petitioner testified that he remained on restrictions not to work leading up to his surgery on November 23, 2020. **(Tr. 94)**. On November 27, 2020, post-surgery, Petitioner was advised not to return to work until re-evaluated at the end of December 2020. **(PX6 P.126).** On December 11, 2020, his restrictions were modified to lift no more than 20 pounds. **(PX6 P.91).** Petitioner testified that he was required to lift more than 10 pounds working for Respondent. **(Tr. 90).**

On January 7, 2021, Petitioner's lifting restrictions were released. **(PX6 P.71)**. Petitioner returned to work for Respondent on February 14, 2021. **(Tr. 101).** Respondent has never paid temporary total disability benefits.

No evidence was admitted into evidence by Respondent to dispute that Petitioner is entitled to TTD benefits during the period of time that he was restricted from full duty work. No evidence was presented that light duty work was offered to Petitioner.

Pursuant to Section 8(b) of the Act, if the period of temporary total incapacity for work lasts more than 3 working days, weekly compensation as hereinafter provided shall be paid beginning on the 4th day of such temporary total incapacity and continuing as long as the total temporary capacity lasts. In cases where the temporary total incapacity for work continues for a period of 14 days or more from the day of the accident compensation shall commence on the day after the accident. Temporary total incapacity under this paragraph (b) shall be equal to 66 2/3% of the employee's average weekly wage. Thus, Petitioner is entitled to TTD benefits for 23 weeks from July 31, 2020 through January 7, 2021 at the sum of $426.67 per week.[2]

[2] 2/3 ($640.00) = $426.67

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

Petitioner claims to be entitled to penalties under Section 19 (k) and Section 19 (l). Section 19(k) of the Act provides in pertinent part:

> "In cases where there has been any unreasonable or vexatious delay of payment or intentional underpayment of compensation, or proceedings have been instituted or carried on by the one liable to pay the compensation, which do not present a real controversy, but are merely frivolous or for delay, then the commission may award compensation additional to that otherwise payable under this Act equal to 50% of the amount payable at the time of such award." 820 ILCS 305 §19(k).

Section 19(l) of the Act provides in pertinent part:

> "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 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(b), the Arbitrator or the Commission shall allow to the employee additional compensation in the sum of $30 per day for each day that benefits under Section 8(a) or Section(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).

Respondent correctly asserts that prior to trial, Petitioner filed a Notice of Motion and Petition For Immediate Hearing under Section 19(b) claiming penalties under Section 19 (k) and Section 19 (l) but without attaching and filing a Petition For Penalties. (Respondent Delta Exhibit 1) Petitioner filed documentation to support penalties in his reply to Respondent's Response to Petitioner's request for penalties.

The Arbitrator notes that Respondent admitted that Petitioner sustained accidental injuries on July 30, 2021 but Respondent did not provide any evidence as to the nature of the accidental injuries for which Respondent admits Petitioner sustained. However, Respondent disputed the causal connection of Petitioner's current condition of ill-being to the work accident. Respondent relied upon Respondent Exhibit 2 which contains a single medical record entry of an apparent non-work-related history as to the cause of the injury. The Arbitrator found this entry not to be persuasive because it is inconsistent with the multiple work-related histories recorded in the medical records of two hospitals by various medical providers.

The Arbitrator further found the history contained in the entry not persuasive on the basis that Petitioner testified under oath of not providing this history. Petitioner credibly explained that the gym he attended was closed as of mid-March due to the COVID epidemic where non-essential facilities were closed. Furthermore, the Arbitrator finds Petitioner credible when explained that his job was physically demanding and that he was working 8 hours per day, six days per week at the time of his injury and, thus, was not inclined to work out in a gym. Petitioner admitted to doing some of the activities noted in the entry but the evidence is unclear when it occurred.

Petitioner testified that Respondent never paid Petitioner temporary total disability benefits despite the work restrictions imposed on him since he was initially discharged from Evanston Hospital on August 4, 2020. Petitioner's testimony is supported by the jointly completed and submitted Request For Hearing Form. Petitioner asserted that he was entitled to TTD for the period of July 31, 2020 through February 13, 2021 and that Respondent had not paid any TTD. Respondent disputed the time period. Respondent in paragraph 3 claimed that it had not paid TTD, TTD, maintenance nor nonoccupational disability benefits for which credit may be allowed under Section 8(j) of the Act. Petitioner agreed. The stipulations constitute a settlement of the issue on non-payment of TTD.

And yet inexplicitly and contrary to the clear and unequivocal stipulations, Respondent in paragraph 10 of its Response to Petitioner's Petition for Penalties incorrectly and falsely alleged that "… *Respondent paid TTD benefits, and these were paid through February 13, 2021."* (Respondent Exhibit Delta 1, p. 2, paragraph 10)

Respondent further incorrectly asserted in its supplemental brief that Petitioner's claim for TTD benefits was *"nonsensical, especially after stipulating at Trial that Petitioner received payment of 28 and 2/7th weeks of TTD. See Trial Stipulation Sheet."* This is false. It is wrong and makes no sense whatsoever. The Request For Hearing, also commonly referred to the stipulation sheet, clearly states that "Petitioner claims to be entitled to TTD "period " 7/31/20 to 2/13/2021 representing 28-2/7th weeks." **(AX 1, p. 2)** Petitioner does not assert that TTD was received or paid.

Although, Respondent failed to present persuasive evidence to dispute Petitioner's claim to TTD benefits, Respondent correctly points out that the medical evidence supports TTD benefits up to January 7, 2021, the date in which Petitioner's lifting restrictions were released; not February 14, 2021, the date Petitioner returned to work.

The Arbitrator finds that Petitioner failed to establish his entitlement to penalties for two reasons: 1. Prior to trial Petitioner did not file a Penalties Petition as required by the Rules Governing Practice Before the Illinois Workers' Compensation Commission; and, 2. Based on the

single non-work related history contained in the medical records, Respondent was entitled to have Petitioner prove his entitlement to benefits by a preponderance of the evidence.

The Arbitrator finds that Respondent was flying close to the sun but not too close in defending the underlying claim in light of the one non-work-related history of injury. However, its defense on the issue of penalties it flew dangerously close. The Arbitrator is mindful that the Commission may find Respondent's conduct to be like that of Icarus - reckless and defiant. The Commission may agree with Petitioner's assertion that Respondent's defense was unreasonable, vexatious and in defiance with the rules of the Commission. The First District Appellate Court in *McDonald's v. Illinois Workers' Comp. Comm'n*, 2022 IL App (1st) 210928WC held that to avoid penalties, employers are required to raise legitimate arguments grounded in reasonable interpretations of the facts. The First District Court noted that "[*t]he Commission awarded additional compensation and attorney fees because McDonald's disputed the issues of accident and notice, and not because of delay or refusal to pay benefits.*" *Id.* at ¶ 62. Near the end of its opinion in *McDonald's*, the First District summarized the overarching theme of the opinion as follows:

> *"[A]n employer must have a reasonable basis to take a position. In other words, there must be some legitimate purpose served by an employer's litigation tactics. A position is not legitimate or reasonable simply because the Act permits it."*

Here, Respondent had a legitimate defense to the issue of penalties in that a Petition For Penalties was not filed before the commencement of trial and that it had the right to defend based on the non-work related history contained in the medical records. But, its allegations the it paid TTD and that the Petitioner claimed to have received TTD are not based on a reasonable interpretation of the facts.

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

Pursuant to §8.1b of the Act, the following criteria and factors must be weighed in determining the level of permanent partial disability for accidental injuries occurring on or after September 1, 2011:

(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.

(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.

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 gives no weight to this factor in determining the nature and extent of Petitioners' disability.

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 delivery driver for Amazon 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 gives some weight to this factor in that Petitioner was engaged in a physically demanding job. Petitioner testified that he has changed the way he carries things. He stopped carrying items in his left arm because of his concern that his condition could reoccur. He is for forever more conscious of how he delivers and lifts anything. But, then the record does not reflect that any permeant restrictions were imposed. **(Tr. 105-106)**

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 41 years old at the time of the accident and has a work expectancy of many more years. The Arbitrator give some weight to his factor in reaching a disability finding.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that no evidence was introduced of future loss of earnings capacity and, thus, the Arbitrator gives no weight to this factor to support a claim for disability.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator finds that, based upon the nature of Petitioner's confirmed diagnosis of acute deep vein thrombosis and acute thoracic outlet syndrome, which required surgery of a rib resection scalenectomy, Petitioner sustained a 10 % loss of use of a person as a whole pursuant to Section 8(d) 2 of the Act.

Petitioner has a permanent scar from the rib resection surgery located on the left side of his body underneath his collar bone. It is a two-and-a-half-inch scar, non-keloid, faint, it's at a 45-degree angle starting at what would be the collar bone towards the sternum, and it's about a quarter inch wide. The scar is viewed by the Arbitrator not as evidence to support a claim for disfigurement but as a permanent injury to Petitioner's skin - the skin being the largest organ of the human body.

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 20WC008744 |
| Case Name | Scott Marsden v.<br>Jewel |
| Consolidated Cases | |
| Proceeding Type | Petition for Review |
| Decision Type | Commission Decision |
| Commission Decision Number | 23IWCC0521 |
| Number of Pages of Decision | 11 |
| Decision Issued By | Kathryn Doerries, Commissioner,<br>Amylee Simonovich, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Matt Walker |
| Respondent Attorney | Paul Krauter |

DATE FILED: 12/11/2023

/s/Kathryn Doerries, Commissioner

Signature

DISSENT: /s/Amylee Simonovich, Commissioner

Signature

23IWCC0521

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 Choose direction | ☐ None of the above |

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SCOTT MARSDEN,

Petitioner,

vs. NO: 20 WC 008744

JEWEL,

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 issue of the nature and extent of the injury 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 affirms and adopts the Arbitrator's Decision with modifications to one paragraph only. Under the Conclusions of Law section of the Arbitrator's Decision, the third paragraph, the Commission corrects a scrivener's error in the second sentence, and strikes the fifth sentence, so the third paragraph now reads as follows:

> 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 journeyman meat cutter 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 that Petitioner worked in meat cutting and suffered an injury to his right middle finger in 2005. Petitioner reported to Vocamotive that he was unable to return to work after surgery and permanent restrictions. No evidence of Petitioner's job duties for Cub Foods, medical evidence of his injuries in 2005 or his restrictions thereafter was offered. Between Cub Foods and starting to work for Respondent, Petitioner

worked more time as a cook than as a meat wrapper or cutter. Following the accident in this matter, Petitioner was placed on lifting restrictions for his back below the job requirements of his job with Respondent. The Arbitrator notes that Dr. Singh provided somewhat conflicting restrictions stating that Petitioner should work per the FCE, which noted lifting up to 45 pounds, frequent lifting of 15 pounds, carrying up to 35 pounds, shoulder lifting of 30 pounds, pushing and pulling of 30 pounds. But he also provided a specific 25 pound lifting restriction. Petitioner did not return to work for Respondent and was placed in a job as a cook, similar to many of the jobs he held previously. Because of these facts, the Arbitrator therefore gives some weight to this factor.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision filed on December 5, 2022, is hereby modified for the reasons stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $570.97 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 the loss of use of 35% of the whole person.

IT IS FURTHER ORDERED BY THE COMMISSION Respondent shall pay Petitioner compensation that has accrued from February 28, 2020 through October 31, 2022, and shall pay the remainder of the award, if any, in weekly payments.

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 $100,020.00. 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.

**December 11, 2023**
O101723
42

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

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

DISSENT

After carefully considering the totality of the evidence, I respectfully dissent from the opinion of the majority and would increase the permanent partial disability award.

Petitioner was working as a journeyman meat cutter for Respondent when he sustained a slip and fall on a wet floor, injuring his lower back. This was a union position with a pension. After undergoing discectomy and fusion at L4-5 by Dr. Singh, Petitioner attended physical therapy and work conditioning. An FCE was performed on March 22, 2021. Thereafter, Petitioner continued in work conditioning through May 3, 2021. During the course of this treatment, it was noted on April 26, 2021, Petitioner "will start to fatigue lumbar spine at 25 lbs." T. 117. Consistent with this, Dr. Singh released Petitioner to return to work with maximum lifting of 25 pounds. This did not meet the lifting requirements of a journeyman meat cutter.

It is a long-held principal that an employer must accept the employee as it finds the employee. *Baggett v. Industrial Comm'n*, 201 Ill.2d 187, 199 (2002). Regardless of his prior occupations, Petitioner's usual and customary line of employment at the time of the injury was journeyman meat cutter. He has suffered a loss of this trade as a result of his work-related injury. While Petitioner may be earning more per hour as a cook at Good Samaritan, he no longer has a pension benefit.

For these reasons, I do not believe the Arbitrator's analysis pursuant to §8.1b properly weighed the effect of the injury on factor (ii), the occupation of the employee, nor factor (iv), Petitioner's future earnings capacity.

I also believe it was error for the Arbitrator to give weight to the AMA Impairment Rating in this matter. §8.1b of the Act states, "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." 820 ILCS 305/8.1b(a). Dr. Sampat's report does not identify which edition of the Guides was used, nor does it comply with the most recent Sixth Edition, which requires an examining physician to "[i]nclude an explanation of each impairment value with reference, including pages and table number, to the applicable criteria of the Guides."

Finally, the Arbitrator's analysis of factor (v), evidence of disability corroborated by the treating medical records, does not weigh any of Petitioner's ongoing complaints. When Petitioner was evaluated by Dr. Sampat on May 17, 2022, he reported that by the end of the day his pain is up to 8 out of 10 in his lower back. In his new position as a cook, he stands in a forward flexed posture while preparing food, which increases his pain. As a result, he utilizes over-the-counter ibuprofen two or more times per week. He no longer bowls with his family, must sleep on his side with a stuffed animal between his legs, and continues his home stretching exercises three times per week.

Based on the foregoing, I would have increased the permanent partial disability awarded to Petitioner.

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

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
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| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 7 |
| Decision Issued By | Stephen Friedman, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Matt Walker |
| Respondent Attorney | Paul Krauter |

DATE FILED: 12/5/2022

**THE INTEREST RATE FOR THE WEEK OF NOVEMBER 5, 2022 4.55%**

/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
## NATURE AND EXTENT ONLY

**Scott Marsden**
Employee/Petitioner

v.

**Jewel**
Employer/Respondent

Case # **20** WC **008744**

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 **Stephen J. Friedman**, Arbitrator of the Commission, in the city of **Wheaton**, on **October 31, 2022**. By stipulation, the parties agree:

On the date of accident, **February 28, 2020**, 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 $**49,483.79**, and the average weekly wage was $**951.61**.

At the time of injury, Petitioner was **47** years of age, ***married*** with **2** dependent children.

Necessary medical services and temporary compensation benefits have been provided by Respondent.

Respondent shall be given a credit for all lost time benefits paid.

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 $**570.97**/week for a further period of **175** weeks, as provided in Section **8(d)2** of the Act, because the injuries sustained caused **35% loss of the whole person**.

Respondent shall pay Petitioner compensation that has accrued from **February 28, 2020** through **October 31, 2022**, 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.

**DECEMBER 5, 2022**

***Stephen J. Friedman***
Signature of Arbitrator

ICArbDecN&E p.2

## Statement of Facts

Petitioner Scott Marsden testified he has a high school education and was in the Army reserves. He was first employed by Respondent Jewel in November 2018. He was employed as a journeyman meat cutter. He was a member of the union. His benefits included a pension. His duties were to cut and grind meat and service customer requests. He would need to lift to unload deliveries including boxes of meat weighing and unpacking the meat from the boxes. He would lift from 5 to 100 pounds. He would do this daily. He would need to carry large pieces to cut to the table to cut it into the sizes requested. Petitioner identified the job description and DOT description of his job and testified they were accurate. The job description noted frequent lifting and carrying of 20 to 30 pounds, occasional lifting up to 50 pounds, and seldom lifting over 50 pounds (PX 2, p 792, 811). Petitioner testified that prior to his accident, he was not under any medical treatment and was working his full job duties.

Petitioner testified to his prior work history from 1992 to his employment with Respondent. He worked at Cub Foods in the meat department cutting meat from 1992 to 2008. He was in the same union as with Respondent. His prior work included meat cutting for US Foods (2013 to 2015) and Sysco (2016) and employment as a Deli wrapper, merchandiser and cook. The positions as a cook or merchandiser did not have pension rights. Petitioner testified he had a prior workers compensation injury to his right middle finger as a meat cutter for Cub Foods. Petitioner denied that his restrictions from that injury were permanent. He testified that the doctor told him to wait and see how he did. He testified was not able to return to that job. He settled for $496,000. Commission records show that Petitioner filed cases 05WC040135 and 05WC 053407 for accidents to the right middle finger on 01/17/2005 and 11/03/2005. The cases were settled on 09/26/2011 for $93,624 future medical and $496,000 compromise settlement based on life expectancy (RX 2). He testified that he started working for Kellogg's in 2007 while he was under voc. in the worker's comp case.

Petitioner testified that on February 28, 2020, he was traying up the meat. he lifted a full tray and turned to put it on a bottom rack when he slipped on a wet floor and fell, injuring his low back.

Petitioner first sought medical care on March 10, 2020 at Northwestern Medicine (PX 1). He provided a consistent history of the accident and complained of pain in the middle of the lower lumbar region with some extended pain of the posterior thighs bilaterally. Physical examination was unremarkable. X-rays noted evidence of disc degeneration at the L4-5 level, minor loss of disc height at L5-S1. Low grade anterolisthesis at L3-4. The assessment was disc degeneration, lumbar radiculopathy, and strain of the lumbar region. Petitioner was provided a Medrol dose pack, referred for physical therapy and placed on a 25 pound lifting restriction (PX1).

Petitioner saw Dr. Kern Singh at Midwest Orthopedics at Rush beginning April 21, 2020 (PX 2). Dr. Singh ordered 4 weeks of therapy and restrictions of no lifting over 25# (PX 2, p 1094). Petitioner underwent thoracic and lumbar MRIs on June 11, 2020. The thoracic MRI impression was mild degenerative disc and endplate changes with no significant spinal canal or foraminal stenosis. The lumbar MRI impression was markedly diminished disc height at L4-5 with endplate degenerative changes. However, no significant spinal canal or foraminal stenosis. Moderate bilateral facet arthropathy at L3-4 causing mild spinal canal and mild left foraminal narrowing (PX 2, p 879-880).

On August 3, 2020, Dr. Singh noted Petitioner had undergone 4 weeks of physical therapy and progressed to work conditioning. As of July 29, 2020, work conditioning noted him lifting 40 pounds and pushing and pulling 85 pounds, not meeting his job requirements. Petitioner reported 5-8/10 pain which is sharp, stabbing across

his lower back and both buttocks. He also reported thigh pain, numbness and tingling extending into both feet. Petitioner was looking for a definitive treatment, including surgery, to address his symptoms. Dr. Singh notes the MRI findings and a CT impression of bilateral pars defect, L4-5 spondylolisthesis, and L4-5 focal kyphosis. He diagnosed L4-5 spondylolisthesis, bilateral L4 pars fracture, L4-5 focal kyphosis. He recommended a 2 stage lumbar fusion (PX 2, p 289-291). Petitioner underwent surgery on October 15, 2020 consisting of an anterior retroperitoneal lumbar discectomy and fusion at L4-5 (left), and a minimally invasive L4 and L lumbar laminectomy with bilateral facetectomy and foraminotomy with posterolateral spinal fusion at L4-5. The postoperative diagnosis was degenerative disc disease, L4-5 spinal stenosis, degenerative spondylolisthesis L4-5 (PX 4). Petitioner had a lower extremity Doppler on October 30, 2020 at the Rush Copley emergency room. The impression was superficial thrombophlebitis in the left lesser saphenous vein and negative left lower extremity DVT study (PX 4).

Petitioner attended postoperative physical therapy through March 10, 2021. On March 4, 2021, Dr. Singh ordered an FCE and work conditioning for 2 to 4 weeks (PX 2, p 448). A CT scan performed March 4, 2021 notes the fusion construct is unremarkable. There is no residual spinal stenosis. It also noted grade 1 anterolisthesis of L3. Multilevel mild degenerative disc/endplate changes with moderate facet arthropathy at L3-4. Mild spinal canal stenosis at L3-4. No high-grade canal or foraminal narrowing at other levels (PX 4). The FCE performed March 22, 2021 found Petitioner could do bilateral lift of 45 pounds, frequent lift of 15 pounds, bilateral carry of 35 pounds, bilateral shoulder lift, push and pull of 30 pounds. This was 84.6% of the physical demands of his job as a meat cutter (PX 2, p 549). Petitioner attended work conditioning from March 23, 2021 though May 3, 2021 (PX 2, p 990). On May 3, 2021, Dr. Singh notes Petitioner continues to progress well in regard to pain. He is overall improved with his surgical results. He desires to return to work. Physical examination is completely negative. Dr. Singh released Petitioner to return to work with permanent restrictions per the FCE., maximum lifting 25 pounds. He found him at MMI (PX 2, p 16-17). Petitioner last saw Dr. Singh on September 30, 2021 with respect to concerns about adjacent level disease. Petitioner states his pain continues to improve and he is taking no medication. He has returned to all activities with minimal discomfort. X-rays note well positioned hardware and restored lumbar lordosis. Dr. Singh states Petitioner can return to work with restrictions per the FCE, which places him at 25 pounds. Petitioner remains at MMI (PX 2, p 10-11).

Petitioner was seen by Vocamotive for a vocational evaluation on November 24, 2021 (PX 6). He notes his employment with Respondent as a meat cutter and his release by Dr. Singh with restrictions per the FCE. He reported his prior 2005 right middle finger injury at Cub Foods. He reported he was unable to return to work after a surgery and permanent restrictions. He detailed his work history from 1992 to the present including jobs as a Merchandiser, Foodservice cook and manager, meat wrapper and cutting machine operator. He reported he was earning $20.50 per hour for Respondent. He noted he would like to stay in the meat industry. Vocamotive noted Petitioner was a candidate for vocational rehabilitation. He had lost access to his preinjury job as a meat cutter, but was employable in the industry in various other capacities (PX 6).

The Vocational plan was to have Petitioner complete keyboard skill training, receive job seeking skills training and begin a supervised and independent job search (PX 6). Petitioner participated in the computer training and conducted a job search. He obtained a job with Advocate Good Samaritan Hospital as a Cook II position. The job paid $20.75 per hour. Petitioner's start date was February 14, 2022 (PX 6). Petitioner testified he now makes $21.02 per hour. He works 40 hours per week. His job duties alternate between Front Tray Line and Back Grill. On the Front Tray Line, he is assembling plates and filling the counter. He testified that this requires more bending from the waist and reaching, so he notices more back pain. The Grill requires him to take orders and put them on the plates. This also requires leaning over, but he can move around to help with his pain. He does not have to do lifting like he did previously. Good Samaritan respects his restrictions. Petitioner's pay

records document that he works 40 hours per week with some limited overtime. In addition to his hourly rate, there is a shift premium for evenings and weekends of $1.25 per hour (PX 7). Petitioner testified he does not currently have a pension plan with Good Samaritan.

Petitioner testified his back hurts if he is in an awkward position, such as leaning forward or picking something up. Standing in one spot or driving long distances increase his pain. He no longer bowls with his family. He testified he must sleep on his side, not his back or stomach. He uses a stuffed animal between his legs. He does not take any prescription medications. He uses Ibuprofen if he has a bad day, which he estimates as 2 or more times per week. His pain is higher after workdays. He still does his home stretching exercises about 3 times per week. He has not seen Dr. Singh or any other medical provider for his back since September 2021.

Petitioner was evaluated at Respondent's request on May 17, 2022 by Dr. Chinton Sampat (RX 1). After taking a history, performing a physical examination, and reviewing x-rays taken in his office, he diagnosed low back pain with lumbar radiculopathy secondary to spondylolisthesis status post lumbar surgery with resolved lumbar radiculopathy. He found Petitioner at MMI with no further treatment necessary. He agreed Petitioner could work withing the restrictions of the FCE, which he listed as lifting up to 45 pounds, frequent lifting of 15 pounds, carrying up to 35 pounds, shoulder lifting of 30 pounds, pushing and pulling of 30 pounds. He opined that pursuant to AMA guidelines that Petitioner sustained a 9% loss of the whole person (RX 1).

## Conclusions of Law

### In support of the Arbitrator's decision with respect to 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. By stipulation, Petitioner waived rights under Section 8(d)1 and is seeking compensation under Section 8(d)2.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that the record contains an impairment rating of 9% of the whole person as determined by Dr. Sampat, pursuant to the most current edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment (RX 1). 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 that this impairment rating was based upon a single level fusion with a decompression without residual signs or symptoms. Because of this, the Arbitrator therefore gives some 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 journeyman meat cutter 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 that Petitioner worked in meat cutting and suffered an injuries to his right middle finger in 2005. Petitioner reported to Vocamotive that he was unable to return to work after surgery and permanent restrictions. No evidence of Petitioner's job duties for Cub Foods, medical evidence of his injuries in 2005 or his restrictions thereafter was offered. The amount of the settlement, however, and the statement it was based upon lifetime benefits, creates an inference of compromise of either a wage loss under Section 8(d)1 or a permanent total disability. Between Cub Foods and starting to work for Respondent, Petitioner worked more time as a cook than as a meat wrapper or cutter. Following the

accident in this matter, Petitioner was placed on lifting restrictions for his back below the job requirements of his job with Respondent. The Arbitrator notes that Dr. Singh provided somewhat conflicting restrictions stating that Petitioner should work per the FCE, which noted lifting up to 45 pounds, frequent lifting of 15 pounds, carrying up to 35 pounds, shoulder lifting of 30 pounds, pushing and pulling of 30 pounds. But he also provided a specific 25 pound lifting restriction. Petitioner did not return to work for Respondent and was placed in a job as a cook, similar to many of the jobs he held previously. 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 47 years old at the time of the accident. He would be expected to remain in the workforce for an extended number of years. 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 based upon the wage records submitted, Petitioner is currently earning less per week that the average weekly wage stipulated to by the parties. However, Petitioner's current hourly wage of $21.05 plus a shift bonus of $1.25 for evening hours is higher that the $20.50 per hour he reported to Vocamotive that he was earning at Respondent at the time of his accident. Because of this, the Arbitrator therefore gives some 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 Petitioner was diagnosed with L4-5 spondylolisthesis, bilateral L4 pars fracture, L4-5 focal kyphosis. Petitioner underwent a 2 stage lumbar fusion on October 15, 2020. The FCE listed limitations as lifting up to 45 pounds, frequent lifting of 15 pounds, carrying up to 35 pounds, shoulder lifting of 30 pounds, pushing and pulling of 30 pounds. Dr. Singh released Petitioner to return to work with permanent restrictions per the FCE, maximum lifting 25 pounds. 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 35% loss of use of whole person pursuant to §8(d)2 of the Act.

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 19WC029725 |
| Case Name | Kimberly Belangee v.<br>SSM Health |
| Consolidated Cases | |
| Proceeding Type | Petition for Review |
| Decision Type | Commission Decision |
| Commission Decision Number | 23IWCC0522 |
| Number of Pages of Decision | 21 |
| Decision Issued By | Carolyn Doherty, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Richard Salmi |
| Respondent Attorney | Michael Karr |

DATE FILED: 12/12/2023

/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

KIMBERLY BELANGEE,
Petitioner,

vs. NO: 19 WC 29725

SSM HEALTH,
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, temporary total disability, medical expenses, occupational disease, 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 February 22, 2023 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.

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.

**December 12, 2023**

O: 12/07/23
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 | 19WC029725 |
| Case Name | Kimberly Belangee v. SSM Health |
| 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 | Richard Salmi |
| Respondent Attorney | Michael Karr |

DATE FILED: 2/22/2023

**THE INTEREST RATE FOR THE WEEK OF FEBRUARY 22, 2023 4.91%**

/s/Linda Cantrell, 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

**Kimberly Belangee**
Employee/Petitioner

v.

**SSM Health**
Employer/Respondent

Case # **19** WC **029725**

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 **Mt. Vernon**, on **November 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 _____

**FINDINGS**

On **8/21/19**, 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 occupational disease that arose out of and in the course of her 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 $**135,940.53**; the average weekly wage was $**2,614.24**.

On the date of accident, Petitioner was **44** years of age, ***married*** 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 a total credit of $**0**.

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

**ORDER**

Respondent shall pay the medical expenses contained in Petitioner's Group Exhibit 12, pursuant to the Illinois medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $**1,529.84 (Max rate)**/week for **19-3/7** weeks, commencing **8/22/19 through 1/4/20**, as provided by Section 8(b) of the Act.

Respondent shall pay Petitioner the sum of $**836.69 (Max rate)**/week for a period of **62.5** weeks, because the injuries sustained caused permanent partial disability to the extent of **12.5% loss of use of Petitioner's body as a whole,** under Section 8(d)2 of the Act.

Respondent shall pay Petitioner compensation that has accrued from **7/27/22** through **11/29/22**, 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.

**FEBRUARY 22, 2023**

Arbitrator Linda J. Cantrell

**STATE OF ILLINOIS )**
**) SS**
**COUNTY OF JEFFERSON )**

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

| | | |
|---|---|---|
| KIMBERLY BELANGEE, | ) | |
| | ) | |
| Employee/Petitioner, | ) | |
| | ) | |
| v. | ) | Case No.: 19-WC-029725 |
| | ) | |
| SSM HEALTH, | ) | |
| | ) | |
| Employer/Respondent. | ) | |

## FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Mt. Vernon on November 29, 2022 on all issues. On 10/11/19, Petitioner filed an Application for Adjustment of Claim alleging pulmonary and systemic injuries as a result of an occupational exposure on 8/21/19. At arbitration, Petitioner made an oral motion without abjection to amend the Application for Adjustment of Claim to proceed under the Occupational Diseases Act. The issues in dispute are occupational disease, causal connection, medical bills, temporary total disability benefits, and the nature and extent of Petitioner's injuries.

## TESTIMONY

Petitioner was 44 years old, married, with two dependent children at the time of accident. She has a master's degree in nursing and has worked in the nursing field for approximately 28 years. Petitioner began working for Respondent in 2005 and worked in labor and delivery until 2011. In November 2013, Petitioner again became employed by Respondent as a family nurse practitioner at its Wayne City facility.

Petitioner testified she worked at an acute care clinic with workers' comp injuries but has never treated a patient with an occupational exposure. She described the Wayne City facility as an older building with the exterior buried halfway underground on three sides. The inside is 90% carpeted. The office is laid out in an "H" formation with two long hallways that are connected by a centralized waiting room and walkway. Petitioner treated 25 to 30 patients per day and her colleague treated 10 to 12 patients per day in the other hallway. She testified there was usually 40 to 45 patients that visited the building per day. There were two secretaries and four nurses working in the practice.

Petitioner testified that in her 28 years of experience, she has been exposed to influenza and other transmissible medical conditions. She had never tested positive for influenza until

November 2013, approximately three weeks after she began working in the Wayne City facility. Petitioner described herself as healthy prior to working in the building, and every year since November 2013 she has tested positive for influenza and was symptomatic with respiratory cough, shortness of breath, body aches, fever, irregular heartbeat, and palpations.

Petitioner testified that her palpations and irregular heartbeat have been continuous. She consulted three cardiologists to determine the cause of her symptoms. Since working in the Wayne City building, Petitioner developed severe shortness of breath, chronic sore throats, a manly sounding voice, shortness of breath, chronic upper respiratory symptoms, watery eyes, joint pain, and fatigue. She initially controlled her symptoms with Tamiflu, but they significantly worsened in 2015, particularly irregular heartbeat, which caused her to see a cardiologist, undergo an echocardiogram, and wear a Holter monitor. She was offered medication which she stated was a band-aid.

Petitioner testified that her symptoms worsened in January 2019 when she contracted influenza A and was not able to recover. She took Tamiflu and was off work for ten days and still tested positive. She took steroids and four weeks later she still had severe shortness of breath and a bad cough that caused her to urinate her pants. She testified that her symptoms got so bad that walking down the hallway caused shortness of breath and she had joint swelling. Petitioner tested positive for influenza A for nine straight months in 2019 with severe symptoms.

Petitioner testified that her work partner was her primary care physician. She underwent multiple workups, chest x-rays, and blood work. Petitioner went to another local primary care provider who could not find a medical reason for Petitioner's positive influenza A test results. Petitioner stated she informed her office manager of every influenza swab she took.

Petitioner stated that by July 2019 she was not able to sit in a chair, she had significant joint swelling, her skin felt like it was burning, and she missed approximately 32 days of work. She testified that her co-worker suggested they perform a study on the building as some of her co-workers also exhibited symptoms. An environmental study was conducted of the Wayne City building. (PX11, RX2) Petitioner identified a drawing she prepared which represents a floor plan of the building. (PX11, p 1-2) She testified that the building was initially tested in August 2019. The areas tested were her colleague's hallway, her colleague's examination room No. 3, and the center joint hallway. She stated that her hallway was not tested at that time.

Petitioner testified that the building was tested again in September 2019, which included her office, her examination room No. 3, an abandoned x-ray room, the center area, and her colleague's office. Petitioner testified that the office was cleaned between the first and second testing. She testified that the main pollutants that were tested were carbon dioxide and skin cell fragment levels. They tested for skin cell fragment levels only in the first testing. Petitioner testified she took vacation for ten days at the end of July 2019 during which the first test was performed and the office was cleaned. Petitioner testified she had less shortness of breath and was able to do more physically while on vacation. When she returned to the building at 6:30 a.m. on 8/19/19, Petitioner had no cough or respiratory symptoms. She testified that by lunchtime she told her office manager she felt sick again. She testified that the ten-day vacation in July was the only time she had been away from the building for a period of time. Her joints started swelling

again, she could not sit at her desk and had to return to a standing desk, and she had to start wearing pads again due to coughing.

Petitioner testified she went to pulmonologist Dr. Kondapaneni, a/k/a Dr. Murali, who placed her off work effective 8/22/19. She remained off work until she found new employment on 1/5/20. Respondent did not accommodate her restrictions during her time off work. Dr. Murali referred Petitioner to an occupational medicine specialist which was denied by Respondent and her private health insurer through Respondent. Petitioner testified that her joint aches and cough improved after she left the building on 8/22/19, but her irregular heartbeat persisted.

Petitioner testified that Respondent had her examined by Dr. Hyers in January 2020 who spent 15 minutes with her. She told him she had no significant medical problems prior to 2013 and her symptoms improved after leaving employment, but never resolved. Petitioner came under the care of Dr. Susan Alt who started her on regime of adrenal support and immunity vitamins. Dr. Alt believed Petitioner's symptoms were related to adrenal problems and diagnosed her with sick building syndrome. She sees Dr. Alt a minimum of every 12 weeks. Petitioner testified that her symptoms are not as bad today, but anytime she gets a sniffly nose her "lungs are shot". Weather changes and indoor heat increase her symptoms.

Petitioner testified she has continued to work as a family nurse practitioner for another employer since January 2020. Her rate of pay is the same as it was working for Respondent. She has not tested positive for influenza A since leaving the Wayne City building, despite being exposed to influenza A in her current practice. When she has respiratory issues, she has difficulty recovering, including joint pain and swelling, severe fatigue, breathing difficulty, and coughing which requires her to wear pads. Her symptoms have not been as severe as they were when she worked in Respondent's building.

Petitioner testified that Respondent has not paid any of her medical expenses and some have been paid by her private health insurer. She did not receive temporary benefits.

On cross-examination, Petitioner identified numbers on the rooms of the floor plan maps she drew. (PX11) She stated the lighter numbers are from the initial testing done on her colleague's side before the facility was cleaned, and the black numbers underneath are from the second testing of the CO2 levels. She stated the numbers show improvement between the tests. She stated that the common area between the hallways was walked by many patients and the testing in August showed 1,166 parts per million and after the facility was cleaned it showed 734 parts per million. She testified that her area was only tested the second time and showed nearly 800. She agreed that 800 ppm and below is normal and any numbers in the 700's were within the normal range for indoor CO2 levels. Petitioner did not know what cleaning was done between the two tests, which was done the weekend prior to her returning to work on Monday, 8/19/19.

Petitioner testified she first treated with cardiologist Dr. Parham in 2015. She testified that the tests showed irregular heartbeat. Dr. Parham was not able to determine the cause of her condition and prescribed medication. She testified she consulted with Dr. Shamsham twice in 2018 and a Holter monitor again confirmed irregular heartbeat. She was prescribed medication

again. In May 2022, she consulted Dr. Reed who is an electro physicist cardiologist that specializes in irregular heartbeats. She wore a Holter monitor that showed 1,500 irregular heartbeats per day. Dr. Reed prescribed medications. She agreed that the cardiologists of all three physicians were not admitted into evidence and none of the doctors provided an explanation for her condition. Petitioner testified she underwent pulmonary function testing between 2013 and 8/21/19 which were all normal and has undergone PFT's since that time that were all normal.

Petitioner testified that in September 2019 she requested Respondent to put an American Red Cross mobile unit in the parking lot so she could continue seeing patients and her request was denied. She is not aware of any of her co-workers filing workers' compensation claims, but she testified they exhibited runny noses, headaches, nasal drainage, and a "manly" voice. Petitioner testified she has symptoms 12 to 15 times per month for which she is seeing Dr. Alt. She receives vitamins and steroids when her symptoms are severe. Petitioner testified that Dr. Alt wanted to take her off work but due to the current crisis, Petitioner feels obligated to treat her patients. She sees approximately 25 patients per day and works full duty.

Petitioner agreed she told Dr. Murali on 9/19/19 that she was doing much better since she was out of the building, she tested negative for the first time all year, she did not have any symptoms, and decreased congestion. Petitioner testified that prior to working in the Wayne City building she had three jobs and worked 70 hours per week. She stated that any runny nose, congestion, harvest season, or allergy trigger, causes her respiratory symptoms to increase and results in a relentless cough and joint swelling.

Petitioner testified that to the best of her knowledge the Wayne City building was never environmentally tested prior to 2019. She stated they went to electronic medical records in January 2014 and the paper charts were stored in the x-ray room where mold was found on the walls which was painted over. She testified that the facility was cleaned by a company on a weekly basis during her employment. Petitioner stated a sewer backed up on one occasion and saturated the carpets that were shampooed and not replaced.

## MEDICAL HISTORY

On 3/27/19, Petitioner was examined by Rachel Sinclair, NP at Carmi Rural Health. (PX5) She reported testing positive for flu three times in the past seven weeks. She had fever, chills, headache, overall ill-appearing with fatigue, and headache. NP Sinclair assessed Influenza A, fatigue due to exposure, and cough. Labs were performed and her ANA Titer was high at 1.8. Chest x-ray did not show evidence of pulmonary disease.

On 7/23/19, Petitioner's colleague, Stella Johnson, APRN-CNP, noted Petitioner's chronic cough for more than five months which was not improving. (PX7) CNP Johnson noted Petitioner had failed multiple medications and had been treated with steroids. Petitioner reported she felt like she was sucking air through a straw. The office note indicates a history of chronic high platelet levels, a long history of positive influenza in the office chronically, easily chokes on food, elevated WBC, and a negative respiratory panel. CNP Johnson ordered blood work, a CT scan, and Z-pack. Petitioner's white blood count was elevated and her platelets were stable. The CT scan was read to show the 12-mm diameter left axillary lymph node could be reactive, with no acute pulmonary

infiltrate or consolidation. A repeat chest x-ray was performed on 7/26/19 that was negative for pulmonary disease. (PX4, p. 19)

On 8/22/19, Petitioner saw Dr. Murali Kondapaneni for chronic cough, mild intermittent asthma without complication, adverse exposure in the workplace, and dyspnea on exertion. (PX3) Her history was positive for influenza almost every year. Petitioner reported that for the last few years, she has been feeling sick with occasional cough, watery eyes, and tiredness. For the last few months, her cough has been getting worse along with watery eyes, sneezing, and other symptoms which makes her tired and exhausted. She noticed that the symptoms usually start after a couple of hours in the office. By the latter half of the day, she notices her symptoms really affect her. Petitioner reported she recently went out of town for a couple of weeks and her symptoms completely resolved. Petitioner reported that some of her office coworkers were experiencing the same symptoms. Dr. Murali noted Petitioner had influenza earlier that year along with the possibility of Lyme disease previously. Albuterol and antihistamines did not improve her symptoms.

Dr. Murali noted Petitioner's chest CT scan and pulmonary function tests were normal. He reviewed the first environmental study and noted it was "nonspecific" with high levels of skin cell fragments. He stated he was not sure of the clinical significance of this finding. Dr. Murali ordered testing for fungal antibody panel immunodiffusion, IGE blood, allergen profile mini panel, pneumonitis hyperintensive panel, complete PFT w/wo bronchodilator, and fractional exhaled nitric oxide, which were performed at SSM Good Samaritan Hospital. (PX4, p. 33-40) Dr. Murali noted Petitioner's symptoms were classic for work-related exposure. He recommended spirometry after she was off work a few days and he excused her from work. Following testing, Dr. Murali noted the PFT's and DLCO were normal. He opined that the absence of pulmonary pathology and a normal CT was consistent with possible workplace induced symptoms. Petitioner was placed off work pending further testing.

On 8/26/19, Petitioner returned to NP Sinclaire with shortness of breath and cough. Petitioner reported her treatment with Dr. Murali and environmental issues related to carbon dioxide at her workplace that were causing her symptoms. Petitioner reported that since being off on vacation her symptoms improved with return of energy, improved breathing, and overall feeling of wellness. Upon returning to work her symptoms returned, with fatigue, shortness of breath, dyspnea on exertion, headache, dizziness, and nausea. (PX5, p. 7) NP Sinclaire assessed cough, toxic effect of carbon dioxide, mild intermittent asthma, adverse effects of work environment, and situational anxiety.

On 8/29/19, Dr. Murali placed Petitioner off work pending completion of environmental testing. (PX3, p. 42) On 9/4/19, Dr. Murali continued Petitioner off work.

On 9/19/19, Petitioner returned to Dr. Murali and reported her symptoms completely resolved since being away from her workplace. She was negative for influenza for the first time since January. Dr. Murali reviewed the inspection report and noted the building had undergone some cleaning last month. Given the significance of her symptoms and the uncertain nature of the exposure that led to her symptoms, Dr. Murali referred Petitioner to an occupational medicine specialist. He stated that a specialist should be able to determine if the improvements made to

Petitioner's workplace were sufficient for her to safely return to work. He continued to believe there was some occupational related exposure that contributed to Petitioner's symptoms. (PX3, p. 22)

On 10/1/19, Dr. Murali placed Petitioner off work pending consultation with occupational medicine. (PX3, p. 12)

On 2/5/20, Petitioner was seen by Dr. Fadi Shamsham for heart palpitations. She described daily recurrent heart palpitations and shortness of breath on exertion. Rhythm strips confirmed the presence of intermittent palpitations. He noted a BMI of 37.86 and familiar history of hypertension. His assessment was palpitations and ventricular premature depolarization. He recommended an EKG which was performed on 2/26/20 and was read to be a good study. (PX6, p. 2)

On 9/2/20, Petitioner began treating with Dr. Suzanne Alt for sick building syndrome. (PX2) Dr. Alt diagnosed PVC's, shortness of breath, sick building syndrome, menopause, chronic fatigue, EBV positive mononucleosis syndrome, Lyme disease, positive ANA, and joint pain. Petitioner continued to exhibit symptoms of shortness of breath and fatigue which began in 2013 with feelings of lethargy. Dr. Alt continues to treat Petitioner at regular intervals and Petitioner reports her symptoms come and go with shortness of breath and fatigue.

On 11/25/20, Dr. Alt noted Petitioner was feeling better with a regimen of supplements. Dr. Alt noted the elevated levels of CO2 causes respiratory acidosis and changes body biochemistry which results in headache, confusion, anxiety, drowsiness, and stupor (CO2 narcosis). Viral loads are high and cause repetitive viral infections as her immune system is depressed with chronic CO2 exposure. Long term effects include memory loss, sleep disturbance, and excessive daytime sleepiness. Studies show increase in dry cough, rhinitis, prevalence of asthma, sympathetic stimulation, and changes in heart rate variability. Linear effects noted in the circulatory, cardiovascular, and autonomic nervous systems were noted with CO2 levels ranging from 500-5000 ppm. (PX2, p. 68)

On 2/3/21, Dr. Alt referred Petitioner to a cardiologist for a second opinion. Dr. Alt also noted Petitioner was scheduled to undergo gastric bypass. On 6/16/21, Petitioner presented to Dr. Alt for post-op follow up, irregular heartbeat, and major joint and finger swelling. Dr. Alt referred Petitioner to a cardiologist for further evaluation.

On 8/18/21, Petitioner returned to Dr. Alt following cardiology workup with Dr. Wetsic who increased Petitioner's Metoprolol. Dr. Alt noted that Petitioner's lab work was normal, and she lost 86 pounds since surgery.

On 11/17/21, Dr. Alt noted no change in Petitioner's symptoms. She exhibited palpitations, irregular heartbeat, EBV positive mononucleosis, positive ANA, PVC's, and sick building syndrome. Dr. Alt recommended increasing vitamin intake and prescribed Diltiazem. Petitioner followed up on 12/8/21 and reported her symptoms became significantly worse after she started the new medication. It was noted that Dr. Wetsic transferred Petitioner's care due to her anxiety and sensitivity.

On 1/5/22, Dr. Alt noted Petitioner was evaluated by infectious disease specialist Dr. Sobani who could not find a reason for Petitioner's symptoms. On 4/27/22, Petitioner reported no change in her symptoms, with continued fatigue, shortness of breath, heart palpitations, and EBV positive mononucleosis. Petitioner refused to return to work and reported she was taking care of her daughter. On 7/13/22, Dr. Alt noted Petitioner continued to follow up with cardiology and she noted intermittent problems with premature ventricular contractions and irregular heartbeat. (PX2, p. 10) Petitioner continued to report fatigue on 7/27/22.

Dr. Suzanne Alt testified by way of deposition on 4/7/22. (PX1). Dr. Alt is an osteopathic physician who is board-certified in family practice, holistic medicine, anesthesia, and pain management. She has practiced for 36 years. Dr. Alt testified she has performed many occupational evaluations for work injuries. She testified that Petitioner's condition is pretty rare and she has only treated four or five patients with symptoms that Petitioner exhibits. She stated the condition is significant and debilitating.

Dr. Alt testified that the study of allopathic medicine is designed to identify a disease and then treat the symptoms. From an osteopathic standpoint, there is more interest in determining the cause of a condition because of its importance in treating the condition. She initially examined Petitioner on 9/2/20 and took a full history of Petitioner's symptoms including irritability, insomnia, loss of memory, and urinary incontinence. Petitioner related her symptoms to her workplace which began in 2013 and reported repeated exposures to influenza and upper respiratory infections. She complained of heart palpitations, joint pain, headaches, and dizziness. She reported her symptoms resolved when she was away from her workplace. Dr. Alt testified that the course of Petitioner's symptoms is consistent with sick building syndrome. She testified it can be very difficult to identify the source of the condition as it can be multiple issues, including glue from the carpet, paint, the ventilation system, and different individuals respond differently.

Dr. Alt diagnosed premature ventricular contractions (PVSs) which were consistent with Petitioner's complaints of palpations, shortness of breath, and fatigue. She diagnosed sick building syndrome, menopause, chronic fatigue, Lyme's Disease, obesity, arrythmia, and positive ANA or connective tissue which could indicate Lupus, joint pains, and low-grade fevers.

Dr. Alt reviewed the environmental report that revealed elevated levels of carbon dioxide. Petitioner complained there were no ducts that ventilated viral or bacterial loads out of the building, and she had a sudden onset of fatigue off and on since 2013. Dr. Alt testified she was not an expert and did not know normal levels, but she noted that the highest level of spores and skin cell fragments were in the center area and the private office in the southwest part of the building. Dr. Alt testified that one component of the cause of Petitioner's symptoms could be high CO2 levels which commonly cause vasodilation within blood vessels, particularly in the head that can cause headaches. Dr. Alt opined that Petitioner's exposure to mold and high carbon dioxide levels and skin cell fragments was one of the causes for her symptoms and need for treatment. Dr. Alt based her opinion on the environmental reports and that Petitioner's symptoms improved when she was away from the sick building and immediately rebounded when she returned to work. She stated the environmental studies were very limited in what was being tested. She testified that other factors, including glues, toxins, and aerosols, were not tested and

could be in the building and a causative factor of Petitioner's symptoms. Dr. Alt testified she has never been in the building.

Dr. Alt testified it may take multiple exposures over a period of time before a reaction occurs within the body. It was not unusual for Petitioner to have developed new side effects over many years. Dr. Alt testified that the side effects of a sick building diminish immune system function and make a person more susceptible to bacterial, viral, and fungal infections. In Petitioner's case, the exposure has affected her pulmonary, musculoskeletal, and neurologic functioning as she has PVCs, joint pain, and headaches. Dr. Alt testified that a negative pulmonary function test does not mean Petitioner does not have these symptoms or conditions. She stated there are things that cannot be seen on PFTs such as biochemical changes within the lungs and histamine releases.

Dr. Alt referred Petitioner to several specialists that diagnosed a heart block in the conduction system which could be the reason for her heart palpations. Dr. Alt placed Petitioner on a vitamin regime, hormone replacement therapy, and a strict diet in order to address her symptoms that were causally related to the sick building exposure. Dr. Alt noted some improvement in Petitioner's symptoms, but stated she continues to have palpations, fatigue, joint pain, and breathing issues. She testified that Petitioner's immune system is chronically damaged as a result of the exposure, and she will require ongoing treatment in the form of pulmonary and cardiac care with specialists and family practice care to rebuild her immune system.

Dr. Alt testified that Petitioner reported a history of EBV positive mononucleosis syndrome, which can wax and wane and cause chronic fatigue. Dr. Alt testified that the sick building exposure triggered the positive mono testing in Petitioner. She testified that in September 2020 Petitioner's respiration was 16 breaths per minute which is fairly normal. Her pulse oximetry was 97 which was slightly low, blood pressure was normal at 123 over 77, and chest examination was within normal limits, and her heart rate and sounds were normal. Dr. Alt explained that relatively normal physical exam findings are not unusual with patients with sick building syndrome and that Petitioner's test results and condition could change at any time. Since Petitioner remained significantly symptomatic after being out of the building for nine or ten months, it shows chronicity, and is diagnostic of sick building syndrome.

Dr. Alt testified that she first saw Petitioner nine months after she resigned employment and a year and a couple of months after she was last in the building. She testified she did not know exactly what was in the building that caused Petitioner's conditions due to the limited testing. She stated it could have been the glue on the carpet, paint, cleaning sprays, lack of ventilation, and certain lighting. Dr. Alt testified that "sick building syndrome" is relatively new and Petitioner had significant symptoms that waxed and waned as she was in and out of the building. Dr. Alt did not know how long the CO2 and ventilation issues were present in the building. She did not know what levels of CO2 Petitioner was exposed to or for how long.

Dr. Thomas Hyers testified by way of deposition on 5/6/22. (RX1) Dr. Hyers is board-certified in internal and pulmonary medicine. He treats patients with occupational exposure and stated over his 30 years of practice he has probably treated or diagnosed someone with sick building syndrome, but he could not recall a specific instance. Dr. Hyers saw Petitioner on

1/22/20 and spent approximately 40 minutes with her. He had Petitioner undergo chest x-rays and a pulmonary function test.

Dr. Hyers testified that sick building syndrome is a generic term that refers to some source of irritant in a building which leads to symptoms such as watery eyes, nasopharyngitis, cough, and difficulty breathing. Exposure to high levels of carbon dioxide typically occurs in an enclosed structure which is not adequately ventilated into the atmosphere. He testified that exposure to high levels of CO2 typically causes mild symptoms and can cause shortness of breath. He is not aware that long-term exposure to high levels of CO2 can cause lasting damage to any systems of the body.

Dr. Hyers testified that Petitioner did not exhibit any symptoms at the time of his examination. She described her symptoms between January and October 2019 as a dry cough, shortness of breath on exertion, fatigue, and joint pain. He reviewed Petitioner's medical records and noted she had a prior diagnosis of thrombocytosis, which is elevated blood platelet count. He noted that allergy and respiratory pathogen testing was negative in 2019. He noted that Dr. Murali ordered pulmonary function testing that was normal. Dr. Hyers reviewed the environmental testing on the Wayne City building and noted elevated carbon dioxide levels. He stated the elevated skin cell fragments could have been due to poor ventilation, but he did not think those would cause a problem.

Dr. Hyers testified that Petitioner has high blood pressure most likely due to her obesity and not her workplace. His review of previous blood work did not identify any immunologic problems. He testified that the chest x-ray and spirometry he ordered were normal. Dr. Hyers testified that Petitioner reported the usual pattern of symptoms in the workplace and relief when she removed herself from the building, but he could not identify anything in the workplace that would cause Petitioner's symptoms. He testified that this history suggests a site of exposure that was causing Petitioner's problems, but the data he reviewed only indicated elevated CO2 levels which is typically not linked to symptoms of cough and fatigue. He testified there was possibly something else in the building besides carbon dioxide that was causing Petitioner's symptoms. However, since she had been out of the building for a couple of years and still experiencing symptoms, he did not believe the building was a contributing factor. Dr. Hyers did not find any objective evidence that Petitioner had asthma. He opined Petitioner did not require any additional treatment or testing with respect to her workplace exposure and she had reached MMI.

Dr. Hyers testified that Petitioner was concerned she had multiple episodes of influenza infection from 2013 through 2019. He agreed that the environmental testing of the facility included carbon monoxide, carbon dioxide, skin cells, mold, formaldehyde, and pollen, which are the common irritants that cause respiratory symptoms, but it was not a complete list. He agreed that elevated skin cell fragments were elevated in Petitioner's room that was an isolated area. He did not know how long the elevated carbon dioxide was in the building as the testing only revealed the levels on those two specific testing dates. He agreed that patients have significantly different reactions to the same environmental stimuli. He testified that building materials such as carpeting and particle board, chemicals such as cleaning supplies and aerosols, biological pollutants such as infectious disease and allergens, and toxins such as mold and fungus can cause respiratory symptoms. He agreed that viruses, bacteria, and dust mites can

cause respiratory symptoms. Dr. Hyers testified that long-term exposure to certain types of pollutants or irritants can cause symptoms. He testified it is his general practice to advise patients to avoid specific environments if the exposure causing symptoms. He agreed that spirometry testing does not diagnose past incidents of influenza. Dr. Hyers did not believe the elevated carbon dioxide levels found in the building explained the symptoms reported by Petitioner. He stated the first test showed carbon dioxide levels greater than 1,000 ppm, but it did not state how much greater. He stated that typically that kind of environment would result in mild symptoms, if any, including slight shortness of breath. He did not believe the elevated skin cell fragments would cause Petitioner's symptoms as they were found only in one room. He agreed that some people are more sensitive than others.

On 8/2/19, Wellington Environmental conducted an air focused environmental study of Petitioner's colleague's private office, the colleague's examination room No. 3, and the center area. (RX2) The study revealed the level of airborne mold was within normal limits, skin cell fragment counts in the private office and exam room No. 3 were within normal limits and elevated in the center area. Results of the environmental conditions indicated a "problem with carbon dioxide levels in the clinic building". A high reading of carbon dioxide is normally an indication that the building is not receiving the proper amount of outside (fresh) air mixed with the return air system in the building. Carbon dioxide was measured at greater than 1,000 parts per million in each test location within the building. Further investigation revealed the fresh air vent on the exterior of the building was blocked. The louver was opened and cleaned to allow outside air to the building's air handling units within a few says of the site inspection. Additional cleaning of horizontal surfaces with disinfectant wipes was recommended.

A second study was conducted on 9/9/19 that included exam room No. 4, Petitioner's colleague's office, Petitioner's office, the center area, and an old radiology room. (RX2) The study showed CO2 concentrations were within the American Society of Heating, Refrigeration, and Air Conditioning Engineers recommended levels. Temperature and moisture testing were within the normal range. Based on the data and visual inspection the building was functioning as designed and the environment in the building was within guideline parameters.

## CONCLUSIONS OF LAW

**Issue (C): Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?**
**Issue (F): Is Petitioner's current condition of ill-being causally related to the injury?**

An occupational disease is a disease arising out of and in the course of employment and the claimant has the burden of proving that he suffers from an occupational disease and that a causal connection exists between the disease and his employment. *Omron Elecs v. Illinois Workers' Compensation Comm'n*, 2014 IL App (1st) 130766 WC, ¶36; 21 N.E.3d 1245, 1253, 387 Ill.Dec.74, 82 (2014). Proof that disease arises out of employment exists where it is apparent to the rational mind, upon consideration of all the circumstances, that a causal connection exists between the work and the occupational disease. *Omron Elecs* at 82. However, there is no requirement to prove a direct causal connection. *Omron Elecs* at 83. Rather, causal connection may be based on a medical expert's opinion an accident might or could have caused an injury,

and a chain of events suggesting a causal connection may be sufficient to prove causation even if the specific etiology of the disease is unknown. *Omron Elecs* at 83.

Injuries sustained in a place where a claimant might have reasonably been while performing his work duties are deemed to have been received in the course of his employment. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill.2d 52, 57, 541 N.E.2d 665, 133 Ill. Dec. 454 (989). 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. *Caterpillar* at 58. This standard was recently reaffirmed by the Illinois Supreme Court in *McAllister v. Workers' Comp. Comm'n*, 2020 IL 124848.

In the present case, Petitioner was performing duties she might be reasonably expected to perform in the usual course of her employment. Petitioner is not required to provide additional evidence establishing that she was exposed to the risk of injury, either qualitatively or quantitatively, to a greater degree than the general public, once she has presented proof that she was in an employment-related accident. *McAllister* at p.64. Petitioner has met her burden of proving a work-related occupational exposure. The Arbitrator finds that Petitioner's contraction of sick building syndrome is more probably than not traceable to Respondent's facility. It is unrebutted that Petitioner developed symptoms once she began working at the SSM Wayne City facility. The Wellington Environmental testing showed elevated levels of carbon dioxide in excess of 1,000 ppm and elevated skin cell fragments. Petitioner worked regularly in the facility for nearly six years prior to any testing or abatement efforts. In addition, the records of Dr. Kondapaneni and the opinions of Dr. Hyers and Dr. Alt all point to the chain of events as competent evidence of occupational exposure from her workplace.

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). 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*, 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). This is consistent with the Occupational Disease Act which allows for proof of an occupational disease if it is apparent to the rational mind, upon considering all of the circumstances, that there is a causal relationship between the work conditions and the disease. *Omron Elecs* at 82.

The Arbitrator finds that Petitioner has satisfied her burden that her current condition is causally related to sick building syndrome contracted at the SSM Wayne City facility. There is no evidence Petitioner suffered any similar symptoms or conditions prior to November 2013 when she began working in the building. She was working in the nursing field prior to that time and had remained well. Her uncontradicted testimony is that she became ill within weeks of starting at the Wayne City SSM facility and that she became increasingly ill over the years she worked there. The environmental testing, performed six years after Petitioner's initial exposure,

showed elevated levels of a limited range of pollutants and confirmed that the outside air vents had been blocked, resulting in higher levels of pollutants.

Petitioner's pulmonologist Dr. Murali Kondapaneni opined that Petitioner's symptoms were the result of adverse exposure in the workplace. Petitioner reported that her symptoms usually started after a couple of hours in the office. By the latter half of the day, she noticed her symptoms really affected her. Petitioner reported she went on vacation for a couple of weeks and her symptoms completely resolved. Dr. Murali noted Petitioner's chest CT scan and pulmonary function tests were normal. He noted Petitioner's symptoms were classic for work-related exposure given her negative spirometry test and the absence of pulmonary pathology.

On 8/26/19, Petitioner reported to Dr. Alt that her symptoms improved while on vacation. She had increased energy, improved breathing, and an overall feeling of wellness. Upon returning to work her symptoms returned, with fatigue, shortness of breath, dyspnea on exertion, headache, dizziness, and nausea. Petitioner testified she took vacation for ten days at the end of July during which the first environmental test was performed and the office was cleaned. Petitioner testified she had less shortness of breath and was able to do more physically while on vacation. When she returned to the building at 6:30 a.m. on 8/19/19, Petitioner had no cough or respiratory symptoms. She testified that by lunchtime she told her office manager she felt sick again. She testified that the ten-day vacation in July was the only time she had been away from the building for a period of time. Her joints started swelling again, she could not sit at her desk and had to return to a standing desk, and she had to start wearing pads again due to coughing.

On 8/29/19 and 9/4/19, Dr. Murali placed Petitioner off work pending completion of a second environmental test and a referral to occupational medicine. On 9/19/19, Petitioner returned to Dr. Murali and reported her symptoms completely resolved since being away from her workplace. She was negative for influenza for the first time since January 2019. Dr. Murali again referred Petitioner to an occupational medicine specialist to determine if she could safely return to work in the building. He continued to believe there was some occupational related exposure that contributed to Petitioner's symptoms. Petitioner remained off work until she found new employment on 1/5/20.

Respondent's Section 12 examiner Dr. Hyers agreed that high levels of carbon dioxide typically occur in an enclosed structure that is not adequately ventilated into the atmosphere. He testified that exposure to high levels of CO2 typically causes mild symptoms and can cause shortness of breath but typically not cough or fatigue. He agreed that some people are more sensitive than others and every patient reacts differently to environmental stimuli. Dr. Hyers testified that Petitioner reported the usual pattern of symptoms in the workplace and relief when she removed herself from the building. Although he could not identify anything in the workplace that would cause Petitioner's symptoms based on the environmental tests, he testified that Petitioner's history suggests a site of exposure that was causing her problems. He testified there was possibly something else in the building besides carbon dioxide that was causing her symptoms. Dr. Hyers did not know how long the elevated carbon dioxide existed in the building or how much greater than 1,000 ppm it was elevated. He testified it is his general practice to advise patients to avoid specific environments if the exposure causes symptoms.

The Arbitrator finds the opinions of Dr. Murali and Dr. Alt persuasive. Dr. Alt treats patients in a family practice setting and is not limited to focusing on one specific body system. She testified that sick building syndrome is a relatively new diagnosis and Petitioner's condition is rather rare. In her 36 years of practice, Dr. Alt has only treated four or five patients with similar symptoms that Petitioner exhibits. Dr. Hyers testified that in his 30 years of practice he has probably treated or diagnosed someone with sick building syndrome, but he could not recall a specific instance.

Dr. Alt testified that Petitioner had a history of repeated exposures to influenza, upper respiratory infections, heart palpitations, joint pain, headaches, cough, dizziness, irritability, insomnia, loss of memory, and urinary incontinence. Petitioner reported her symptoms started just weeks after beginning work in Respondent's building and always improved and sometimes completely resolved when she was away from her workplace for a period of time. Dr. Alt testified that the course of Petitioner's symptoms is consistent with sick building syndrome. She reviewed the environmental report that revealed elevated levels of carbon dioxide. Petitioner complained there were no ducts that ventilated viral or bacterial loads out of the building, and she had a sudden onset of fatigue off and on since 2013. Her complaints were consistent with the findings of the environmental study that found the fresh air vent on the exterior of the building was blocked which prevented outside (fresh) air from reaching the building's air handling units. The report indicated a "problem with carbon dioxide levels in the clinic building", which measured greater than 1,000 parts per million in each test location within the building.

Dr. Alt testified that one component of the cause of Petitioner's symptoms could be high CO2 levels which commonly cause vasodilation within blood vessels, particularly in the head that can cause headaches. Dr. Alt based her causation opinion on the environmental reports and that Petitioner's symptoms improved when she was away from the building and immediately rebounded when she returned to work. Dr. Alt testified that the environmental studies were very limited in what was being tested and other factors, including glues, toxins, and aerosols, which were not tested could be in the building and a causative factor of Petitioner's symptoms. This is consistent with Dr. Hyers' testimony that Petitioner's history suggests a site of exposure and that possibly "something" in the building was causing her symptoms.

Dr. Alt testified that the side effects of a sick building diminish immune system function and make a person more susceptible to bacterial, viral, and fungal infections. In Petitioner's case, the exposure has affected her pulmonary, musculoskeletal, and neurologic functioning as she has PVCs, joint pain, and headaches. Dr. Alt placed Petitioner on a vitamin regime, hormone replacement therapy, and a strict diet in order to rebuild her immune system which she opined is chronically damaged as a result of her exposure.

Based on the totality of the evidence, the Arbitrator finds that Petitioner was exposed to an occupational disease that arose out of and in the course of her employment with Respondent on 8/21/19, and that her current condition of ill-being is causally connected to her work injury.

**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?**

Respondent disputes liability for medical expenses based on accident and causal connection. Based upon the above findings as to accident and causal connection, and the opinions of Dr. Alt, the Arbitrator finds the medical care administered to Petitioner was reasonable and necessary to treat her work-related injuries. Respondent shall therefore pay the medical expenses contained in Petitioner's Group Exhibit 12, pursuant to the Illinois medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act.

**Issue (K): What temporary benefits are in dispute? (TTD)**

Based upon the foregoing findings as to accident and causal connection, the Arbitrator finds Petitioner is entitled to temporary total disability benefits. Petitioner claims entitlement to TTD benefits for the period 8/22/19 through 1/4/20, representing 19-3/7 weeks. Respondent disputes liability for TTD benefits based on accident and causal connection.

On 8/22/19, Dr. Murali placed Petitioner off work pending further testing. On 8/29/19, Dr. Murali continued Petitioner off work pending completion of environmental testing which was performed on 9/9/19. On 9/4/19, Dr. Murali placed Petitioner off work for ongoing symptoms. On 9/19/19, Dr. Murali referred Petitioner to an occupational medicine specialist to determine if the building was safe for Petitioner to return to work. On 10/1/19, Dr. Murali continued Petitioner off work pending consult with occupational medicine.

Petitioner testified that the occupational medicine referral was denied by Respondent and her private health insurer. She ultimately obtained new employment on 1/5/20.

Therefore, Respondent shall pay Petitioner temporary total disability benefits from 8/22/19 through 1/4/20, representing 19-3/7 weeks, pursuant to Section 8(b) of the Act.

**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 impairment rating. Therefore, the Arbitrator places no weight on this factor.

(ii) **Occupation**: Petitioner returned to work as a family medicine nurse practitioner with another employer on 1/5/20. Petitioner testified she is working full duty. The Arbitrator places some weight on this factor.

(iii) **Age**: Petitioner was 44 years old at the time of accident. She is a younger individual and must live and work with her disability for an extended period of time. Pursuant to *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). The Arbitrator places some weight on this factor.

(iv) **Earning Capacity**: There is no evidence of reduced earning capacity contained in the record. Petitioner testified she returned to work for another employer earning the same rate of pay she earned working for Respondent. The Arbitrator places some weight on this factor.

(v) **Disability**: Dr. Alt testified that as a result of Petitioner's sick building syndrome she continues to have palpations, fatigue, joint pain, and breathing issues. Dr. Alt testified that Petitioner's immune system is chronically damaged as a result of the sick building exposure, and she will require ongoing treatment in the form of pulmonary and cardiac care with specialists and family practice care to rebuild her immune system.

Petitioner testified that her symptoms are not as bad today, but anytime she gets a sniffly nose her "lungs are shot". Weather changes and indoor heat increase her symptoms. She has difficulty recovering from respiratory illness, including joint pain and swelling, severe fatigue, breathing difficulty, and coughing which requires her to wear pads. Her symptoms have not been as severe as they were when she worked in the Wayne City building. The Arbitrator places greater weight on this factor.

Based upon the foregoing factors, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 12.5% loss of use of her body as a whole, under Section 8(d)2 of the Act.

Respondent shall pay Petitioner compensation that has accrued from the date she last saw Dr. Alt prior to arbitration on 7/27/22 through 11/29/22, 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 | 20WC010985 |
| Case Name | Dennis Austin v.<br>State of Illinois - Vienna Correctional Center |
| Consolidated Cases | |
| Proceeding Type | Petition for Review |
| Decision Type | Commission Decision |
| Commission Decision Number | 23IWCC0523 |
| Number of Pages of Decision | 25 |
| Decision Issued By | Carolyn Doherty, Commissioner,<br>Marc Parker, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Thomas C Rich |
| Respondent Attorney | Kenton Owens |

DATE FILED: 12/12/2023

/s/Carolyn Doherty, Commissioner

Signature

DISSENT: /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

DENNIS AUSTIN,

Petitioner,

vs. NO: 20 WC 10985

STATE OF ILLINOIS –
VIENNA CORRECTIONAL CENTER,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by the Petitioner and Respondent 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 February 6, 2023 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.

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.

**December 12, 2023**

O: 12/07/23
CMD/ma
045

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

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

DISSENT

I respectfully dissent from that portion of the Majority's Decision concluding that Petitioner's cervical spine condition was not causally related to his accident. I believe, under a chain of events analysis, that his cervical spine condition was causally related to his accident. I would have awarded additional benefits. Therefore, I respectfully dissent from that portion of the Majority's Decision.

/s/ *Marc Parker*
Marc Parker

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 20WC010985 |
| Case Name | Dennis Austin v. State/Vienna Correctional Center |
| Consolidated Cases | |
| Proceeding Type | |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 22 |
| Decision Issued By | Maureen Pulia, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Thomas Rich |
| Respondent Attorney | Kenton Owens |

DATE FILED: 2/6/2023

**THE INTEREST RATE FOR THE WEEK OF JANUARY 31, 2023 4.68%**

/s/ Maureen Pulia, Arbitrator
Signature

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

February 6, 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**

**DENNIS AUSTIN,**
Employee/Petitioner

v.

**STATE/VIENNA CORRECTIONAL CENTER,**
Employer/Respondent

Case # **20** WC **10985**

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 **Maureen Pulia**, Arbitrator of the Commission, in the city of **Herrin**, on **3/14/20**. 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 **3/14/20**, 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 as it relates to his left shoulder and lumbar spine ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**99,273.84**; the average weekly wage was $**1,909.11**.

On the date of accident, Petitioner was **66** years of age, ***married*** with **no** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services for his left shoulder and lumbar spine.

Respondent ***has*** or will pay all appropriate charges for all reasonable and necessary medical services related to petitioner's left shoulder and lumbar spine.

Respondent shall be given a credit of $**146,372.10** for TTD, $**00** for TPD, $**00** for maintenance, and $**00** for other benefits, for a total credit of $**146,372.10**.

Respondent is entitled to a credit of $**00.00** under Section 8(j) of the Act.

**ORDER**

Respondent shall pay Petitioner temporary partial disability benefits of $1,274.74/week for 136 weeks, commencing 6/16/20 through 1/20/23, as provided in Section 8(a) of the Act. Respondent is entitled to a credit of $146,372.10 for what it has already paid in temporary total disability benefits pursuant to Section 8(a) of the Act.

Respondent shall pay reasonable and necessary medical services for petitioner's left shoulder and lumbar spine from 3/14/20 through 1/10/23, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall 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 permanent partial disability benefits of $836.69/week for 150 weeks, because the injuries sustained caused the petitioner a 30% 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.

Maureen H. Pulia

_____ **FEBRUARY 6, 2023**

Signature of Arbitrator

**THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:**

Petitioner, a 66 year old Stationary Fireman at the power plant, sustained an accidental injury to his left shoulder and low back that arose out of and in the course of his employment by respondent on 3/14/20. The petitioner further alleges that he sustained an accidental injury to his neck that arose out of and in the course of his employment by respondent on 3/14/20. Respondent disputes any injury to petitioner's neck as a result of the accident on 3/14/20. Petitioner no longer works for respondent. Petitioner is right hand dominant.

The parties stipulate that there exists a causal connection between petitioner's injuries to his left shoulder and low back and the injury on 3/14/20; that respondent has or will pay for all reasonable and necessary medical services to petitioner's left shoulder and low back pursuant to Section 8(a) and Section 8.2 of the Act; and, has or will pay all temporary total disability benefits related to petitioner's left shoulder and low back injury. The issues of causal connection, medical expenses and temporary total disability as they relate to petitioner's alleged neck injury are at issue, as well as the nature and extent of petitioner's left shoulder and low back injuries, and his alleged neck injury.

Petitioner began working in Corrections in September 2005. Before that he worked construction for 20 years. Petitioner education consists of a high school diploma.

On 3/14/20 while taking inmates down under the coal loading facility to instruct them on how to clean the coal feeder he fell off a ladder. As he was falling, he grabbed the ladder with his left hand and arm before hitting the bottom. Petitioner denied any injury to his left hand and arm before 3/14/20.

On 3/14/20 petitioner was treating for an unrelated right knee injury for which he underwent surgery on 3/30/20. For this reason, petitioner was off work as of the date of his right knee surgery.

On 3/18/20 petitioner presented to Brook Jackson, PA, at SIH. He provided a consistent history of the accident. He complained of left shoulder pain with movement since the accident, and low back pain since the day after the accident. Following an examination and x-rays, Jackson was diagnosed with strain of the left shoulder and sacroiliac joint. Jackson prescribed Mobic an/or tramadol as needed for pain. She also took petitioner off work.

On 3/20/20 petitioner completed the Employee's Notice of Injury report. He indicated that he was on the VCC boiler house in the coal pit under the inground coal hopper on 3/14/20 instructing inmate workers on how to clean the coal feeder. He noted that as he was climbing down the ladder, he slipped and fell 4-5 feet before catching himself with his left hand. He reported pain in his left shoulder, left hip and left lower back.

On 3/23/20 petitioner presented to Dr. Shannon Rider. He reported that his pain was unchanged. Following an examination, Dr. Rider ordered an MRI and referral to orthopedics. Dr. Rider continued petitioner off work. Petitioner's diagnosis remained the same.

On 3/30/20 petitioner underwent surgery on his right knee, unrelated to the injuries at issue in this case.

On 5/6/20 petitioner presented to Dr. Paletta for evaluation of his left shoulder. Petitioner reported minimal discomfort at rest, and more pain trying to raise overhead and reaching behind his back. Petitioner reported no radiating pain or associated numbness, tingling, or paresthesias. He also reported pain at night. Following a physical and radiologic examination, Dr. Paletta's impression was left shoulder pain with possible rotator cuff or subscapularis tear versus SLAP tear. He ordered an MR arthrogram of the left shoulder. Dr. Paletta was of the opinion that petitioner's current left shoulder condition is causally related to the injury that occurred on 3/14/20. He restricted petitioner from lifting ten pounds from floor to chest; lifting with arm close to the body; no more than one pound lift above chest level; no repetitive overhead activities; and, no pushing/pulling more than ten pounds.

On 5/27/20 petitioner returned to Dr. Paletta. Dr. Paletta noted that he had reviewed the results of the MR arthrogram of the left shoulder performed on 5/22/20 that demonstrated evidence of a tear of the subscapularis; minimal tendon retraction; mild fatty atrophy of the subscapularis muscle body; absence of the intraarticular portion of the long head of the biceps tendon consistent with probable rupture; partial thickness tear of the infraspinatus, without evidence of a full thickness tear; supraspinatus that appeared intact, but with underlying tendinopathy; glenohumeral joint chondrosis; acromioclavicular joint arthritis; and, what appear to be an intact labrum without evidence of an obvious SLAP tear. Based on these results, Dr. Paletta's impression was a high grade subscapularis tear, partial thickness tear infraspinatus tendon, and rupture of the long head of the biceps tendon. He recommended an arthroscopy with subscapularis repair, debridement of the partial tear of the supraspinatus, and subacromial decompression.

On 6/16/20 petitioner underwent a left shoulder arthroscopy with extensive debridement, superior labrum from anterior to posterior including debridement of retained biceps stump; subscapularis repair; and subacromial decompression, bursectomy, and acromioplasty, performed by Dr. Paletta. Petitioner's postoperative diagnosis was left shoulder pain; left shoulder subscapularis tear; left shoulder SLAP tear; left shoulder impingement syndrome; and, rupture of the long head of the biceps tendon with retained stump at the superior labrum. Dr. Paletta released petitioner to work on 6/22/20 with strictly one handed work with right extremity, no lifting, and clerical or sedentary work only.

On 6/29/20 Dr. Paletta ordered 4 weeks of physical therapy and continued petitioner's restrictions, and added no reaching overhead or doing overhead work. Petitioner underwent a course of physical therapy at Joyner Physical Therapy.

On 8/5/20 petitioner followed up with Dr. Paletta. He noted that overall petitioner was doing well. Petitioner reported no pain at rest. He reported that at maximum with physical therapy or certain activities his pain is 4-5/10. Following a physical and radiographic examination, Dr. Paletta's impression was that petitioner was doing well, and had met or exceeded goals and milestones of the therapy protocol. He wanted petitioner to move to phase 2 of the therapy protocol. With respect to work, he restricted petitioner to a ten pound lift limit from floor to chest; lifting with the arm in close to the body and not extended away from the body; 1 pound lifting above chest level; no pushing/pulling more than 10 pounds; and no repetitive overhead. Petitioner continued in physical therapy.

On 9/23/20 petitioner followed up with Dr. Paletta. Petitioner reported no pain with rest, but sore after therapy. He stated that generally his pain was not a big deal. Petitioner also mentioned some low back pain down the left leg. Following an examination of the left shoulder, Dr. Paletta assessed mild residual motion loss and internal rotation deficit status post subscapularis repair, and left sciatic type symptoms. Dr. Paletta ordered more aggressive strengthening, functional rehabilitation and work specific strengthening. He restricted petitioner from lifting more than 5 pounds above chest level, no repetitive overhead activities, and not pushing/pulling more than 10 pounds. He also ordered an MRI of the lumbar spine.

While in therapy on 10/19/20 petitioner reported "tingling in upper left extremity with use starting Friday. On 10/21/20 he reported a tingling and numbness sensation down his arm to his hand on 2 occasions when he road the stationary bike. On 10/23/20 he stated that the tingling came back into his arm when performing scaption/flexion exercises with 3 pound weight. Petitioner had no further numbness/tingling complaints until 11/2/20 when reported tingling in his 2-4 digits when performing pulleys. Thereafter, petitioner had no further tingling or numbness complaints in therapy. Petitioner was discharged from therapy on 12/23/20.

On 12/22/20 petitioner last followed up with Dr. Paletta for his left shoulder. Petitioner reported that his left shoulder was doing quite well and that he had been transitioned out of therapy to a home exercise program. He reported that his main problem was his lumbar spine and left sided sciatica. He reported increased back pain and numbness down the left leg after standing more than 20-30 minutes. A shoulder examination revealed outstanding motion; virtually full forward elevation and abduction; lack of 5 degrees of external rotation; good cuff strength; internal and external rotational strength at 5/5; supraspinatus strength at 5-/5; negative Liftoff and Bear hugger test; and no translational abnormalities on load and shift testing. Petitioner made no complaints of any numbness or tingling in his left upper extremity.

Dr. Paletta reviewed the MRI of the lumbar spine and noted that it demonstrated a multilevel disc pathology, significant disc herniation at L4-L5 with left foraminal stenosis resulting in L4 nerve root compression. He was of the opinion that these findings were consistent with petitioner's symptoms of sciatica.

With respect to the left shoulder, Dr. Paletta discontinued physical therapy and instructed petitioner to continue with a home exercise program. Dr. Paletta also released petitioner to return to work without restrictions, and placed him at maximum medical improvement. With respect to the low back he gave petitioner restrictions of no standing or walking for more than 30 minutes an hour, and no material handling of more than 20 pounds. He recommended a consultation with a spine specialist. Given that petitioner's family was familiar with Dr. Gornet, because he operated on a family member, Dr. Paletta referred petitioner to Dr. Gornet.

On 12/30/20 petitioner presented to Dr. Matthew Gornet for his spine complaints. He reported that his low back pain had been an ongoing problem, but treatment was delayed due to treatment of his other body parts. He did not recall any previous problems of significance with his neck and low back. He did not have a lot of neck pain. His primary complaints were with respect to his back and left leg. Dr. Gornet noted that x-rays of the cervical spine showed some loss of disc height at C5-C6 and C6-C7; and, some mild degeneration, with loss of disc height at L4-L5 with air in the disc, and loss of disc height at other level. Dr. Gornet also reviewed the results of the MRI of the lumbar spine.

Dr. Gornet was of the opinion that petitioner's current symptoms and need for treatment to his neck and low back is causally connected to his injury on 3/14/20. With respect to the back, he diagnosed a disc injury at L3-L4 and L4-L5, aggravation of some preexisting degeneration and stenosis, and aggravation of his left facet joint at L4-L5. Dr. Gornet was also of the opinion that in petitioner's cervical spine there is an overlap between the shoulder and cervical spine. He ordered an MRI of the cervical spine, and restricted petitioner to light duty work with a 10 pound limit, as well as no repetitive bending or lifting, and alternating between sitting and standing as needed. Dr. Gornet also prescribed medications, and ordered physical therapy. He also referred petitioner to Dr. Blake for injections.

On 2/22/21 petitioner underwent an MRI of the cervical spine. The impression was C5-C6 lobulated right paracentral-foraminal and separate left foraminal protrusion resulting in moderate to severe central and severe right greater than left, foraminal stenosis; C6-C7 left lateral recess-foraminal and separate right foraminal protrusion resulting in left ventral cord flattening, mild central canal stenosis, and severe left greater than right foraminal stenosis; and, C3-C4 and C4-C5 central protrusions with right foraminal protrusion at C3-C4 to severe right foraminal stenosis at C3-C4; and, mild central canal stenoses at both levels.

On 2/22/21 petitioner also followed-up with Dr. Gornet. He continued to complain of low back and neck pain. He reported that his symptoms were predominantly left buttock, left hip, and left leg pain. Dr. Gornet reviewed the results of the CT and MRI of the cervical spine, and recommended a two level cervical disc replacement at C5-C6 and C6-C7. Dr Gornet was of the opinion that petitioner was temporarily totally disabled. He also noted that he would focus on petitioner's back later.

On 2/23/21 petitioner underwent a left L3-L4, and L4-L5 transforaminal ESI performed by Dr. Helen Blake. Petitioner's postoperative diagnosis was left lumbar radiculopathy. On 3/9/21 Dr. Blake performed a left L4-L5 ILESI.

On 4/14/21 petitioner underwent a disc replacement at C5-C6 and C6 and C7 performed by Dr. Gornet. His post-operative diagnosis was cervical radiculopathy. Petitioner followed-up post-operatively with Dr. Gornet. On 4/29/21 petitioner reported that his headaches were dramatically improved. He had 5/5 strength in all groups. He also reported that his left shoulder, left scapular pain and tingling in his arms were all improved. He reported some mild residual pain. Dr. Gornet continued petitioner off work.

On 5/27/21 petitioner returned to Dr. Gornet and reported improvement in his neck, shoulder and arm symptoms. He released petitioner with restrictions through 7/22/21. On 7/22/21 petitioner had strength of 5/5 in all groups. A CT of the cervical spine was taken and Dr. Gornet noted that it revealed good position of the devices with excellent motion of flexion/extension. With respect to his back, Dr. Gornet was of the opinion that his complaints were difficult to solve. He recommended light duty with a 10 pound limit, no repetitive bending or lifting, alternating between sitting and standing as needed, and no overhead work. On 10/21/21 petitioner reported that he was doing well with his neck and shoulders, but still had some tingling in his arms bilaterally. He also reported ongoing back pain. Dr. Gornet upped petitioner's restrictions from 10 to 20 pounds of lifting, and continued the other restrictions.

On 11/4/21 petitioner underwent a Section 12 examination performed by Dr. Michael Chabot, at Orthopedic Specialists, at the request of the respondent. He reported a consistent history of the accident and treatment to date. He complained of persistent left sided back pain radiating into the left lower extremity at times. Petitioner told Dr. Chabot that he wanted to keep working for a total of 20 years to be qualified for the retirement plan. He wanted to return to work. Dr. Chabot reviewed the records of SIH Harrisburg, Dr. Shannon Rider, Dr. Koth, Dr. Paletta, and Dr. Gornet, as well as the physical therapy records and the diagnostic studies. Following his record review and physical evaluation, Dr. Chabot's impression was history of left shoulder strain 3/14/20, history of lumbar spine strain 3/14/20, status post left shoulder arthroscopic surgery with rotator cuff repair, status post cervical total disc replacement at C5-C6 and C6-C7, and multilevel lumbar spinal stenosis, disc protrusion and disc degeneration.

Dr. Chabot was of the opinion that petitioner sustained a left shoulder strain/rotator cuff injury as a result of his 3/14/20 injury, and a strain/contusion injury to the lumbar spine with aggravation of his preexisting lumbar spinal stenosis resulting in lumbar radiculopathy. He was of the opinion that the records do not support a finding that petitioner sustained a neck injury as a result of the 3/14/20 injury, nor do the records document that he sustained an aggravation or exacerbation of his preexisting degenerative disease with spinal stenosis involving the cervical spine. He was of the opinion that the surgery to petitioner's neck was performed to address chronic degenerative changes involving the cervical spine unrelated to his 3/14/20 injury. Dr. Chabot was of the opinion that treatment to petitioner's left shoulder and low back were causally related to the injury on 3/14/20. Dr. Chabot was of the opinion that petitioner's low back condition would most likely result in persisting recurrent back pain complaints. He was further of the opinion that petitioner had reached maximum medical improvement. Dr. Chabot was of the opinion that petitioner could return to work duties with lifting up to 20 pounds, related primarily to his chronic low back condition, his age, and comorbidities. He was of the opinion that supervisory, administrative, or clerical type duties would be most appropriate for petitioner. He did not believe petitioner could tolerate work duties that require repetitive lifting of bags, salt or material weighing up to 50 pounds. Dr. Chabot was of the opinion that petitioner's job as a Stationary Fireman, requires lifting in the 50 pound range.

On 4/21/22 petitioner returned to Dr. Gornet's office and was seen by Nathan Collin, PA. He reported that his symptoms in his neck and shoulders were improved, but he still had some numbness and tingling in his arms and down into his hands bilaterally. He also reported significant low back pain, radiating into his left hip, buttock and leg. He stated that he does well within his restrictions. Dr. Gornet was of the opinion that petitioner's residual numbness could be related to a possible peripheral nerve entrapment versus permanent radiculopathy. With respect to petitioner's low back, Dr. Gornet made petitioner's restrictions permanent. He released petitioner on an as needed basis and told petitioner to follow-up in a year per long term follow-up protocol, if he desired.

On 5/25/22 petitioner filed a Reasonable Accommodations Form with respondent detailing his reasons for which he could safely return to his Stationary Fireman position with respondent.

On 9/2/22 petitioner underwent a Vocational Evaluation performed by Timothy Kaver with England Company Rehabilitation Services, Inc.

On 11/1/22 Kaver drafted a Vocational Evaluation Report that indicated that in addition to his interview with petitioner on 9/2/22 he reviewed medical documents, petitioner's education, employment history, employment skills, and job search efforts. He also performed a transferable Skills Analysis. Kaver was of the opinion that petitioner was capable of returning to work at Light Physical Demand level, so long as he is

allowed to alternately sit and stand throughout his work shift and be requires to lift above 20 pounds. Kaver noted that England and Company was going to assist petitioner with his career search, leading towards his selection of physically appropriate job goals. Kaver was of the opinion that petitioner possessed transferable skills based upon his educational background, his employment history, and his current level of vocational skills and knowledge. He was of the opinion that petitioner could work as a Trucking Dispatcher Trainee, Industrial Parts Specialist, staffing a Commercial Help Desk, Staffing Coordinator Trainee, Manager Trainee. However, at an age of 68, Kaver was of the opinion that some employers will not put time and effort into an employee who may retire in the near future. Kaver noted that petitioner's first choice was to remain as a Stationary Fireman. He noted that petitioner thought he could perform the job if he was not assigned additional job duties that were not assigned to his job description. He noted that petitioner was also interested in working with the AEP for an alternative State of Illinois light duty job. Kaver was of the opinion that if petitioner could not find work with the State of Illinois, he would need to consider alternative, entry-level, service relate employment opportunities which allow for on the job training. He identified these jobs as security guard, customer service representative, social services aid/human service assistant, dispatcher trainee, or program interviewer/intake worker. Kaver placed the expected starting annual salary for these occupations in a range from $27,040 - $37,440). Kaver drafted a Vocational Rehabilitation Plan that identified what petitioner would need to do to be a competitive applicant, and the different positions petitioner could perform. The positions he identified ranged from $25,449 annually without restrictions, to $59,805 annually with experience.

On 11/10/22 the evidence deposition of Dr. Gornet was taken on behalf of the petitioner. Dr. Gornet is an orthopedic surgeon whose practice is devoted to spine surgery. He testified that he specializes in neck and low back pain and has authorized numerous publications regarding that. Dr. Gornet testified that after undergoing post-op physical therapy petitioner noticed increasing sharp pain in his scapula, shoulder, upper arm, and intermittent tingling. Dr. Gornet was of the opinion that when he first saw petitioner on 12/30/20 petitioner demonstrated some C6 nerve irritation, that is very often associated with shoulder pain. He was of the opinion that there is a significant overlap between the shoulder and the cervical spine, and believed that the nerve irritation at C5-C6 may be the reason why petitioner's still having some residual left scapula trapezial pain and intermittent tingling in his left arm.

Dr. Gornet opined that the mechanism of injury petitioner reported was consistent with a cervical spine injury and a lumbar spine injury. He opined that petitioner sustained an aggravation of his underlying condition in both his neck and back, and that petitioner may need further treatment for his back in the future. Dr. Gornet opined that petitioner's cervical spine conditions and symptoms were caused, contributed to, or aggravated by his work injury on 3/14/20. He was of the opinion that petitioner's immediate shoulder pain was in part coming

from his neck, independent of his shoulder, and when they treated his neck, his shoulder symptoms improved. He further opined that the diagnostic tests of petitioner's neck support a clear structural pathology that could be aggravated, and/or caused by the accident petitioner described. He opined that these were identified intraoperatively, after which he dramatically improved. He opined that all these would indicate that there is a causal connection to his injury. He further opined that petitioner's lumbar spine condition and symptoms were caused, contributed to, or aggravated by his work activities and work injury on 3/14/20. Dr. Gornet opined that all bills for his services rendered as a result of the care and treatment that petitioner required were due to his work injury. Dr. Gornet opined that petitioner's cervical spine condition would not have improved without the surgery that he performed. He testified that it was very clear in physical therapy that as he started increased activity, he was getting worse, and that was the first time his neck symptoms started. He opined that petitioner's symptoms were coming in part from his neck, and that is why his shoulder symptoms improved when he treated petitioner. He further opined that petitioner's temporary and permanent restrictions were due to his work injury.

On cross examination, Dr. Gornet opined that petitioner had preexisting bone spurring and OPLL prior to the injury that were asymptomatic. He further opined that petitioner's preexisting degeneration, resulted in a herniation, after the sudden mechanical load, and that the sudden mechanical load aggravated his asymptomatic mild foraminal narrowing. He was of the opinion that petitioner's preexisting central stenosis was not addressed as part of his surgery and that it may now play a role in some of his residual tingling. Dr. Gornet opined that any calcification on the disc was on the right side and has no relevance to the left shoulder pain. He further opined that the foraminal herniations were causing petitioner's left shoulder pain, left scapular pain, left trapezial pain, and intermittent tingling in his left arm. With respect to petitioner's cervical spine, he was of the opinion that for the most part, petitioner would be able to work full duty without restrictions, other than the possibility of avoiding overhead work. Dr. Gornet testified that despite the bilateral symptoms petitioner was having in his arms, left worse than right, he was not planning on doing anything more to his cervical spine. He related these symptoms to petitioner's cord compression. Dr. Gornet was of the opinion that petitioner's headaches were not related to the disk protrusions.

On 11/18/22 the evidence of deposition of Dr. Chabot, was taken on behalf of respondent. Dr. Chabot is an orthopedic surgeon. Dr. Chabot noted that there was not any mention of neck complaints in Dr. Paletta's notes after the June 2020 shoulder surgery. Dr. Chabot was of the opinion that calcification of the disc is a long term effect, just like OPLL is. He was further of the opinion that disc calcification is an ossification condition, that is an abnormality, not associated with an acute injury. With respect to the disc space degeneration at C5-C6 and C6-C7, Dr. Chabot was of the opinion that these are long term degenerative conditions. With respect to his broad-based disc protrusion and endplate spurring, Dr. Chabot was of the opinion that these preexisted

petitioner's injury. Dr. Chabot testified that in the physical therapy there is only one incident where petitioner experiences some tingling and numbness in his fingers while doing pull downs with a pulley. He noted that this was the only mention he saw of any symptoms into the left upper extremity that would be suggestive of any radiculopathy. He added that he saw no mention by Dr. Paletta, Dr. Gornet, the physical therapist, or the occupational therapist of neck pain radiating into the left upper extremity which could be suggestive of an acute radiculopathy. Based on this, Dr. Chabot was of the opinion that this would not support the presence of an active radiculopathy.

Dr. Chabot opined that the surgery performed by Dr. Gornet to petitioner's cervical spine was not related to the injury on 3/14/20. Dr. Chabot further opined that when he saw petitioner he did not report any significant back complaints, and in fact, had noted a profound improvement in his back and leg complaints following the epidural injections that were performed. He opined that his physical examination of petitioner failed to show any evidence of persisting residuals that he could relate to his alleged work injury. Dr. Chabot opined that petitioner could return to work with a 20 pound lifting restriction, related to his chronic back condition, age and comorbidities, and not his injury on 3/14/20. He was of the opinion that petitioner could return to supervisor or administrative type duties, but not work duties that required repetitive lifting of salt bags, or material weighing up to 50 pounds. He agreed that the treatment to petitioner's left shoulder and low back had been reasonable and necessary to address the complaints of 3/14/20. Dr. Chabot testified that carpal tunnel disease is the most common type of peripheral nerve entrapment, and ulnar nerve neuropathy is the 2nd most common type of peripheral nerve entrapment. He believed that with carpal tunnel disease one can develop tingling and numbness in the fingers usually performing some repetitive activities like pulling down a pulley. He believed a nerve study should have been performed before, or definitely after the surgery, since petitioner still had symptoms on both sides after surgery.

On cross examination Dr. Chabot testified that petitioner showed no signs of symptom magnification or malingering. Dr. Chabot stated that none of the records he reviewed from 2019-2021 contained a history of cervical complaints, and that petitioner did not report any history of lumbar or cervical complaints. Dr. Chabot opined that the mechanism of injury that petitioner described, could possibly aggravate, accelerate, or exacerbate, a cervical spine. Dr. Chabot also agreed that the pain diagram petitioner drew regarding his pain level shortly after the injury described sharp and stabbing pain from between his shoulder blades down over to the left shoulder, and then midway down his left arm. Dr. Chabot was of the opinion that this is a classic pattern for shoulder injury, usually with irritation along the 5th nerve root distribution.

Dr. Chabot opined no causal connection between petitioner's cervical spine and the injury on 3/14/20 due to a lack of any history documenting any specific injury to the neck following the injury, as well as a lack of

documentation that he had specific complaints of neck pain radiating to the upper extremity to suggest he had evidence of a neck injury or active radiculopathy. He was of the opinion that petitioner had only one instance of tingling in his 2nd and 4th digits that could have been consistent with him using the pulley and overdoing it. He was further of the opinion that petitioner did not develop radiculopathy. He only had numbness and tingling in his fingers, and that could have been from a peripheral nerve issue at the wrist, elbow or anywhere. He was of the opinion that it was not specific at all, and was 8 months after the accident. He was of the opinion that it was a soft tissue or inflammation issue that developed because of the exercise he was performing, which were localized to the hand and nothing more.

Dr. Chabot was of the opinion that the overlap between cervical and shoulder symptoms is possible. However, he was of the opinion that the sharp, stabbing symptoms that petitioner had between his shoulder blades and that went down into the trapezius about midway down the arm could not be related to the cervical pathology at C5-C6 and C6-C7, but is related to his significant shoulder injury. He opined that petitioner's complaints at physical therapy in November were never specifically from radiculopathy, but was only generalized pain. Dr. Chabot questioned how it could be suggested that petitioner had a major improvement with his neck surgery, when his examination on 11/4/21 revealed pain patterns which were more extensive than they were shortly after his accident. Dr. Chabot was of the opinion that petitioner's treatment for his cervical spine was reasonable and necessary, irrespective of causation.

With respect to the lumbar spine Dr. Chabot noted that following his epidural injections petitioner had 100% reduction or resolution of his complaints, but on 7/22/21 was still having some back pain, that he was still complaining of when he saw him in November of 2021. However, Dr. Chabot was of the opinion that these complaints were not consistent with his examination that showed no guarding, tenderness or functional restrictions. It is because of this Dr. Chabot was of the opinion that petitioner's low back had returned to his pre-injury baseline. Dr. Chabot was of the opinion that even if petitioner did not have the accident on 3/14/20, he would still give him restrictions of no lifting greater than 20 pounds because he is 67 years old and has a variety of degenerative conditions.

On 11/21/22 the evidence deposition of Timothy Kaver, a certified vocational rehabilitation counselor, was taken on behalf of petitioner. Kaver testified that he would like to return to his regular position with accommodations. To this end, Kaver testified that petitioner made this request to respondent, but had not yet heard back. Kaver testified that petitioner is a highly motivated guy. He further testified that petitioner told him that he makes $41.75 an hour, and works 40 hours a week, and made over $100,000 with his regular salary and overtime. Kaver testified that his charges were reasonable and customary for the services that he rendered in his community and GEOzip area.

On cross examination, Kaver testified that assistance with a job search for petitioner was on hold pending a decision from respondent as to whether or not petitioner could return to work as a Stationary Fireman with accommodations. Kaver testified that to his knowledge no decision had yet been made. Kaver testified that petitioner's job as a Stationary Fireman can be accommodated. Kaver testified that petitioner told him his job as a Stationary Fireman is a light-duty position, but he was always required to perform additional heavy-duty job duties that would typically be performed by the power plant maintenance technician, the stationary engineer, or the chief engineer. Kaver testified that he did not review petitioner's job description, because although he made a request for it from petitioner and respondent, he had not yet received it. He testified that petitioner's request from the State was made at the AEP Office. Kaver testified that he did not review Dr. Chabot's report. Kaver did not know what petitioner would be making today in his position as a Stationary Fireman. Kaver was of the opinion that petitioner was employable, but needed some computer skills to make him a competitive job applicant.

At trial, petitioner testified that prior to his left shoulder surgery, he had pain across his back and shoulder and down his left arm, as well as pain in lower back and down his left arm. He further testified that after his shoulder surgery his left shoulder improved in therapy, but then he reached a plateau, and the condition with his left shoulder and left arm got worse.

Petitioner testified that when he saw Gornet and he recommended cervical spine surgery, that he had pain across the center of his neck and across the back, as well as numbness in the fingers of his left arm. He stated that after surgery his symptoms improved immediately.

At trial, petitioner complained of soreness in his left shoulder with pushing and pulling; minimal numbness and tingling; and pain in his lower back with a lot of bending over. Petitioner testified that he no longer hunts in the deer stand, and no longer farms. He sold his cattle after he got hurt. Petitioner testified that he gets his sons and grandson to help with heavy lifting. Petitioner takes Tramadol for his symptoms. Petitioner denied any new injuries since the date of accident. He alleged that physical therapy increased his symptoms.

Petitioner testified that he currently receives a SERS disability pension. He has not applied for Social Security. He also testified that he has looked for work, but has not found anything. However, petitioner did not offer into evidence any job logs.

**F. IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?**

The parties stipulated that the petitioner's current condition of ill-being as it relates to his left shoulder and lumbar spine is casually related to the injury on 3/14/20. The parties have a dispute as to whether or not

petitioner's current condition of ill-being as it relates to his cervical spine is causally related to the injury on 3/14/20.

Although the parties stipulated on the record that the sole issue as to causation was the petitioner's cervical spine, they both addressed the issue of causation as it relates to the petitioner's low back in their respective proposed decisions. For this reason, the arbitrator will briefly address this issue. The petitioner denied any problems with his low back prior to the injury on 3/14/20. Thereafter, the petitioner had ongoing complaints that worsened over time. For this reason, Dr. Paletta referred petitioner to Dr. Gornet. Petitioner underwent conservative treatment with no lasting improvement. Dr. Gornet opined a causal connection between petitioner's low back condition and his injury on 3/14/20, finding the injury aggravated petitioner's preexisting lumbar condition. Although Dr. Chabot admitted that petitioner sustained an injury to his low back as a result of the accident and needed restrictions for his current low back condition, he opined that no causal connection exists between petitioner's low back and the injury on 3/14/20, claiming that he only sustained a strain/sprain that had resolved. Given that petitioner's low back was asymptomatic prior to the injury on 3/14/20; that his low back pain continued and resulted in left leg pain; and that both Dr. Gornet and Dr. Chabot have indicated that he needs permanent restrictions, the arbitrator adopts the opinions of Dr. Gornet and finds the petitioner's current condition of ill-being as it relates to his lumbar spine is causally related to the injury on 3/14/20.

With respect to petitioner's cervical spine the medical records make no mention of any numbness and/or tingling in the left arm until the physical therapy record of 10/19/20. While in therapy on 10/19/20 petitioner reported some tingling in his upper left extremity with use starting on Friday 10/16/20. On 10/21/20 he reported a tingling and numbness sensation down his arm to his hand on 2 occasions when he rode the stationary bike. On 10/23/20 he stated that the tingling came back into his arm when performing scaption/flexion exercises with a 3 pound weight. Petitioner had no further numbness/tingling complaints until 11/2/20 when he reported tingling in his 2-4 digits when performing pulleys. Thereafter, petitioner had no further tingling or numbness complaints in therapy through his discharge date of 12/23/20. Also, the arbitrator finds it significant that in the 39 therapy visits petitioner had, he had isolated instances of numbness and/or tingling in his arm or fingers on only 4 occasions, while doing specific exercises; that petitioner made no other mention of any numbness/tingling in therapy, or as it relates to his normal activities of daily living; that prior to therapy there was no documentation regarding any neck complaints during any of the prior 7 medical visits he had on 3/14/20, 3/18/20, 3/20/20, 2/23/20, 5/6/20, 5/27/20, or 6/20/20; and, most importantly, that when petitioner was discharged from care by Dr. Paletta on 12/2/20 he had absolutely no complaints of any numbness and tingling in his arms, no neck pain, and, specifically noted that his left shoulder was doing quite well. In

fact, the only real complaints petitioner had when he last saw Dr. Paletta on 12/20/20 was that his lumbar spine and left sided sciatica. It was during this visit that Dr. Paletta placed petitioner at maximum medical improvement for his left shoulder and referred petitioner to Dr. Gornet for his lumbar spine. The arbitrator finds it significant that petitioner had no left shoulder or neck complaints on that date, and Dr. Paletta did not refer petitioner to Dr. Gornet for any neck or left shoulder complaints. The referral to Dr. Gornet was solely for back problems.

Nonetheless, when petitioner initially presents to Dr. Gornet on 12/30/20, he begins treating petitioner for his neck and low back. The arbitrator finds it significant that on that date there are no documented complaints of any specific radiculopathy to the left upper extremity, and petitioner did not have a lot of neck pain. Despite this lack of any documented radiculopathy complaints and minimal neck pain, Dr. Gornet ordered an MRI of the cervical spine, and this is where treatment for petitioner's cervical spine began.

Again, when petitioner next followed up with Dr. Gornet on 2/22/21 his primary complaints remained left buttock, left hip, and left leg. Although petitioner made some mention of neck pain, he again made no complaints of an numbness/tingling or radiculopathy. Despite this lack of any radiculopathy complaints, Dr. Gornet performed a two level fusion at C5-C6 and C6-C7 on petitioner, with a diagnosis of cervical radiculopathy. The arbitrator finds it significant that prior to this surgery petitioner had only four isolated complaints of numbness and/or tingling in his left arm or hand with certain exercises in therapy, 7 months after his injury. Thereafter, the medical records contain no mention of any further complaints of radiculopathy, including when petitioner presented to Dr. Gornet on 12/30/20, and not until after the surgery to his cervical spine. The arbitrator also finds it significant that the first documented mention of any specific neck pain was not until 12/30/20, over 9 months after the injury, when petitioner reported to Dr. Gornet that he did not have a lot of neck pain, and in fact his primary complaints were with respect to his back and leg. The arbitrator questions why Dr. Gornet would race into surgery on petitioner's cervical spine when he had current complaints of radiculopathy, and not much neck pain, rather than first addressing petitioner's lumbar spine, which was his primary concern.

Post-operatively, on 4/14/21 petitioner told Dr. Gornet that the tingling in his arms had improved. However, other than the 4 isolated instances in therapy while he was doing certain exercises from 10/19/20-11/2/20, there is no mention of any tingling in petitioner's arm(s) prior to the surgery on his cervical spine. The arbitrator finds it significant that at his next visit with Dr. Gornet on 10/21/21 petitioner was reporting tingling in his bilateral arms, which he never had prior to the surgery to his cervical spine. It was not until 4/21/22 that Dr. Gornet was of the opinion that the tingling in his arms might be related to a possible peripheral nerve entrapment versus permanent radiculopathy, which was never an issue prior to the cervical spine surgery. In

response to this opinion, Dr. Chabot was of the opinion that Dr. Gornet should have done an EMG/NCS prior to the surgery, and if not done before the surgery, definitely after the cervical spine surgery. Dr. Chabot was of the opinion that a possible peripheral nerve entrapment would not be related to the neck.

Causal connection opinions regarding the relationship between petitioner's cervical spine and the injury on 3/14/20 were offered by both Dr. Gornet and Dr. Chabot.

Dr. Gornet was of the opinion that petitioner noticed increasing intermittent tingling in his left arm after undergoing post-op physical therapy. The arbitrator finds this opinion misleading, as petitioner had only 4 isolated instances of numbness and/or tingling while doing various exercises in therapy from 10/19/20-11/2/20. The arbitrator finds it significant that there are no further documented instances of numbness and/or tingling in petitioner's arm(s) until after the cervical spine surgery. Dr. Gornet opined that the mechanism of injury petitioner reported was consistent with a cervical injury. However, the arbitrator finds it significant that prior to petitioner's first visit with Dr. Gornet on 12/30/20, there was never any mention of any specific neck complaints, and at that time petitioner stated that he did not have a lot of neck pain. Additionally, Dr. Paletta's referral to Dr. Gornet was for petitioner's back complaints, not any neck complaints.

Dr. Gornet opined that after treating petitioner's neck his shoulder symptoms improved. The arbitrator finds this unsupported by the credible medical evidence given that just 8 days before petitioner presented to Dr. Gornet, petitioner told Dr. Paletta that his left shoulder was doing quite well; Dr. Paletta's examination showed no abnormalities at that time; Dr. Paletta had placed petitioner at maximum medical improvement for his left shoulder at that time; and, there were no documented left shoulder complaints in Dr. Gornet's office notes on 12/30/20.

Dr. Gornet opined that the diagnostic tests of petitioner's neck supported a clear structural pathology that could be aggravated, and/or caused by the accident on 3/14/20. However, the arbitrator finds the fact that petitioner had no neck complaints, and only four isolated instances of numbness and/or tingling in his left arm and hand with specific exercises during a 2 week period while in physical therapy 7 months after the injury, do not support such a finding. Dr. Gornet also opines that petitioner's cervical symptoms were dramatically improved following the surgery. However, the arbitrator again notes that there were no cervical complaints from the date of injury on 3/14/20, until petitioner presented to Dr. Gornet on 12/30/20 with minimal neck pain, and no mention of any numbness and/or tingling in his left arm/hand. The arbitrator finds it significant that was not until after the cervical spine surgery that petitioner developed bilateral arm radiculopathy, which he never had prior to the surgery. Dr. Gornet attributed this to the fact that he did not address petitioner's preexisting central stenosis. Dr. Gornet opined that the foraminal herniations were causing petitioner's left shoulder pain.

However, the arbitrator notes that the foraminal stenosis at C5-C6 seen on the MRI was noted as being worse on the right.

Dr. Chabot opined that the records do not support a finding that petitioner sustained a neck injury as a result of the accident on 3/14/20, nor do they support a finding that petitioner sustained an aggravation or exacerbation of the preexisting degenerative changes in his cervical spine as a result of the accident on 3/14/20. Dr. Chabot opined that petitioner's cervical spine condition preexisted the injury on 3/14/20, and that the only mention of any tingling or numbness in the medical records was one instance in October of 2020 where petitioner experienced numbness and tingling in his fingers while doing pull downs with a pulley. (The arbitrator notes that this opinion is not supported by the physical therapy records, which showed 4 isolated instances of numbness and/or tingling in petitioner's left arm/hand while in therapy from 10/19/20-11/2/20). Dr. Chabot opined that this would not support the presence of active radiculopathy, but could have been from a peripheral nerve issue. The arbitrator finds it significant that both Dr. Gornet and Dr. Chabot opined that petitioner's active radiculopathy could be from a peripheral nerve issue that neither opined was casually related to the injury.

Dr. Chabot opined that petitioner's cervical spine condition is not causally related to the injury on 3/14/20. Although Dr. Chabot agreed that an overlap between cervical and shoulder symptoms is possible, he was of the opinion that the sharp, stabbing symptoms that petitioner had between his shoulder blades and that went down into the trapezius about midway down the arm could not be related to the cervical pathology at C5-C6 and C6-C7, but is related to his significant shoulder injury. He opined that petitioner's complaints in physical therapy were never specifically from radiculopathy, but rather generalized pain. Dr. Chabot also questioned how it could be suggested that petitioner had a major improvement after his neck surgery, when his examination on 11/4/21 revealed pain patterns which were more extensive then shortly after his accident.

Based on the above, as well as the credible evidence, the arbitrator finds the opinions of Dr. Chabot more persuasive than those of Dr. Gornet. The arbitrator further finds Dr. Chabot's opinions as they relate to petitioner's cervical spine, more clearly aligned with the credible evidence in this case. The arbitrator finds many of Dr. Gornet's opinions and finding regarding petitioner's cervical spine were based on facts not in evidence. For this reason, the arbitrator adopts the causal connection opinion of Dr. Chabot, and finds the petitioner has failed to prove by a preponderance of the credible evidence that his current condition of ill-being as it relates to his cervical spine is causally related to the injury he sustained on 3/14/20.

**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 parties stipulated that the medical services for petitioner's left shoulder and lumbar spine were reasonable and necessary to cure or relieve petitioner from the effects of his injury on 3/14/20. The parties have a dispute as to whether or not the medical services that were provided to petitioner for his cervical spine were reasonable and necessary and related to the injury on 3/14/20.

Having found the petitioner has failed to prove by a preponderance of the credible evidence that his current condition of ill-being as it relates to his cervical spine is causally related to the injury he sustained on 3/14/20, the arbitrator finds all treatment to petitioner's cervical spine was not reasonable or necessary to cure him from the effects of the injury he sustained on 3/14/20.

Respondent shall pay all reasonable and necessary medical services related to the treatment of petitioner's left shoulder and lumbar spine through 1/10/23, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit for medical benefits that have been paid relative to the petitioner's left shoulder and lumbar spine, 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.

**K. WHAT TEMPORARY BENEFITS ARE IN DISPUTE?**

The parties stipulated that petitioner was paid temporary total disability benefits related to his left shoulder and lumbar spine from 6/16/20 to 9/15/22, in the amount of $146,372.10. A dispute exists as to whether or not petitioner was temporarily total disabled for the period 9/16/22 through 1/20/23.

The petitioner claims the petitioner is entitled to additional temporary total disability benefits for the period 9/16/22 through 1/20/23. The arbitrator finds that as of the 1/20/23 petitioner had permanent restrictions for his lumbar spine that prevented him from returning to his regular job as a Stationary Fireman. As of that date, respondent had not offered or denied any accommodations that would allow him to return to work in that position, nor had respondent offered or denied him any alternative employment. The arbitrator also finds it significant that Kaver testified that he could not begin any job placement services with petitioner until he gets a response from respondent as to whether or not they will approve the "Reasonable Accommodations" that petitioner requested on 5/25/22, or whether or not AEP will work with petitioner to find an alternative State of Illinois light duty job. As of the date of trial, both are still pending.

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner has proven by a preponderance of the credible evidence that he was temporarily totally disabled from 6/16/20-1/20/23, a period of 136 weeks, pursuant to Section 8(a) of the Act. The arbitrator finds the respondent is entitled to a credit of

$146,372.10 for what it has already paid in temporary total disability benefits pursuant to Section 8(a) of the Act.

**L. 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 Stationary Fireman on the date of injury. Both Dr. Chabot and Dr. Gornet agreed that petitioner's restrictions prevent him from returning to work as a Stationary Fireman. However, petitioner testified at trial that he is still waiting to hear back on his "Reasonable Accommodation" request for his job as a Stationary Engineer, and his request for assistance through AEP to find alternate employment with the State. Petitioner has permanent restrictions that prevent him from returning to work as a Stationary Engineer, and although Kaver has indicated petitioner could find some entry level employment with training, he noted that all this is on hold pending a response to petitioner's "Reasonable Accommodation" request, and his request to AEP for alternate employment with the State. For these reasons, the arbitrator gives greater weight to this factor.

With respect to factor (iii), the age of the employee. Petitioner was 66 years old on the date of injury, and 68 years old when he underwent a vocational evaluation on 11/1/22. Petitioner told Dr. Chabot that he wanted to work a total of 20 years for the State to be qualified for the retirement plan. Petitioner began working for respondent in 2005, and was injured in 2020. Therefore, the arbitrator finds that in 2020 the petitioner had planned on working another 5 years with the State before retiring. For these reasons, the Arbitrator gives lesser weight to this factor.

With respect to factor (iv), the future earnings of the petitioner, the petitioner underwent a vocational evaluation performed by Kaver, a vocational counselor. Kaver developed a Vocational Rehabilitation Plan that placed the ranges for the jobs he felt petitioner was capable of performing within his restrictions, from $25,449.00/yr without experience, and $59,805.00/yr with experience. No formal job search assistance was provided to petitioner because Kaver testified that petitioner was waiting to hear back from the State as to

whether or not they would accommodate him in his job as a Stationary Fireman, or find alternate State employment for him. For these reasons Kevar never initiated a formal job search for respondent. Therefore, the arbitrator finds petitioner's future earnings unclear, and for these reasons, the arbitrator gives lesser 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 3/14/20 petitioner sustained a left shoulder injury and aggravation of a preexisting low back condition. With respect to the left shoulder injury petitioner underwent a left shoulder arthroscopy extensive debridement of the superior labrum from the anterior to the posterior, including debridement of the retained biceps stump; subscapularis repair; and subacromial decompression, bursectomy, and acromioplasty. Petitioner followed-up post-op with Dr. Paletta through 12/20/20. At that time, Dr. Paletta released petitioner to work without restrictions and placed him at maximum medical improvement.

With respect to his low back petitioner underwent an MRI that demonstrated a multilevel disc pathology, significant disc herniation at L4-L5 with left foraminal stenosis resulting in L4 nerve root compression. These findings were consistent with petitioner's symptoms of sciatica. Dr. Paletta gave him restrictions of no standing or walking for more than 30 minutes an hour, and no material handling of more than 20 pounds. For his low back complaints with radiculopathy, petitioner underwent transforaminal epidural steroid injections on the left side at L3-L4, and L4-L5, as well as a left L4-L5 ILESI. Petitioner continued with low back complaints and no further treatment was rendered. Dr. Gornet was of the opinion that petitioner's low back complaints were difficult to solve. As a result, he recommended light duty with a 20 pound limit on lifting, no repetitive bending or lifting, alternating between sitting and standing as needed, and no overhead work. Dr. Chabot was of the opinion that petitioner could return to work with a 20 pound lifting restriction.

At trial, petitioner complained of soreness in his left shoulder with pushing and pulling; minimal numbness and tingling; and pain in his lower back with a lot of bending over. Petitioner testified that he no longer hunts in the deer stand, and no longer farms. He sold his cattle after he got hurt. Petitioner testified that he gets his sons and grandson to help with heavy lifting. Petitioner takes Tramadol for his symptoms.

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 30% loss of use to his person as a whole pursuant to Section 8(d)2 of the Act, as it relates to petitioner's left shoulder and low back injuries sustained on 3/14/20.

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 21WC001864 |
| Case Name | Sheena Myers v.<br>Wahl Clipper |
| Consolidated Cases | |
| Proceeding Type | Petition for Review |
| Decision Type | Commission Decision |
| Commission Decision Number | 23IWCC0524 |
| Number of Pages of Decision | 12 |
| Decision Issued By | Carolyn Doherty, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Jason Esmond |
| Respondent Attorney | Kevin Luther |

DATE FILED: 12/12/2023

/s/Carolyn Doherty, Commissioner

Signature

STATE OF ILLINOIS )
) SS.
COUNTY OF ROCK ISLAND )

| | |
|---|---|
| ☒ 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

SHEENA MYERS,
Petitioner,

vs. NO: 21 WC 1864

WAHL CLIPPER,
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, notice, causal connection, temporary total disability, medical expenses, 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 April 5, 2023 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.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $7,700.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

**December 12, 2023**

O: 12/07/23
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 | 21WC001864 |
| Case Name | Sheena Myers v. Wahl Clipper |
| Consolidated Cases | |
| Proceeding Type | |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 10 |
| Decision Issued By | Adam Hinrichs, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Jason Esmond |
| Respondent Attorney | Kevin Luther |

DATE FILED: 4/5/2023

**THE INTEREST RATE FOR THE WEEK OF APRIL 4, 2023 4.70%**

/s/ Adam Hinrichs, Arbitrator

Signature

STATE OF ILLINOIS )
)SS.
COUNTY OF **Rock Island** )

☐ 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**

**Sheena Myers**
Employee/Petitioner

v.

**Wahl Clipper**
Employer/Respondent

Case # **21 WC 1864**

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 **Adam Hinrichs**, Arbitrator of the Commission, in the city of **Rock Island**, on **March 9, 2023.** 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 the date of accident, **January 15, 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 her accident.

In the year preceding the Petitioner's injury, Petitioner's average weekly wage was **$891.09.**

On the date of accident, Petitioner was **37** 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 $**0** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit of $**10,715.64** under Section 8(j) of the Act.

**ORDER**

The Respondent shall pay the petitioner temporary total disability benefits of $ **594.06** /week for **8 & 4/7** weeks, from **July 10, 2020 through September 8, 2020** , as provided in Section 8(b) of the Act.

The Respondent shall pay the petitioner permanent partial disability benefits of $ **534.65** / week for 23.75 weeks as Petitioner sustained **12.5%** loss of use of the right hand pursuant to Section 8(e) of the Act.

Respondent shall pay all outstanding medical bills for Petitioner's reasonable and necessary medical care, as outlined herein and in Petitioner's exhibits, pursuant to Sections 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 IWCC. The Respondent shall be given a full credit for payments made by its group health insurance carrier, and shall hold Petitioner safe and harmless from any and all claims related to said payments, pursuant to Section 8(j).

**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

**APRIL 5, 2023**

## FINDINGS OF FACT

Sheena Myers ("Petitioner") testified that she started working for Wahl Clipper ("Respondent") beginning in June 2006 as a temporary worker. On July 10, 2006, Petitioner was hired by Respondent as a full-time employee. Petitioner typically worked 50 hours a week with occasional work on Saturdays. Petitioner worked as an assembly line worker, and occasionally worked as an inspector after 2011.

Over the two years prior to her alleged work injury, she worked on 3rd Operation ("Op") and 4th Op. Petitioner testified there were 8 operations on the line. On 3rd Op, Petitioner would assemble blades onto electric hair clippers. A clipper would come to her on an assembly line. She would grab it and put blades onto the clipper. She would tune the clipper by reaching above her with her right hand and grabbing an air gun. She would then tighten screws with the air gun until the clipper turned off. After the blades were attached, she took a handheld screwdriver, in her right hand, and attached another screw until it was tight. She would then send the clipper down the line. While on 3rd Op, she would repeat that portion of the assembly all day, outfitting between 100 and 200 clippers per hour.

Petitioner was also frequently assigned to work on 4th Op. In that position, she would use a small wooden mallet, weighing 1-2 pounds, to attach and line up blades on the hair clipper. She would hold the mallet in her right hand and strike the blades to line them up. Petitioner testified that sometimes it would take a lot of force to move the blades. Petitioner testified she would have to hit the blades between 3 and 20 times to get them lined up correctly. Once the blades were lined up, she would use an air screwdriver in her right hand to tighten the blades down with screws. Again, she would outfit between 100 and 200 clippers per hour at this position.

At the above rates of assembly, over the course of a 10-hour work day, Petitioner would outfit between 1000 and 2000 clippers in 3rd and/or 4th Op.

Petitioner testified that she would also occasionally work as an inspector for Respondent. When working as an Inspector, she would double check the work done on 3rd and 4th Op. She used a handheld screwdriver in her right hand to make sure the screws attached by someone on 3rd and 4th Op were done correctly and sufficiently. Petitioner testified that she mainly worked on 4th Op and as an Inspector during the last year of her employment with the Respondent.

Petitioner testified that with these job duties, she began to experience stiffness in her right wrist and her fingers, making it difficult to bend her fingers. The symptoms began around the end of 2019 and continued to worsen. Petitioner testified that she went to the plant nurse at Respondent on or about January 15, 2020, and related her complaints. She testified that the procedure to report an injury with Respondent is to report it to the plant nurse.

As documented in Respondent's record reviewer's report, Petitioner sought treatment at Whiteside County Community Health. (Rx. 1, Dep. Ex. 2). Petitioner reported bilateral shoulder pain radiating down her arms and hands for the past week. She reported doing repetitive work. Petitioner was taken off work for one week, to return on March 12, 2020. (Rx. 1, Dep Ex. 2). Petitioner testified she return to her regular job after being off work for the week.

On March 19, 2020, Petitioner called Whiteside County Community Health, advising that Gabapentin was not working, and she continued to have pain in her wrist, elbow, and shoulder. (Rx. 1, Dep. Ex. 2).

Petitioner testified that she was furloughed due to the COVID 19 pandemic beginning at the end of March of 2020. She did not work during that time until her return to work after surgery.

On May 20 and June 3, 2020, Petitioner sought treatment at Ortho IL, and was seen by Dr. Brian Foster. Petitioner reported right wrist pain for 4-5 months. Petitioner reported her symptoms were due to repetitive use at work. Dr. Foster reviewed an EMG performed on April 8, 2020 which was consistent with right carpal tunnel syndrome. Dr. Foster diagnosed carpal tunnel syndrome and recommended surgery. (Px. 2, pp. 43-48).

Petitioner was seen by Dr. Jasek for a rheumatology consult on June 29, 2020 and assessed with inflammatory polyarthropathy, generalized osteoarthritis, and carpal tunnel syndrome. (Px. 2).

On July 10, 2020, Petitioner underwent right carpal tunnel release with Dr. Foster. She followed up on July 22, 2020 and was restricted to left hand duty only. On August 20, 2020, Dr. Foster noted that Petitioner's right hand/wrist symptoms were improving and she was no longer having numbness and tingling. Due to some left-handed symptomology, he recommended an EMG of the left hand. The EMG of the left-hand was performed on August 31, 2020 and was interpreted to be normal. (Px. 2).

On September 8, 2020, Dr. Foster noted Petitioner had throbbing in both her hands with swelling and clicking in her elbows. He prescribed a Medrol Dosepak and Meloxicam, and released Petitioner to work without restrictions. (Px. 2).

Petitioner returned to work for Respondent, in her regular job duties, in December 2020. She was able to perform her regular job duties without issue and with no need for additional treatment.

At Respondent's request, Dr. Michael Birman provided a records review report on April 21, 2021. Dr. Birman opined that Petitioner's carpal tunnel syndrome was unrelated to her work duties. Dr. Birman noted that Petitioner's job duties were repetitive, but were not sufficiently forceful to be causative factor in the development of carpal tunnel syndrome. Dr. Birman noted that work activities can be a factor if repetitive and forceful gripping is done in a consistent and sustained manner throughout the workday over a significant period of time. Dr. Birman opined that Petitioner had multiple other risk factors for the development of carpal tunnel syndrome. Dr. Birman agreed with Dr. Foster's carpal tunnel diagnosis and opined that the surgical release procedure had been reasonable. Dr. Birman reviewed a job video and description, but did not evaluate

Petitioner or discuss her job duties with her. Dr. Birman noted that it was not Petitioner in the job video he reviewed. Dr. Birman testified that if Petitioner's job duties were different that those documented in the job video it could change his opinion. Dr. Birman testified that Petitioner suffered no permanent impairment as a consequence of her carpal tunnel syndrome diagnosis and surgery, however, no AMA impairment report was included in the record. (Rx. 1).

On June 28, 2021, Dr. Foster provided a narrative report opining that Petitioner's carpal tunnel syndrome was causally related to her work activities. On February 9, 2022, the parties deposed Dr. Foster. He testified that based on Petitioner's work activities as an assembly line worker for approximately 14 years, and her using a screwdriver to assemble approximately 100 clippers per hour or hitting a clipper blade with a mallet approximately 100 times per hour, that her work was a causative factor in the development of carpal tunnel syndrome. Dr. Foster noted that high hand/wrist repetition rates are associated with increased risk of developing carpal tunnel syndrome. (Px. 3, pp. 79-81).

The Arbitrator reviewed the job videos submitted by Respondent into the record. Each of the three job videos are 50 seconds or less. The videos depict Op 2, Op 3, and Op 4 on Respondent's line. Petitioner testified that her job usually was on Op 3 and Op 4. The operations depicted indicate the need for fine manual dexterity and well as gripping and grasping of the light tools employed with minimal force.

Petitioner testified that the surgery helped relieve her right hand/wrist complaints. Petitioner testified that she continues to have some swelling and stiffness in her right hand, for which she takes over the counter medications like ibuprofen, but has not required additional treatment since September 8, 2020. Since leaving Respondent, she has worked assembly line jobs, similar to her work at Respondent's facility, without significant symptoms.

## CONCLUSIONS OF LAW

**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:**

Petitioner has proven by the preponderance of the credible evidence that her job duties did contribute to her diagnosis of carpal tunnel syndrome. The Arbitrator relies upon the records and opinions of the Petitioner's treating physician, as well as Petitioner's testimony.

Petitioner's initial treatment record on March 5, 2020 noted pain in both shoulders and hands. At that time, she reported doing repetitive work. When seen by Dr. Foster on May 20 and June 3, 2020, she reported pain in her right wrist for 4-5 months, associating it with her repetitive use at work. Petitioner testified regarding her assembly line work. Dr. Foster explained his understanding of Petitioners job duties, using screwdrivers and a small mallet, to assembly hair clippers throughout her day. He noted she assembled approximately 100 per hour. Petitioner testified she would assembly between 100 and 200 per hour.

The job description relied upon by Respondent's record reviewer, Dr. Birman, was not substantially different than Petitioner's testimony. Dr. Birman also reviewed job videos that documented repetition work assembling clippers. Petitioner testified that Dr. Birman appears to review assembly of shavers, as opposed to clippers, but it was not disputed that Petitioner spend her days assembling clippers, using air screwdrivers, handheld screwdrivers, and a small wooden mallet.

Petitioner testified she initially went to the nurse at Respondent with her complaints of pain in her right wrist, as required by company injury-reporting policy, but continued working her regular job through the end of March 2020 when she was laid off due to COVID. Petitioner's testimony was unrebutted.

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. The Arbitrator observed the Petitioner and found her to be sincere, consistent and credible. Petitioner's testimony regarding her job duties, was supported by the job videos; and her associated complaints are supported by the medical in the record.

It is clear from the records and testimony that Petitioner performed repetitive job duties in her employment with Respondent, and those repetitive job duties caused her pain in her right wrist. Petitioner reported her complaints to the Respondent when she became aware of the nexus between her complaints and her job duties.

The Petitioner has proven by the preponderance of the evidence that she sustained an accident to her right hand/wrist arising out of and in the course of her employment for the Respondent.

The Arbitrator finds that Petitioner sustained a repetitive trauma injury to her right hand that arose out of and in the course of her employment with Respondent manifesting on or about January 15, 2020.

**Issue (E): Was timely notice of the accident given to Respondent? The Arbitrator finds as follows:**

Petitioner testified that she reported her hand symptoms to the plant nurse on or about January 15, 2020. She testified it was Respondent's policy to report injuries to the plant nurse. Petitioner was taken off work for a week after seeing Whiteside County Community Health on March 5, 2020. Petitioner's credible testimony that she notified the plant nurse of her symptoms as was required by Respondent was unrebutted.

The Arbitrator finds that Petitioner provided timely notice to Respondent of her work injury.

**Issue (F): Is Petitioner's current condition of ill-being causally related to the injury? The Arbitrator finds as follows:**

Incorporating the above, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to her January 15, 2020 work injury. The Arbitrator relies upon the persuasive opinion of Dr. Foster and Petitioner's credible testimony.

"The fact that an employee may have suffered from a preexisting condition will not preclude an award if the condition was aggravated or accelerated by the employment. The employee need not prove employment was

the sole causative factor or even that it was the principal causative factor, but only that it was a causative factor in the resulting injury." Williams v. Industrial Com., 85 Ill. 2d 117, 122 (1981).

Petitioner's treating physician, Dr. Foster, and Respondent's examiner, Dr. Birman, are in general agreement regarding Petitioner's job duties. Dr. Foster found that Petitioner's repetitive job duties, using a screwdriving and mallet to assemble approximately 100 clippers per hour was sufficient to cause or aggravate her carpal tunnel syndrome. Dr. Birman opined that Petitioner's job duties were repetitive, but without sufficient force to be considered a causative factor in Petitioner's development of carpal tunnel syndrome.

Dr. Birman never examined the Petitioner, but agreed with Dr. Foster's diagnosis and course of care.

Petitioner described some force asserted in using a screwdriver to tighten the blades onto the clippers. This minimal and frequent application of force is confirmed in the job video offered by Respondent. Petitioner also described having to forcefully strike the blades with a small mallet to align them correctly. She described using the screwdriving and mallet with her right hand. Petitioner credibly testified to assembly line work which was very repetitive, outfitting 100 to 200 clippers per hour.

The record is clear that Petitioner's job is highly repetitive and requires a frequent application of some force in the performance of her job duties. Dr. Foster considered Petitioner's job duties as described and found them to be a contributing cause or aggravating factor in Petitioner's development of carpal tunnel syndrome. The Arbitrator finds the opinion of Petitioner's treating physician, Dr. Foster, to be persuasive on the issue of causation.

Given the totality of the evidence, the credible testimony of the Petitioner, the medical evidence in the record, and the opinion of Dr. Foster which relied on multiple physical exams and who was in the best position to evaluate the Petitioner, the Arbitrator finds that Petitioner's current condition of ill-being in her right hand/wrist is causally related to her repetitive trauma work injury manifesting on or about January 15, 2020.

**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? The Arbitrator finds as follows:**

Incorporating the above, the Arbitrator finds that the medical services provided to Petitioner for her right hand/wrist were reasonable and necessary through September 8, 2020. The Arbitrator notes that Dr. Birman, Respondent's record reviewer, agreed that Petitioner's right carpal tunnel release procedure was reasonable and necessary. The Arbitrator notes that Petitioner's Exhibit 4 contains treatment at CGH Medical Center after September 8, 2020, for unrelated body parts. Having found Petitioner to be at MMI as of September 8, 2020, only treatment related to her right carpal tunnel syndrome is awarded through her MMI date.

Medical care was paid for by Blue Cross Blue Shield, Petitioner's insurance through Respondent. Respondent is entitled to a credit for benefits paid. The only outstanding charges related to Petitioner's treatment are balances after group insurance payments. Balances sent to collection after group payments at Ortho IL from June 3, 2020 through September 8, 2020 total $452.54. Balance at Whiteside County Community Health

totals $25.00 for treatment on March 5, 2020. Balance at OSF Parkview for an EMG performed on April 8, 2020, totals $16.80.

The Respondent shall pay these outstanding medical bills for Petitioner's reasonable and necessary medical care for her right hand/wrist, pursuant to Sections 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 IWCC.

Pursuant to Section 8(j), the Respondent shall be given a full credit for payments made by its group health insurance carrier, and shall hold Petitioner harmless for said payments.

**Issue (K): What temporary benefits are in dispute? The Arbitrator finds as follows:**

Incorporating the above, the Petitioner underwent right carpal tunnel release on July 10, 2020, and was taken off work. On July 22, 2020 she was restricted to left hand duty only. As of September 8, 2020, Petitioner was released at maximum medical improvement and allowed to return to work without restrictions, and subsequently did return to work full-duty for Respondent. Petitioner's light duty period was not accommodated by Respondent.

The Arbitrator finds that Petitioner is entitled to TTD benefits from July 10, 2020 through September 8, 2020, at her weekly TTD rate of 594.06 per week.

**Issue (L): What is the nature and extent of the injury? The Arbitrator finds as follows:**

Pursuant to Section 8.1(b) of the Act, in assessing the nature and extent of Petitioner's injury, the Arbitrator now considers the following five factors:

1) An impairment report prepared by a physician using the most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment.": While Respondent's examiner testified that Petitioner sustained no permanent impairment as a consequence of this injury, no AMA report was entered in the record. The Arbitrator has considered this factor and lends it no weight.

2) The occupation of the injured employee: Petitioner worked for Respondent as an assembler for approximately 14 years. After her surgery, she returned to her regular position and has since found subsequent, similar employment as an assembler. The Arbitrator has considered this factor and lends it some weight.

3) The age of the employee at the time of the injury: Petitioner was 37 years old at the time of her January 15, 2020 injury. The Arbitrator has considered this factor and lends it some weight.

4) The employee's future earning capacity: Petitioner has worked in similar employment positions post-surgery with no reported decrease in future earning capacity. The Arbitrator has considered this factor and lends it little weight.

5) Evidence of disability corroborated by the treating medical records. Petitioner testified that her right carpal tunnel surgery was helpful in reducing her complaints. She reported some ongoing swelling and stiffness in her right hand and fingers but has not required additional treatment since being released from care on September 8, 2020. The Arbitrator has considered this factor and lends it more weight.

After considering the evidence in the record, and the factors enumerated in Section 8.1(b) of the Act, the Arbitrator finds that Petitioner is entitled to 12.5% loss of use of the right hand pursuant to Section 8(e) of the Act.

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 18WC020644 |
| Case Name | Anthony Marshall v.<br>AV Chicago |
| Consolidated Cases | |
| Proceeding Type | Petition for Penalties |
| Decision Type | Commission Decision |
| Commission Decision Number | 23IWCC0525 |
| Number of Pages of Decision | 5 |
| Decision Issued By | Maria Portela, Commissioner |

| | |
|---|---|
| Petitioner Attorney | James Marszalek |
| Respondent Attorney | Kevin Gottlieb |

DATE FILED: 12/12/2023

/s/Maria Portela, Commissioner

Signature

23IWCC0525

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 MARSHALL,

Petitioner,

vs. NO: 18WC020644

AV CHICAGO,

Respondent.

DECISION AND OPINION ON PETITION FOR PENALTIES

This matter comes before the Commission on Petitioner's "Petition For Penalties Under [Section] 19(k)…" (hereafter "Petition"), filed on June 22, 2023. A hearing was held before Commissioner Maria Portela on October 20, 2023, in Chicago, Illinois and a record was made.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1) On March 27, 2023, a settlement contract was approved in this matter by Arbitrator Vazquez. The contract provided that proceeds were to be distributed as follows:

| | |
|---|---|
| Total amount of settlement | $3,398.28 |
| Deduction: Attorney's fees | $679.00 |
| Deduction: Petitioner's costs | $45.00 |
| Deduction: Other (explain) | $0.00 |
| Amount employee will receive | $2,674.28 |

2) Based on statements by the attorneys at the hearing on this matter (*T.21*), it appears that Petitioner's attorney forwarded, directly to Respondent's insurance adjuster at Liberty Mutual, a letter (*Px1, Rx2*), dated April 5, 2023, that Petitioner's attorney had received from the Child Support Services section of the Illinois Department of Healthcare and Family Services (hereafter "IHFS"). This letter informed Petitioner's attorney that IHFS agreed to accept $1,604.75 in satisfaction of its lien on Petitioner's workers' compensation settlement. Petitioner's attorney was instructed to mail the payment to the Collection & Asset Recovery Unit at the address provided.

3) On May 1, 2023, three checks were issued by Respondent's insurance carrier to the following parties:

| | | |
|---|---|---|
| Petitioner | $1,069.53 | (Px3) |
| Petitioner's attorney | 724.00 | (Px4) |
| IHFS | 1,604.75 | (Px8, Rx1) |
| Total | $3,398.28 | |

4) On May 24, 2023, Petitioner's attorney emailed Respondent's attorney stating, "This case …was settled for $3,398.28. We received checks totaling $1,793.53. I presume that Liberty took the liberty of paying the $1,604.75 child support lien. We need to see proof of payment." *Px5*. Respondent's attorney replied, "Thanks for the email. I don't handle the disbursement of the checks, but I've reached out to the adjuster to get an answer for you." *Id*.

5) On June 22, 2023, Petitioner filed the penalties petition at issue here. *Px6*.

6) On June 28, 2023, the Liberty Mutual adjuster emailed Petitioner's attorney (with a copy to Respondent's attorney) details regarding the check and stating, "Payment was issued in the amount of $1604.75 on 5/1/2023 to IL HFS, along with a copy of the agreement letter from IL HFS that was provided by your office. Please let me know if you have any questions." *Px7*.

7) Petitioner's attorney stated at the hearing that he subsequently discussed with Respondent's attorney that the June 28th email was not adequate proof of payment and he wanted to see "a canceled check with the Department of Healthcare and Family Services," which he received on August 9, 2023." *T.11, Px8.*

8) Petitioner's attorney represented at the hearing that, at that time, he still did not know if Petitioner's IHFS account had been credited with the payment because the check did not reference Petitioner's name or IHFS account number. *T.11* Ultimately, Petitioner's attorney was "able to confirm that it was [properly credited], but it wasn't until after August 9th, 2023." *Id*.

9) On September 7, 2023, Respondent's attorney emailed Laurie Bartholomew, a Child Support Specialist with IHFS, inquiring about whether Petitioner's account had been credited with the $1,604.75 check that had been sent to IHFS. *Rx3*.

10) On September 8, 2023, Ms. Bartholomew emailed Respondent's attorney to inform him that the check had been inadvertently posted as "a regular income withholding rather than a lien payment" and it had been applied to Petitioner's case on May 11, 2023. *Rx3*.

Petitioner asks that penalties under §19(k) of the Act be assessed against Respondent because, although the entire settlement was paid in full on May 1, 2023, it was unreasonable for the insurance adjuster to mail the check in satisfaction of the IHFS lien directly to IHFS instead of to Petitioner's

attorney.

Petitioner's attorney acknowledged that IHFS was the entity that would have received the payment regardless of who sent it (*T.13*) but argues that this was not done in accordance with the terms of the settlement contract nor with IWCC Rule 9080.20 which states, "Unless otherwise directed by the Petitioner or the Commission, the Respondent, its agent, or insurance carrier shall deliver the first payment of accrued compensation following an award or settlement to the offices of the attorney of record for the Petitioner." *T.14-15, 28, 50 Illinois Admin. Code 9080.20*.

The Commission finds that, under the limited circumstances here, Respondent's behavior was not unreasonable or vexatious and Petitioner is not entitled to penalties under §19(k) of the Act. We acknowledge that the settlement contract states, "The respondent agrees to this settlement and will pay the benefits to the petitioner or the petitioner's attorney, according to the terms of this contract, promptly after receiving a copy of the approved contract." *Px2 at 3*. The contract is also silent regarding the IHFS lien. *Px2*. However, the evidence indicates that Petitioner's attorney forwarded, directly to the insurance adjuster, the April 5, 2023 IHFS letter which included the amount to be sent to IHFS along with the address. A check in that amount was timely issued on May 1, 2023 payable to IHFS.

Petitioner argues that the lien release letter directs *Petitioner's* attorney to mail the payment to IHFS and that the insurance adjuster breached the terms of the settlement contract by sending the check directly to IHFS instead of to Petitioner's attorney. At the hearing, Petitioner's attorney argued that his purpose in sending the IHFS letter to Liberty Mutual's adjuster was "letting the carrier know that it was okay with the Department of Human Services to release the funds." *T.21-22.* However, there is no accompanying correspondence in evidence to indicate whether the adjuster was informed that the IHFS letter was being forwarded for this limited purpose and that the adjuster was still supposed to mail the check to Petitioner's attorney.

Therefore, we do not find Respondent's insurance adjuster's issuance of the child support lien check directly to IHFS to be unreasonable or vexatious under the circumstances here. To the contrary, in the absence of any directive otherwise, it was reasonable for the adjuster to interpret that forwarded letter as a direction, or at least an authorization, by Petitioner's attorney under Rule 9080.20 to mail the IHFS check directly to IHFS. This conclusion is supported by Petitioner's attorney's May 24, 2023 email indicating, "I presume that Liberty took the liberty of paying the $1,604.75 child support lien."

It is unfortunate that, in a situation where Respondent made full and timely payment of the settlement contract, miscommunication occurred regarding who was to send the child support lien check to IHFS. Petitioner's attorney stated, "we ended up wasting a lot of time trying to figure out where this check actually went, was it actually received, was it actually credited to the Petitioner's account." T.*9-10*. Although there was a delay in obtaining the canceled check and verifying with IHFS that Petitioner's account had properly been credited, as Respondent's attorney pointed out, "had Petitioner just checked his own account he would have seen that the money was credited which is something that I had mentioned to Counsel during our conversations about this case saying that no one was in a better position to check the status of a child support balance and any payments under that account than his client who is the owner of the account." *T.25-26*.

For the above reasons, we find that Respondent's behavior was not unreasonable or vexatious.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's "Petition For Penalties Under [Section] 19(k)…" is hereby denied.

Since no award was made, no bond is required 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.

**December 12, 2023**

/s/ *Maria E. Portela*

SE/

R: 10/20/23

49

/s/ *Amylee H. Simonovich*

/s/ *Kathryn A. Doerries*

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 21WC029847 |
| Case Name | Savannah Sonnenfeld v.<br>Hardee's |
| Consolidated Cases | |
| Proceeding Type | Petition for Review under 19(b)<br>Remand Arbitration |
| Decision Type | Commission Decision |
| Commission Decision Number | 23IWCC0526 |
| Number of Pages of Decision | 21 |
| Decision Issued By | Carolyn Doherty, Commissioner |

| | |
|---|---|
| Petitioner Attorney | David Jerome |
| Respondent Attorney | Michael Karr |

DATE FILED: 12/12/2023

/s/Carolyn Doherty, Commissioner

Signature

| | |
|---|---|
| STATE OF ILLINOIS ) | ☒ Affirm and adopt (no changes) |
| ) SS. | ☐ Affirm with changes |
| COUNTY OF ) | ☐ Reverse |
| MADISON ) | |
| | ☐ 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

SAVANNAH SONNENFELD,

Petitioner,

vs. NO: 21 WC 29847

HARDEE'S

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under Section 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, prospective medical care, 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).

The Commission writes additionally on the issue of prospective care to clarify that Respondent shall authorize and pay for the left shoulder arthroscopy with likely labral repair and possible biceps tenodesis recommended by Dr. Solman, as well as the reasonable and necessary care attendant thereto.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 30, 2023, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay the left shoulder arthroscopy with likely labral repair and possible biceps tenodesis recommended by Dr. Solman, as well as the reasonable and necessary care attendant thereto.

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 Section 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 is hereby fixed at the sum of $27,400.00. 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.

**December 12, 2023**

o: 12/07/23
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 | 21WC029847 |
| Case Name | Savannah Sonnenfeld v. Hardee's |
| Consolidated Cases | |
| Proceeding Type | 19(b) Petition |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 18 |
| Decision Issued By | Jeanne AuBuchon, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | David Jerome |
| Respondent Attorney | Michael Karr |

DATE FILED: 3/30/2023

**THE INTEREST RATE FOR THE WEEK OF MARCH 28, 2023 4.65%**

/s/ Jeanne AuBuchon, Arbitrator

Signature

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)**

**Savannah Sonnenfeld**
Employee/Petitioner

v.

**Hardee's**
Employer/Respondent

Case # **21** WC **029847**

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 **Jeanne L. AuBuchon**, Arbitrator of the Commission, in the city of **Collinsville**, on **11/28/22**. 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, **8/24/21**, 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 $**21,309.25/45**; the average weekly wage was $**473.54**.

On the date of accident, Petitioner was **19** 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 **$1,262.76** for TTD, $**0** for TPD, $**0** for maintenance, and $**5,247.84** for medical benefits, for a total credit of $6,510.60.

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

**ORDER**

Respondent shall pay Petitioner temporary total disability benefits of **$315.69**/week for **61 1/7** weeks, commencing 9/27/21 through 11/28/22 as provided in Section 8(a) of the Act.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, as listed in Petitioner's Exhibit 11, as provided in section 8(a) and 8.2 of the Act.

Respondent shall authorize medical treatment consistent with the recommendation of Dr. Corey Solman.

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.

Jeanne L. AuBuchon

Signature of Arbitrator

**MARCH 30, 2023**

ICArbDec19(b)

## PROCEDURAL HISTORY

This matter proceeded to trial on November 28, 2022, pursuant to Sections 19(b) and 8(a) if the Illinois Workers' Compensation Act (hereinafter "the Act"). The issues in dispute are: 1) the causal connection between the accident and the Petitioner's left shoulder condition; 2) payment of medical expenses; 3) entitlement to TTD benefits from September 27, 2021, through November 28, 2022; and 4) entitlement to prospective medical care to the Petitioner's left shoulder.

## FINDINGS OF FACT

At the time of the accident, the Petitioner was 19 years old and employed with the Respondent as a manager. (AX1, T. 10) On August 24, 2021, the Petitioner was stocking the fry freezer when she grabbed a box of fries, causing a box of hash browns to fall on the ground that in turn caused the Petitioner to jump and jar her left shoulder into a shelving unit. (T. 11) She said she started having issues with being able to lift anything above her head, her arm started going numb, and there was increased pain where she struck her shoulder. (T. 12) She said she never had any problems or treatment for her shoulder in the past. (T. 14-15)

The next day, the Petitioner reported the accident and performed her regular duties. (T. 13, 31, PX2) She said she was required to talk with a nurse, who told her to get medical treatment. (T. 40) On August 26, 2021, the Petitioner went to the St. Elizabeth's UrgiCare and complained of shoulder pain. (T. 14, PX3) X-rays were negative. (PX3) The Petitioner was diagnosed with sprain of the shoulder and upper arm, prescribed medications and instructed to alternate ice and heat and follow up with her doctor. (Id.)

The Petitioner testified that the Respondent sent her to Dr. Andrew Brown, an orthopedic surgeon at Professional Athletic & Orthopedics. (T. 16, PX4) The Petitioner saw Dr. Brown on September 8, 2021, and he found she likely had a sprain of the rotator cuff. (PX4) Dr. Brown

prescribed an anti-inflammatory, referred the Petitioner for physical therapy, ordered an MRI and gave light-duty work restrictions of a 5-pound lifting restriction to waist level only and no overhead lifting with the left upper extremity. (Id.)

The MRI was performed on September 16, 2021, and showed a very small interstitial tear in the posterior fibers of the infraspinatus tendon (part of the rotator cuff that runs across the back of the head of the humerus). (PX5) The Petitioner underwent physical therapy at ApexNetwork from September 13, 2021, through October 14, 2021, for a total of 12 visits. (PX6) The Petitioner reported pain ranging from 7/10 to 10/10 throughout therapy but was mostly able to complete the exercises. (Id.) At one point, the Petitioner rated her pain at 7/10, but after the therapist explained the pain scale to her, she rated it at 3-4/10. (Id.) Her range of motion improved during therapy. (Id.)

The Petitioner returned to Dr. Brown on September 27, 2021, and reported pain during therapy with nausea and queasiness. (PX4) Dr. Brown performed a steroid injection to the Petitioner's shoulder and prescribed another anti-inflammatory. (Id.) The Petitioner testified that the injection made her arm go numb for about two weeks. (T. 17) On September 28, 2021, she reported to her physical therapist that she experienced pain after the injection and if she moved her arm just slightly, she was in excruciating pain. (PX6) On September 30, 2021, the Petitioner reported to her physical therapist that she was in more pain since the injection and that she was going to the emergency room because of the pain. (Id.) She said she was jumped on by her Great Dane, jostling her shoulder. (Id.) She reported vomiting because of the pain. (Id.) The Petitioner did not recall being jumped on by her Great Dane dog. (T. 33) She said that even if her dog jumped on her, there was no significant change in her shoulder. (T. 43) She acknowledged going

to the emergency room at the end of September because she was having excruciating pain and her arm was going out on her. (T. 33-34)

At a follow-up visit with Dr. Brown on October 6, 2021, Dr. Brown reported that the Petitioner had a partial response to therapy. (PX4) He said he spoke with the therapist, who said the Petitioner missed some visits due to her cat and dog jumping on her shoulder. (PX4) The Petitioner did not recall missing physical therapy visits for this reason but said she missed visits because her pain was really bad. (T. 34) The Petitioner testified that physical therapy made her shoulder worse. (T. 17)

At the October 6, 2021, visit, Dr. Brown discussed consideration of arthroscopy with decompression and possible rotator duff repair if physical therapy failed. (PX4) The Petitioner returned to Dr. Brown on October 21, 2021, and reported that she felt a pop in her shoulder on October 14, 2021, and has not been back to work and limited her physical therapy. (Id.) She said her pain was mostly 10/10 and only went down to 7/10. (Id.) Dr. Brown wrote that the reported pain levels did not match the Petitioner's affect. (Id.) He wanted the Petitioner to go to work with restrictions of no lifting with the left arm and continue therapy. (Id.) He discussed with the Petitioner that the findings on the MRI were not representative of a complete tendon tear. (Id.) He stated that if the Petitioner failed the next two weeks of therapy, he would repeat the MRI. (Id.) He again discussed surgery with the Petitioner and that her pain tolerance may preclude her from doing well with surgery. (Id.)

The Petitioner testified that the Respondent was willing to accommodate her restrictions but did not. (T. 18) She said she was still doing heavy-duty lifting. (Id.) She said that on September 27, 2021, she was informed that the Respondent could not accommodate her

restrictions, and she began receiving TTD. (T. 19) She said TTD payments stopped at the end of October with no explanation. (Id.)

The Petitioner testified that Dr. Brown referred her for a second opinion to Dr. Corey Solman, an orthopedic surgeon at the Orthopedic and Spine Institute of St. Louis. (T. 17-18) She later testified that Dr. Brown told her to get a second opinion and she chose to see Dr. Daniel Brunkhorst, a chiropractor at DB Health Services (T. 35-36) She said she had been treated by Dr. Brunkhorst after a motorcycle accident when she was 14 years old. (T. 36)

The Petitioner first saw Dr. Brunkhorst on October 28, 2021, and complained of left shoulder and wrist/hand pain. (PX8) After an examination, Dr. Brunkhorst diagnosed left rotator cuff tear, left shoulder sprain, pain in the left wrist/distal forearm, ligament disorder, myalgia (muscle pain), myositis (muscle inflammation) and muscle contracture. (Id.) He recommended an MRI, which was performed on November 3, 2021, at Greater Missouri Imaging. (PX7) Radiologist Dr. Matthew Ruyle read the scan as showing posterior supraspinatus bursal sided tendinopathy (inflammation of the tendon in the rotator cuff at the top of the shoulder) without evidence of a tear and minimal overlying bursal fluid. (Id.) He said the other components of the rotator cuff – infraspinatus, teres minor and subscapularis were intact and unremarkable. (Id.)

Also on November 3, 2021, the Petitioner began treatment with Dr. Brunkhorst in the form of electrical stimulation to the left shoulder and wrist, therapeutic exercises and myofascial release (manual therapy to loosen restricted muscles). (PX8)

The Petitioner was seen in the Memorial Hospital Belleville emergency room on November 21, 2021, and complained of left shoulder and neck pain/spasms. (PX10) She was diagnosed with rotator cuff tendinitis and prescribed lidocaine patches, a muscle relaxant and an oral steroid. (Id.)

On November 22, 2021, Dr. Brunkhorst performed additional testing and added diagnoses of: cervical disc displacement; cervical radiculopathy; sprain of the cervical ligaments; strain of the cervical muscle, fascia and tendon; disorder of vertebrae ligament; sprain of thoracic ligament; and strain of the thoracic muscle, tendon and fascia. (Id.) Dr. Brunkhorst ordered the Petitioner off work from November 3, 2021, through January 7, 2021. (Id.)

The Petitioner testified that the therapy did not help, and on November 9, 2021, Dr. Brunkhorst referred her to Dr. Solman. (T. 20, 36-37, PX8) Notes from the Petitioner's last visit with Dr. Brunkhorst on December 21, 2021, were essentially identical to the prior treatment notes. (Id.)

On January 4, 2022, the Petitioner underwent a Section 12 examination by Dr. Timothy Farley, an orthopedic surgeon at MotionOrthopaedics. (RX1, Deposition Exhibit 2) Dr. Farley took a history of the accident and treatment, reviewed medical records, performed a physical examination, took X-rays and reviewed the September 17, 2021 MRI. (Id.) The X-rays showed no evidence of any acute-appearing injury. (Id.) He read the MRI as showing no evidence of labral (of the rim of cartilage surrounding the socket of the shoulder joint) or bicipital (of the biceps) pathology. (Id.) He said the tendons of the rotator cuff were intact except for small interstitial tearing in the very posterior/interior aspect of the infraspinatus. (Id.) He saw no signs of any other soft tissue injury or in the marrow of the bones of the shoulder. (Id.) Dr. Farley noted that he did not have images from the October MRI (possibly the November 3, 2021, MRI). (Id.) During the physical examination, the Petitioner showed no outward signs of pain but complained of 8/10 pain and occasionally 10/10. (Id.) Dr. Farley stated that he asked the Petitioner if the maneuvers he performed hurt, and she said yes but showed no signs of pain in her facial features. (Id.)

Dr. Farley concluded that the mechanism of the Petitioner's injury was not at all consistent with the development of a rotator cuff tear. (Id.) He opined that the tear on the MRI would be entirely asymptomatic. (Id.) He stated that if the Petitioner was hit hard enough to cause some damage to a rotator cuff, one would expect to see subcutaneous bruising as well as bruising in the muscles around that area. (Id.) Dr. Farley said that if someone had nonspecific shoulder pain, a short course of physical therapy, a trial of anti-inflammatories and an MRI would be worthwhile. (Id.) He said treatment leading up to the September 17, 2021, MRI was reasonable and necessary but subsequent treatment was not. (Id.) He said the Petitioner reached maximum medical improvement and no further treatment or work restrictions were necessary as a result of the work accident. (Id.) He found that pursuant to The Sixth Edition of the AMA Guidelines to Rating Impairment, the Petitioner did not sustain any permanent impairment to her left shoulder. (Id.)

Regarding Dr. Farley's observation of lack of signs of pain in her facial features, the Petitioner testified that Dr. Farley could not see if she was grimacing because she was wearing a mask. (T. 22) She said Dr. Farley spent 10 minutes with her and did not talk to her about the accident. (Id.) She acknowledged that she played four sports in high school but said she never injured her shoulder. (T. 24)

The Petitioner began treatment with Dr. Solman on March 16, 2022. (PX1, Deposition Exhibit 2) He took a history of the accident, reviewed medical records, took X-rays, reviewed the November 3, 2021, MRI and examined the Petitioner. (Id.) In explaining the accident, the Petitioner said that her shoulder was sore then became more painful a few days after the injury. (Id.) She reported some neck pain in the past few months where she could not move it, but it had gotten significantly better. (Id.) The physical examination showed pain with some testing, discomfort with range of motion, severe tenderness in the bicipital groove (indentation in the ball

of the humerus), mild tenderness over the posterior shoulder joint, mild tenderness over the AC joint (acromioclavicular – where the collarbone and shoulder blade meet) and some tenderness along the trapezius (muscle over the shoulder blade) (Id.) Examinations of the Petitioner's left wrist and cervical spine were normal. (Id.) X-rays showed no bony abnormalities. (Id.) On the MRI, Dr. Solman saw some thickening and abnormality of the anterior and anterior/inferior labrum and mild patulousness (spreading apart) to the inferior capsular ligaments (ligaments connecting the ball and socket of the shoulder joint). (Id.) He said the labral abnormality did not appear to be a SLAP (superior labrum anterior posterior) lesion, and there was no evidence of rotator cuff pathology and no biceps tendon dislocation or subluxation. (Id.)

Dr. Solman diagnosed left shoulder pain, resolved likely wrist contusion and possible labral tear. (Id.) He believed the mechanism of injury "could certainly" lead to labral pathology if the Petitioner struck her shoulder on the back of the glenohumeral joint, imparting an anterior or superiorly directed force, which could cause an anterior or superior labral tear. (Id.) He said the physical examination findings pointed towards a labral and biceps source, which would be more common in a 19-year-old as opposed to a rotator cuff tear that normally requires very high forces on the shoulder. (Id.) He believed the treatment the Petitioner received had been reasonable and necessary in an attempt to cure and relieve the effects of the injury. (Id.) He said the Petitioner had more than seven months of pathology that continued to bother her, which he opined would represent significant pathology. (Id.) He said a strain or sprain would have resolved in six to eight weeks. (Id.) He recommended an MRI/arthrogram as a fairly standard study when looking for hidden labral lesions in younger patients. (Id.)

On March 29, 2022, the Petitioner underwent the MRI/arthrogram of the left shoulder performed by radiologist Dr. Greg Cizek at MRI Partners of Chesterfield that showed an anterior

labral defect – likely a tear – without rotator cuff tear. (PX9) He stated that the defect was more prominent and more inferior than would be expected for a sublabral foramen (a detachment of the anterosuperior labrum from the underlying glenoid that constitutes a normal labral variant) with slightly irregular margins consistent with a labral tear. (Id.) The Petitioner had a follow-up visit with Dr. Solman on April 20, 2022. (PX1, Deposition Exhibit 2) After examining the Petitioner and reviewing the MRI/arthrogram, Dr. Solman diagnosed a left shoulder labral tear and recommended a left shoulder arthroscopy with likely labral repair and possible biceps tenodesis depending on the status of the biceps at the time of surgery. (Id.) He also recommended restrictions on the left arm of the Petitioner lifting no more than 2 pounds, no overhead lifting and no repetitive motions more than 5-10 times per hour. (Id.)

Dr. Farley performed another Section 12 examination on June 21, 2022. (RX1, Deposition Exhibit 3) He reviewed the MRI/arthrogram from March 29, 2022, and said what was described as an anterior labral defect, likely tear was actually a normal variant – a sublabral foramen. (Id.) Dr. Farley reiterated his prior opinions and stated that if the Petitioner were to have enough force that she could have somehow conceivably subluxed her shoulder forward and torn her anterior labrum, she would certainly have evidence of contrecoup injury (injury directly opposite the point of trauma) on the humeral head or in the soft tissue around the posterior aspect of the shoulder on the MRI performed three weeks or so after the accident. (Id.)

Dr. Solman testified consistently with his reports at a deposition on September 27, 2022. (PX1) He explained that the Petitioner's age came into play when dealing with her shoulder because younger patients have more problems with labral tears, while older patients have more problems with rotator cuff pathology. (Id.) He also noted that he performed various tests that were positive for labral issues and others that were negative for rotator cuff issues. (Id.) He said

the labral tear was due to the work accident, adding that a force directed onto the shoulder or humeral head causes the humeral head to move towards the front of the body, leading to the Petitioner's symptoms. (Id.) He explained that especially with a young, healthy patient, injury to the soft tissue can heal, but the labrum is not elastic and does not bounce back to its original position. (Id.)

As to whether the Petitioner had a sublabral foramen as opposed to a labral tear, Dr. Solman thought she had a normal variant, but the labral tear was apparent because the tear was in an inferior position to where the variant would be – as was the looseness of the capsule. (Id.) He explained that the Petitioner's pathology was from the 4 o'clock to 5 o'clock position on the glenoid (the socket on the shoulder blade that meets with head of the humerus), while the normal variant would be in the 1 o'clock to 3 o'clock position. (Id.) He said the pathology was causing the Petitioner's symptoms. (Id.) He said that based on the Petitioner's description of the accident – being struck on the posterior shoulder – would be what would cause an anterior or anterior/inferior defect in the labrum and the capsule. (Id.)

Regarding treatment, Dr. Solman testified that as of April 20, 2022, he felt that because the Petitioner had failed conservative management and was still having impairment to the left shoulder, he recommended surgery. (Id.) He did not feel the Petitioner's shoulder would heal on its own because it had been about eight months since the time of the injury. (Id.) He said work restrictions should continue until she has surgery. (Id.)

As to Dr. Farley's observations of not showing signs of pain during examination although she stated she had pain, Dr. Solman said that such signs of pain are not necessary if the patient says they have pain. (Id.) Regarding the Petitioner not having bruising, redness or swelling at the

emergency room examination, Dr. Solman said he does not necessarily expect those findings with an injury such as the Petitioner's. (Id.)

Dr. Farley testified consistently with his reports at a deposition on November 8, 2022. (RX1) He noted that the Petitioner's lack of pain response to his examination was very atypical – saying it hurt a lot but not showing some sort of outward signs of pain either by vocalizing something or showing it or withdrawing. (Id.) On cross-examination, he acknowledged that the Petitioner was taking an antidepressant that can mask affect and could be a reason for the Petitioner having flat affect during her examinations. (Id.) He also said it was atypical for an accident as described by the Petitioner to result in a "translation event" that would cause a labral tear. (Id.)

In discussing his opinion that the abnormality in the Petitioner's labrum was a normal variant, he said he thought it looked to be a sublabral foramen and later said it was "quite clearly" a sublabral foramen. (Id.) He described the anatomy of a sublabral foramen and said it has clear edges, whereas a torn labrum has coarser edges. (Id.) Regarding the patulousness in the shoulder capsule that Dr. Solman saw on the MRI, Dr. Farley testified that he did not agree that was there and added that patulousness just means sagginess and is something that everyone suffers from in aging bodies or can be a stretching of the lining of the shoulder joint that can be associated with instability – oftentimes in overhead throwers, such as tennis players, swimmers and sometimes volleyball players. (Id.) He said the Petitioner had no signs of instability on his exam or Dr. Solman's. (Id.)

On cross-examination, Dr. Farley acknowledged that doctors can look at an MRI and differ in what they see. (Id.) He also acknowledged that throughout treatment and his examinations, the Petitioner still complained of pain in her shoulder and difficulty reaching her arm overhead. (Id.)

The Petitioner testified she wants to undergo the surgery because she wants her life back – to go back to work, fix the pain and be able to lift over her head again. (T. 23) She said the pain in her shoulder has never gone away, and her arm goes numb whenever her shoulder pops and with cold weather. (T. 25) She said her shoulder pops out of place about two to three times a week and her arm goes numb for at least a couple of hours and she feels a stabbing, burning pain, which started after the injection. (T. 26) She said she could lift her arm to shoulder level but no further. (T. 27) She said her arm would shake when picking up a gallon of milk with her left arm. (Id.)

## CONCLUSIONS OF LAW

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

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

The experts disagreed on what injury the Petitioner suffered as well as whether those injuries were causally related to the accident. After the September 16, 2021, MRI, Dr. Brown thought the Petitioner had a small infraspinatus tear in the rotator cuff. At the time of her last visit with Dr. Brown, he was contemplating surgery. Dr. Farley also saw this tearing but believed the accident would not have caused this injury, and such pathology would be asymptomatic. Dr. Ruyle performed an MRI on November 2, 2021, and saw tendinopathy but no rotator cuff tear. On the same MRI, Dr. Solman saw some thickening and abnormality of the anterior and anterior/inferior labrum and mild patulousness to the inferior capsular ligaments and no rotator cuff pathology. He found the diagnosis was consistent with his physical examination as well. Dr. Farley did not read this MRI.

Then the Petitioner underwent an MRI/arthrogram that Dr. Cizek said showed an anterior labral defect – likely a tear – without rotator cuff tear. Dr. Solman agreed. Dr. Farley believed this defect was a sublabral foramen – a normal variant – and did not believe the force from the accident was sufficient to cause a labral tear, based on the lack of soft tissue injury in the first MRI. Dr. Solman explained that although he believed the Petitioner had a normal variant, the labral tear and capsule looseness was in a different position than where the variant would be – supporting his diagnosis of a labral tear. He also explained that this pathology would be caused by being struck on the posterior shoulder – as occurred in the accident the Petitioner described. Dr. Cizek apparently ruled out a sublabral foramen, noting that the defect was more prominent and more inferior than would be expected for a sublabral foramen and the margins were slightly irregular and could be consistent with a labral tear. Dr. Solman gave several reasons as to why his diagnosis of a labral tear was the correct one – what he saw on the November 2, 2021, MRI; what both he and Dr. Cizek saw on the MRI/arthrogram; the Petitioner's age making it more likely for her to have a labral tear; and his physical examination findings. He thoroughly the physiology behind all of these reasons.

In addition, part of Dr. Farley's opinions was based on his characterizations of the Petitioner's pain responses and the mechanism of injury for her to have suffered a labral tear being "atypical." He also pointed to a lack of physical pain indicators – withdrawing, facial expressions – and a lack of bruising, redness or swelling in the treatment notes immediately following the accident to support his findings. His job as a Section 12 examiner is to be skeptical, and he did his job well. However, his skepticism does not negate the evidence that the Petitioner has a labral tear and was suffering pain as a result. For every indicator that Dr. Farley proposed as evidence

to support his findings, Dr. Solman put forth rebuttal and explained how these issues did not negate his findings. Furthermore, as the treating physician, Dr. Solman's opinions deserve more weight.

For these reasons, the Arbitrator gives Dr. Solman's opinions more weight than Dr. Farley's opinions.

The Arbitrator finds the Petitioner to be credible. Her testimony, report of the accident and reports to the medical providers were consistent. Although Dr. Farley had issues with the Petitioner's responses to pain-generating tests, he acknowledged that could be due to the antidepressant the Petitioner was taking. The Arbitrator also notes the Petitioner's high-pain-scale ratings to her medical providers and the fact that she apparently did not understand the pain-scale ratings – initially rating her pain at a 7/10 then at 3-4/10 after the pain-scale rating was explained to her.

Therefore, the Arbitrator finds that the Petitioner has met her burden of proof establishing causal connection between the accident and the Petitioner's left shoulder condition.

**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?**

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).

Based on the findings above regarding causation and Dr. Solman's opinions regarding treatment, the Arbitrator finds the medical services provided to be reasonable and necessary. The Respondent has not paid all appropriate charges. Therefore, the Arbitrator orders the Respondent to pay the medical expenses contained in Petitioner's Exhibit 11. The Respondent shall have credit

for any amounts already paid or paid through its group carrier. Respondent shall indemnify and hold Petitioner harmless from any claims arising out of the expenses for which it claims credit.

**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).

The Petitioner has subjective symptoms that correlate with her objective pathology. Conservative treatment, specifically an injection and physical therapy, have failed. Her condition has not stabilized nor otherwise reached maximum medical improvement, and Dr. Solman has recommended surgery that he believes necessary to relieve or cure the effect of the Petitioner's injury.

Therefore, the Arbitrator finds that the Petitioner is entitled to prospective medical care as recommended by Dr. Solman, and the Respondent shall authorize and pay for such care.

**Issue (L): What temporary benefits are in dispute? (TTD)**

The parties dispute temporary total disability benefits for the period of September 27, 2021, through the date of trial on November 28, 2022. 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. *Archer Daniels Midland Co. v. Indus.*

*Comm'n*, 138 Ill.2d 107, 118 (1990). The ability to do light or restricted work does not preclude a finding of temporary total disability. *Id.* at 121.

From September 27, 2021, through the date of Arbitration, the Petitioner has either been ordered off work or given work restrictions that have not been accommodated by the Respondent. Therefore, the Petitioner is entitled to temporary total disability benefits pursuant to Section 8(b) of the Act for 61 1/7 weeks, from September 27, 2021, through November 28, 2022. The Respondent is entitled to a credit of $1,262.76 for 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.

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 20WC013233 |
| Case Name | Jessica Lassiter v.<br>State of Illinois/DORS |
| Consolidated Cases | |
| Proceeding Type | Petition for Review under 19(b)<br>Remand Arbitration |
| Decision Type | Commission Decision |
| Commission Decision Number | 23IWCC0527 |
| Number of Pages of Decision | 19 |
| Decision Issued By | Maria Portela, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Alexis Ferracuti |
| Respondent Attorney | Alyssa Silvestri |

DATE FILED: 12/12/2023

/s/Maria Portela, 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 up | ☒ None of the above |

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JESSICA LASSITER,

Petitioner,

vs. NO: 20WC013233

STATE OF ILLINOIS / DORS,

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, causation, temporary total disability, medical expenses and benefit/wage rate, and being advised of the facts and law, modifies the Decision of the Arbitrator and makes clarifications 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).

On the issue of temporary total disability (TTD), we note that Petitioner saw Dr. Joshua Lilly at Midwest Orthopedic Clinic on May 15, 2020. Although there is no off-work note in evidence, his record indicates that he prescribed Norco and "She was given a sling for immobilization and should not be using the shoulder until MRI and surgical consultation is completed." *Px4*. Therefore, we modify the TTD period to begin on May 15, 2020, when Dr. Lilly recommended that Petitioner not use her shoulder until the MRI was completed, rather than May 26, 2020. This results in a TTD period of 102-1/7 weeks from May 15, 2020 through the date of hearing on April 29, 2022.

We also make the following corrections:

1) On page 3, we strike the second paragraph and replace it with:

Although the only time sheets in evidence were those for March and May 2020, it is clear that Petitioner referred to the timesheet for April 2020 during the course of her testimony. *T. 17-23*. Respondent did not dispute that it showed she worked on 4/29/20 and clocked out at 1:07pm.

2) On page 8, in the first sentence of paragraph five, we strike "4/19/20" and replace it with "4/19/21."

3) On page 8, in the second sentence of paragraph six, we strike "4/26/21" and replace it with "4/29/20."

4) On page 11, under Section E, we modify the last sentence in the second paragraph to read, "This is corroborated by the timesheets in question testified to by the Petitioner, which confirmed the time that she clocked out."

5) On page 12, we strike the second full paragraph beginning with "The Arbitrator also notes…" in its entirety.

6) On page 12, under Section F, we strike "4/26/21" in the first sentence of the second paragraph and replace it with "4/29/20."

7) On page 14, we strike the second sentence in the first paragraph beginning, "With regard to the left shoulder…" in its entirety.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $343.08 per week for a period of 102-1/7 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 medical expenses contained in Petitioner's Exhibit 1, which relate to initial emergency services and any and all left shoulder treatment, under §8(a) of the Act subject to the fee schedule in §8.2 of the Act. The medical expenses related solely to the Petitioner's lumbar condition are denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to a credit under §8(j) of the Act for payments made by its group insurance carrier; provided that Respondent shall hold Petitioner harmless from any claims and demands by any providers of the benefits for which Respondent is receiving credit under this order.

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.

**December 12, 2023**

/s/ *Maria E. Portela*

SE/
O: 11/7/23
49

/s/ *Amylee H. Simonovich*

/s/ *Kathryn A. Doerries*

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 20WC013233 |
| Case Name | Jessica Lassiter v. State of Illinois/DORS |
| Consolidated Cases | |
| Proceeding Type | 19(b)/8(a) Petition |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 15 |
| Decision Issued By | Paul Cellini, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Alexis Ferracuti |
| Respondent Attorney | Joseph Blewitt |

DATE FILED: 8/3/2022

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

/s/ Paul Cellini, Arbitrator
Signature

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

August 3, 2022

/s/ Michele Kowalski

Michele Kowalski, Secretary

Illinois Workers' Compensation Commission

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**
**19(b)/8(a)**

**JESSICA LASSITER**
Employee/Petitioner

v.

**STATE OF ILLINOIS / DORS**
Employer/Respondent

Case # **20** WC **13233**

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 Cellini**, Arbitrator of the Commission, in the city of **Ottawa**, on **April 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. ☒ 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, **April 29, 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***, in part, causally related to the accident.

In the year preceding the injury, Petitioner earned $**Unknown**; the average weekly wage was $**343.08**.

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.

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 $**ANY PAID** under Section 8(j) of the Act.

**ORDER**

The Arbitrator finds that the Petitioner sustained accidental injury arising out of and in the course of her employment with Respondent on April 29, 2020.

The Arbitrator finds that the Petitioner's left shoulder condition is causally related to the April 29, 2020 accident. The Arbitrator further finds that the Petitioner has failed to prove that her lumbar spine injury is causally related to the April 29, 2020 accident.

Respondent shall pay Petitioner temporary total disability benefits of $343.08 per week for 100-1/7 weeks, commencing May 26, 2020 through April 29, 2022, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $0 for temporary total disability benefits that have been paid.

Respondent shall pay the reasonable and necessary medical expenses contained in Petitioner's Exhibit 1 which relate to initial emergency services and any and all left shoulder treatment, as provided in Sections 8(a) and 8.2 of the Act. The medical expenses related solely to the Petitioner's lumbar condition are denied.

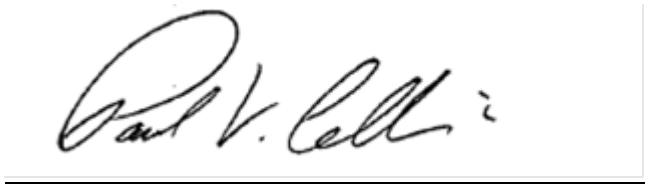
Respondent shall be given a credit for any awarded medical expenses which have been paid by Respondent prior to hearing, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

As there are no currently pending treatment recommendations for prospective medical regarding the left shoulder, prospective medical benefits are not awarded at this time. As noted, pending prospective medical treatment prescribed for the lumbar spine is denied based on a failure to prove causal connection.

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 3, 2022**

## STATEMENT OF FACTS

Petitioner testified that worked for Respondent for two years as an aide assisting a disabled/handicapped person, working with the same family the entire time. This includes performing household chores, feeding, bathing, dressing and laundry – all the basic needs. The disabled person she worked with was Megan, who has cerebral palsy, and she testified that Megan's father/guardian, Dan McDunham, is who she would report to. Megan cannot move her arms and legs, is in wheelchair and is 100% dependent, so she has to be lifted and moved. Activities with Megan would include running errands such as fast food lunches, medical visits, wheelchair repairs and hospital visits, as well as just going for a drive. Petitioner testified she typically worked 5 days a week but worked, generally working 30 hours in a normal week, but also got a lot of additional overtime. Three other aides also worked with Megan. The least she ever worked was when Megan was in the hospital, and the most hours she ever worked was 7 days per week for 6 to 12 hours per day when McDunham was out of town. She testified this happened once for a month, noting there were times McDunham had to leave the country for work. She testified was paid $15.30 per hour at the time of the accident.

As to the time sheets contained in Petitioner's Exhibit 2 from March to May 2020, Petitioner testified that she filled out the documents. In April 2020, the only day she worked was on 4/29/20, as this was when Megan had been hospitalized. She agreed she also worked three less days in March. In May, Petitioner's daughter came to help her work until, Petitioner testified, she just could not physically do the job anymore.

On 4/29/20, Petitioner took Megan to a Casey's, indicating that McDunham asked her to take Megan to get her out of the house due to the Covid quarantine. Petitioner testified that she went inside the store to get sodas for both of them. There was a rug at the front door and as she stepped off the rug and onto the concrete floor she slipped and fell, testifying that it was raining outside at the time and the floor was wet. She fell onto her left elbow and right knee, also injuring her low back. She testified that her left shoulder dislocated, noting she knows this because her right shoulder has dislocated and she knows what it feels like. She got up, paid for the sodas, went back to the car, and got her arm back in the socket. It took a few minutes, and she wasn't sure exactly how she did it, but she got the shoulder to go back into place. When they got back home, McDunham called another aide, Sue, to come in early due to Petitioner's injury. Petitioner testified that the disabled person's guardian can hire their own aides through DORS. Petitioner left about a half hour early, drove home

and iced her shoulder. The shoulder kept dislocating, however, so she went to the Morris Hospital emergency room.

On 4/30/20, the Morris ER note indicated complaints of right shoulder pain after being injured in a fall the day prior when she jammed the shoulder after slipping on a wet floor. A history of right shoulder dislocations was noted. Petitioner reported it felt like the shoulder was popping in and out and she would have to self-reduce it back into place. Bilateral shoulder x-rays were reported as negative for acute fracture or subluxation. Examination noted diffuse tenderness over the left shoulder. Petitioner was also noted to have a "history of falling." She was diagnosed with a right shoulder strain and prescribed medication, a sling and an orthopedic follow up. A separate nursing assessment states that the Petitioner fell onto her left elbow, jamming the left shoulder, and that based on prior right shoulder dislocations she knew how to pop the left shoulder back into place. (Px3).

Petitioner agreed the report indicated a diagnosis for the right shoulder, but that this was a clerical error and they tried to fix this in the record. The notes from Morris Hospital are confusing with regard to which shoulder was diagnosed with abnormality, but the Arbitrator believes that the greater weight of those records support that it was the left shoulder that was diagnosed with a strain on 4/30/20.

Petitioner acknowledged that Morris Hospital did not take her off work, but testified she was unable to work due to her left upper extremity problem. She also agreed she reported a history of prior right shoulder dislocations. A pre-accident 4/14/20 note from Morris indicates Petitioner had a viral syndrome and had not been working as a home health case nurse for about two weeks due to her symptoms, which had started at the end of March. A 4/21/20 Morris ER report indicates Petitioner came in with right hip pain and was diagnosed with right sciatica. A nurse recorded complaints of three day history of right hip pain that radiated around and down the right thigh with pain across the low back. A history states Petitioner had been sick with a cough and in bed for about two weeks and when she started moving around again her back and her leg hurt. Petitioner noted no acute injury and that she had experienced left-sided sciatica in the past. She was advised to follow up with her primary provider. (Px3).

Petitioner testified she contacted Respondent shortly after she left work on 4/29/20 and let them know about her injury. She also called DORS the following week on a Monday or Tuesday, indicating she contacted the party there who deals with work injuries. Petitioner testified she called a few times but then they stopped taking her calls and never called her back. She did keep in touch with Mr. McDunham to keep him advised about her treatment.

Petitioner testified she then presented to Dr. Lilly on 5/15/20 for the first available appointment at Midwest Orthopaedic Center. The report notes complaints of left arm and shoulder pain and a "right dead leg" with shooting pains down the right leg: "All this began after a fall on 4/26/20 when she was in a store and landed directly on her flexed elbow, on her left hand, and on her back. The elbow jammed her shoulder and stated her shoulder popped out of place. The patient states that she has had recurrent dislocations in the past, so she was able to pop it back in but has not been able to move it since." She indicated that the local ER diagnosed a dislocation and advised her to keep it in a sling until orthopedic evaluation. Any movement of the shoulder made her worse. Right leg pain was worse with prolonged sitting and getting in and out of the car. She denied any previous back problems. Left shoulder x-rays showed a bony Bankart on the inferior glenoid with minimal displacement with a glenoid fracture but no Hill-Sachs lesion and otherwise appropriate alignment of the glenohumeral head. Lumbar x-rays show severe degenerative disc changes throughout with osteophytic changes and a right dextroscoliosis at about L3. Diagnoses were: 1) left shoulder recurrent dislocations with bony Bankart lesion, 2) concern for rotator cuff tear and labral pathology, 3) low back pain and 4) lumbar

radiculopathy to the right leg. Left shoulder MRI was prescribed with Norco and ongoing sling use, and for the lumbar spine medications and therapy were prescribed. (Px4).

The 5/26/20 left shoulder MRI impression was: 1) large, bony Bankart with minimally displaced fragment and labral tear extending into the superior labrum, associated with a Hill-Sachs fracture consistent with anterior dislocation; 2) moderate joint effusion with small fragments within the axillary pouch, possibly labral or ligamentous in origin; 3) mild supraspinatus tendinosis and peritendinitis with no cuff tear; and, 4) moderate AC joint arthrosis and capsulitis. (Px4). Dr. Lilly recommended that Petitioner follow up with a shoulder surgeon as soon as possible given the labral tear and Hill-Sachs fracture. (Px4). Petitioner testified she was advised that she had a broken bone in the left shoulder socket area and was referred to Dr. Johnson with concern for a rotator cuff tear.

On 6/1/20, Dr. Johnson noted Petitioner's accident history and that she reported the shoulder had dislocated 3 or 4 more times since the accident date. Following examination and review of the MRI, the doctor recommended arthroscopic surgery with possible anterior labral repair and ORIF of the glenoid fracture with possible latarjet. (Px4). Petitioner underwent pre-operative testing on 6/5/20. (Px5).

Petitioner testified she told Dr. Johnson she had left arm and shoulder pain as well as back pain down to the ankle. Her back and shoulder hurt right away after the injury, but the shoulder was more pressing because it kept dislocating. She testified that she hasn't been able to stand up straight due to back pain since the accident date. Petitioner testified that she had continued to wear her sling up to this time, even when sleeping. She denied any prior left shoulder problems before 4/29/20. While she acknowledged having sciatica prior to the accident, she testified she was not undergoing any treatment and had been working her full work duties at the time of the alleged accident. She testified her prescribed medications were filled at Wal-Mart and paid for by Medicaid, which was her group coverage at the time of the injury. She testified that therapy was also prescribed for her back.

Left shoulder surgery was performed on 6/16/20, involving arthroscopic anterior labral repair and open reduction/internal fixation of the glenoid rim fracture. The posterior humeral head showed significant areas of Grade 3 to 4 chondrosis from recurrent episodes of instability. Post-surgical diagnoses were left shoulder dislocation with displaced anterior glenoid rim fracture and anterior labral tear. (Px4; Px6).

At her 6/25/20 follow up, Petitioner had more stiffness than expected on exam, and Dr. Johnson advised her to perform recommended exercises for range of motion. Petitioner reported some aching pains over the upper arm that was well managed with medications. Petitioner was held off work through 7/17/20. (Px4).

Petitioner testified that Dr. Johnson had taken her off work since she initially saw him. She agreed she missed a 7/2/20 visit, stating this was due to car problems and she had to reschedule. She changed her physical therapy to Northwestern in Sandwich, Illinois because she was unable to drive on the highway.

A Morris Hospital note of 7/7/20 indicated that Petitioner had one therapy visit before indicating she was possibly going elsewhere for therapy. The initial Morris visit stated: "Admits she is doing more than she should be and not wearing the sling at home at all. Allows pain to be her guide." Petitioner said that her doctor had advised her to use the sling unless the arm was supported/propped. She noted that she was generally not having to take pain medications but reported post-surgical loss of function and pain in the left shoulder. Petitioner also complained of back pain and right leg numbness but was most concerned with first addressing the shoulder condition. Therapy then began on 7/13/20 at Northwestern PT. (Px3; Px4).

On 7/17/20, Dr. Johnson reported Petitioner was gradually improving with pain and function. She still had occasional significant pain that was well managed with medications. Therapy was continued and she was advised to wean out of the sling over the next two weeks and then discontinue. On 8/28/20, Petitioner reported doing well with minimal pain and indicated her strength and motion were continuing to improve with no feeling of instability. Therapy was continued and she was given work restrictions: no more than 2 pounds below shoulder height and no overhead use of the left arm, with a 6 to 8 week follow up planned. (Px4).

Petitioner testified her therapy involved both her back and shoulder, and that she continued to improve. The feeling of dislocation stopped but she testified she has a notch in her shoulder that prevented her from raising her right arm overhead. Petitioner testified that her work restrictions were submitted to DORS in Aurora by mail, but she never got a response. Petitioner also testified she had numbness and weakness from the forearm to wrist which began after surgery.

Petitioner testified that at this time she changed therapy locations to OSF in Ottawa because her insurance changed, and workers' compensation was not accepting the claim. Petitioner began therapy there at St. Elizabeth on 9/10/20. The ongoing notes indicate additional complaints of left arm pain and numbness, low back pain and symptoms shooting down both legs. (Px6).

Noting a history of low back pain radiating to the left leg, 9/22/20 lumbar x-rays showed mild multilevel degenerative changes including loss of lordosis, loss of disc height from L3 to L5 and retrolisthesis of L3/4, L4/5 and L5/S1. (Px6). Petitioner again testified that Dr. Johnson indicated the shoulder had to be addressed first.

On 10/9/20, Dr. Johnson noted Petitioner continued to do well and to improve but remained off work as a home health care nurse "due to her shoulder recovery and ongoing issues with her back." Therapy was again continued, and her work restrictions were reduced to no lifting over 10 pounds and no overhead use of the left arm. She was advised to follow up with a spine specialist for her back issues and was to return for the shoulder in 6 weeks. (Px4).

Petitioner testified her shoulder strength and range of motion were improving at this point, but her pain was not. Petitioner testified she again provided Respondent with her work restrictions via mail. Petitioner testified that this restriction would prevent her from performing her work duties because Megan weighs 140 pounds. DORS has never informed her that she was terminated. Other than sending her a couple of checks for $19, Petitioner has not been paid any weekly benefits and was never offered light duty. She testified she was not told what these checks, received in 2021 and February 2022, were for.

An ER report from 10/30/20 indicated a possible diagnosis of Covid-19 based on symptoms of cough, fatigue, and arthralgia, but testing was noted to be negative on 11/9/20. She was diagnosed with an acute viral condition of unknown etiology and a UTI. It was noted at PT on 11/11/20 that her shoulder pain had increased after a pit bull hit her shoulder, and she was referred to rheumatology. In December 2020 she reported being told she had an auto-immune illness. (Px6).

Petitioner testified that Dr. Johnson referred her to Dr. Mulconrey for the lumbar spine, whom she saw on 11/16/20 with complaints of 8 out of 10 (8/10) back and leg pain. She reported the problem began when she fell in April 2020. Her pain was in the bilateral buttocks and in both legs, right much greater than left, with pain radiating to the foot. She reported weakness and numbness in the bilateral thighs and in the right leg to the foot. X-ray revealed multilevel degenerative scoliosis with significant olisthetic deformity at L3/4 and degeneration at L4/5. Diagnoses were degenerative scoliosis, multilevel spondylosis, and neurogenic claudication with spinal stenosis. Lumbar epidural was ordered. (Px4). The Arbitrator notes that Petitioner's pain drawing reflected pain

in the anterior and posterior left arm as well as the anterior and lateral entire legs and the posterior left leg. (Px4). Petitioner testified she told Dr. Mulconrey about the work accident. The Petitioner also testified that Dr. Mulconrey wanted her to do more back therapy along with the shoulder, and that there had been a couple month gap in back therapy prior to this. On 11/23/20, Petitioner reported to her therapist that she was going to have back surgery "from this fall she had." (Px7).

On 11/30/20, Petitioner reported to the physical therapist that her left shoulder constantly ached and "my arm goes numb to the point where it hurts", particularly while she is sleeping. On 12/11/20, she reported that a spine surgeon wanted her to undergo an MRI, but that she needed therapy to be able to get it. She reported being in bad shape since October and that her pain was shooting down to the toes bilaterally. The report also notes she was "still feeling a lot of pressure", and that her prior level of function before 4/29/20 was full with "some back pain from a prior injury." (Px7).

A 12/14/20 report from OSF Healthcare Rehabilitation Services indicates Petitioner reported having two good days in a row of feeling physically better after 4 weeks of being down, complaining of the left arm going completely numb from the shoulder through the hand – "Has to heat it for it to decrease again – can take hours to stop hurting and it wakes her from a dead sleep." She was going to see a rheumatologist "as she has been told her illness was autoimmune." (Px4).

On 12/17/20, Petitioner reported that rheumatology diagnosed fibromyalgia and pthroatic arthritis, but that she was allergic to all of the fibromyalgia medications. The therapy report also states: "The MD states she has more going on but this is where she wants to start." Petitioner reported 7/10 back pain but that she hadn't been out of bed in days and hadn't eaten in two days. (Px7).

On 12/21/20, Petitioner reported having significant ongoing shoulder issues to Dr. Johnson, including pain, weakness, and poor endurance, as well as a painful catching sensation when lowering the left arm from an overhead position. She had mild feelings of instability but hadn't truly felt like the shoulder would dislocate. "Of note, she did become very ill about 6 weeks ago which limited her ability to exercise the shoulder", and she was being worked up for psoriatic arthritis. She had been unable to return to work to date due to her shoulder. The doctor noted that x-rays were "reassuring", and the shoulder was stable on exam. Options included further conservative treatment and a functional capacity evaluation (FCE), and the Petitioner wanted to try the FCE. (Px4). Petitioner testified he continued to restrict her to 10 pounds and no overhead lifting, noting she had significant ongoing pain.

On 12/22/20, Petitioner reported to her physical therapist that she had seen her doctor the day prior and was told her shoulder was about as good as it was going to get and prescribed the FCE. (Px7).

A 12/29/20 physical therapy report indicates Petitioner was not yet demonstrating progress as evidenced by increased back pain. (Px7). During shoulder therapy that same day, she told the therapist her doctor told her a rivet that had been placed in the other side of the bone had disintegrated and that is why she was getting a "catch" when she raised her arm. However, he indicated she was healed and should undergo the FCE. On 1/4/21, Petitioner reported that she had her left arm overhead and it got caught and she couldn't get it to come down, but after being stuck for a few minutes, she had to "calm herself down to get her arm to work with her." On 1/5/21, she reported that she had been in touch with her attorney about the FCE and was waiting to hear back. A 1/11/21 PT report indicated Petitioner said her shoulder was feeling good today, "rates pain at 5/10 which is her normal." On 1/21/21, Petitioner reported 8/10 back pain and that therapy not only wasn't helping, but she thought it was making her worse at times. Shoulder therapy from the same date notes Petitioner reported she awoke with whole body pain. On 1/23/21, Petitioner indicated she had 7 to 8/10 left shoulder pain with numbness throughout the arm. (Px7).

The FCE was performed on 3/2 and 3/3/21 at OSF. The report notes Petitioner gave consistent performance on 23 of 27 tests, with inconsistencies on activities where she had to raise her hands to shoulder level, bend forward to lift from the floor and sustain hold to carry, as well as with walking. The report indicates Petitioner was capable of performing within the abilities indicated in the FCE but needed to change position often to avoid symptom reproduction. She was limited to lift/carrying 17.5 pounds occasionally, lifting from floor to center 15 pounds occasionally and lifting from center to shoulder 12.5 pounds occasionally. Frequent or constant lifting was not recommended. She was able to bend and reach, and perform low level and elevated activities frequently, but would need breaks due to fatigue and pain and change positions as needed. (Px4; Px8).

Petitioner returned to Dr. Johnson on 3/17/21 reporting ongoing shoulder pain and discomfort. Most days she had aching pain down the shoulder and upper arm, and recently felt like the shoulder was sliding out of place with certain reaching motions. A CT scan was prescribed to determine if an additional surgery was needed. In the meantime, Petitioner was restricted to no more than 15 pounds lifting floor to chest and no overhead work with the left arm. Weight loss was recommended. (Px4).

Petitioner presented to the ER with a 4 day history of generalized fatigue and weakness, nausea, and diarrhea on 3/30/21. It was noted she had recently started on Enbrel and did not have her weekly shot the day before. She was diagnosed with diarrhea and anxiety and advised to follow up with her primary provider. (Px7).

In follow up with Dr. Mulconrey's assistant on 4/9/21, Petitioner reported pain had been alternating in her legs but that the right leg was now worse than the left. She had pain in the front of the thighs bilaterally. Therapy did not provide improvement. She was still walking slightly bent forward and had a hard time finding a comfortable position. A lumbar MRI was again ordered, noting epidurals or facet blocks could be performed depending on the results. She was advised to return to Dr. Mulconrey after recovery from shoulder surgery if she failed to improve. Weight loss was recommended. (Px4).

On 4/19/20 Petitioner reported no change in symptoms. Dr. Johnson indicated CT showed the fracture was well healed but with slight irregularity to the articular surface with signs of moderate osteoarthritis. Multiple options were discussed, including surgery and injection, and a home exercise program with the same work restrictions was recommended – "Further treatment of the shoulder will be put on hold at this time due to possible upcoming back surgery." She was to follow up in 3 months. (Px4). Petitioner testified she continued to complain of numbness, tingling and weakness, and that she was restricted to 15 pounds with no overhead work.

Dr. Johnson issued a narrative report on 4/19/21, and he opined the shoulder injury, requiring surgery and possibly further treatment, is directly related to the 4/26/21 accident, as that is when Petitioner likely dislocated the shoulder and fractured the glenoid rim. Dr. Johnson noted the initial report of Dr. Lilly did not specify if prior multiple shoulder dislocations had been to the left or right shoulder, and upon questioning the Petitioner indicated multiple prior right shoulder dislocations but no prior left shoulder dislocations. "If this is correct, I can clearly state that her symptoms and subsequent treatment are clearly related to the shoulder injury she sustained on 4/26 to her left shoulder at that time." He opined that the arthritis seen in the CT scan is also directly related to the injury and the multiple post-accident left shoulder dislocations prior to her initial visit with him. Possible future treatments were up to and including a total shoulder arthroplasty depending on severity of symptoms. She was given lifting restrictions based on the FCE, noting they were likely permanent barring significant further treatment. (Px4; Px9).

The 4/19/21 lumbar MRI reflected: 1) right paracentral protrusion type L4/5 disc herniation indenting the anterior thecal sac and extending into the right L4/5 neuroforamen; 2) left paracentral protrusion type L3/4

herniation indenting the anterior thecal sac, 3) central protrusion type L2/3 and T11/12 herniations indenting the anterior thecal sac, and 4) 15 degree rotoscoliosis convex right centered in the mid lumbar spine. (Px4).

An abdominal ultrasound was performed on 5/10/21 based on nausea, abdominal pain and change in bowel habits. Results were normal. (Px7).

On 1/20/22, Petitioner saw orthopedic surgeon Dr. Van on referral from her primary care provider for a second opinion regarding her lumbar spine. Petitioner reported persistent low back pain over the last several years with some associated pain into her legs. She was a chronic half pack smoker for the last decade and had been off work since April 2020. Her pain was aggravated by prolonged standing while forward leaning, lying down and heat reduced her pain. Exam was essentially normal. Dr. Van noted September 2020 lumbar x-ray showed multilevel degenerative disc disease with associated scoliosis and no evidence of instability, while April 2021 MRI reflected no evidence of acute significant spinal stenosis or disc herniation, with multilevel degenerative disc bulging mainly at L2 to L5. Noting Petitioner was in pain management and taking Norco, Dr. Van recommended ongoing conservative treatment, including weaning from Norco to an anti-inflammatory. He also recommended weight reduction and light aerobic exercise. (Px11).

Petitioner testified that her shoulder has continued to feel unstable. She cannot raise her hand above her head because of the "notch." Her daily pain is less than 7/10 to 8/10 pain and can radiate down to the wrist at times. She continues to experience numbness and tingling. She understood her FCE work restrictions of 12 to 17 pounds were meant to be permanent absent the recommended second surgery with Dr. Johnson. She reiterated that her job with Respondent is heavy due to Megan's weight and that she therefore could not do her job given her current restrictions. As to her March 2022 complaints of ongoing shoulder complaints and instability, she testified she was independent but now has to rely on others for everything. She has had no intervening injuries. Her understanding was x-rays showing a mal-union of the shoulder fracture resulted in the recommendation for further surgery. She has followed the restrictions issued to her. She continues to take prescribed Norco, which she fills at Wal-Mart and takes once or twice daily. In April 2022, she testified that Dr. Johnson advised her to work on her back prior to the recommended shoulder surgery. Dr. Mulconrey found she walked slightly bent forward, which she said is due to back pain. Her right leg pain exceeds that in the left and she finds it hard to get comfortable without moving around a lot. She has not had any back treatment other than therapy. Petitioner advised that she hasn't had the shoulder surgery because she wants a second opinion on her shoulder, indicating Dr. Johnson told her he knew in the beginning that she needed a shoulder replacement but yet did the other surgery. She has not received any new restrictions since she last saw Dr. Johnson.

As to her back, Petitioner testified that Dr. Van did not recommend surgery because it would paralyze her. She is trying to discontinue Norco. She has a home exercise program and was to follow up with Dr. Van. She testified she followed his pain management recommendation, which Petitioner underwent at Perry Memorial with Dr. Ortiz. She isn't under active treatment because treatment isn't being authorized and she wants pain management to be authorized as well. Respondent does not provide a specific job description related to Petitioner's specific patient. As to work injuries, she testified an employment handbook indicates a number to call. Her understanding of her job is to do everything asked of her by the family to take care of Megan.

On cross-examination, the Petitioner testified that she did complete an accident report with Casey's, and that while she understands a video of the incident exists, she has never seen it. She testified that her work schedule would be determined by Megan's father. She was initially paid by check for the first few weeks when she began working for Respondent, but then was paid via a debit card, and she has no records to check into for the debit cards. The debit card came from DORS within the first 3 weeks of working there, and that is how she was paid. She would have to call into a number on the card to make sure her pay was deposited twice a month. It was offered to her as Respondent's version of direct deposit, as it would take her days to receive a physical

paycheck. Petitioner testified she earned $500.50 per week with Respondent, and that taxes were deducted from her wages. She did get a tax form from Respondent.

She completed an accident report with Respondent the week after the accident, indicating she had called the claim in and was never provided with any documentation to complete. She called multiple times but could not recall whom she spoke to. She did not have a receipt for the soda purchases at Casey's.

Petitioner testified she did not work anywhere else other than Megan's house and hasn't worked anywhere since April 2020, other than a couple days in May where her daughter basically did the job for her. Petitioner reiterated she had no prior left shoulder problems. She stopped working for McDunham in approximately Jan 2020. She was not aware of any DORS requirements as to who can or can't be a worker. She did not get a contract when she first started working for McDunham. She did complete all paperwork but did not recall signing a contract that told her what she should or shouldn't be doing.

A number of Petitioner's prior medical records were submitted into evidence. On 2/24/15, Petitioner underwent thoracic x-rays, reflecting mild degenerative cervical and thoracic changes, noting a three month history of upper back pain following a motor vehicle accident. On 9/4/15, she underwent an ultrasound due to right upper abdominal pain. (Px6). On 6/19/15, Petitioner went to the ER at St. Elizabeth M.C. with complaints of back spasms after "daughter jumped on back 3 days ago, pain and pop, neuro intact." She was diagnosed with lumbar radiculopathy. On 4/12/16, she appeared at the ER reporting chronic back pain at all three levels: "Patient reports that she 'has two separate problems in her back' and that she has a chronic history of back pain. Patient reports that in her L1, L2 and L3 vertebrae she has a pinched nerve which causes her legs to go numb on occasion. Patient also reports that about a years [sic] and a half ago she was in a rollover MVA with a resultant injury to the upper thoracic spine which has caused chronic pain as well; patient reports that nothing was broken at the time of the accident, but that her arms go numb and she has had burning pain in her upper back since. Patient states that her back pain has gotten exacerbated since last November when she was diagnosed with IBS which was causing a lot of sickness/illness that was making it hard for her to get out of bed. Patient states this was recently revised as gastroparesis due to an injured nerve from her MVA. Patient states that her back pain has gotten worse due to the amount of time she has had to spend in bed because of her gastroparesis. Patient presents today for outpatient evaluation and treatment of her chronic back pain." Complaints included back pain down the left leg.

On 6/24/19, Petitioner reported to the ER that she gets monthly symptoms of nausea, abdominal pain and flu-like symptoms that last for 5 to 7 days. (Px6). On 10/24/19, Petitioner reported left sided back pain radiating to the left leg with numbness while she was cleaning a week prior. Lumbar x-rays showed mild to moderate degenerative changes and mild retrolisthesis of L5 over S1, potentially degenerative. (Px6). On 12/13/19, rib x-rays were taken based on a fall a week prior when she tripped and struck a railing. (Px6).

Petitioner submitted a 3/12/21 letter from IDHS indicating she was overpaid in the amount of $131.67 for the pay period from 3/1/20 to 3/15/20. (Px10).

## CONCLUSIONS OF LAW

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

The Arbitrator finds that the Petitioner sustained accidental injury arising out of and in the course of her employment with Respondent on 4/29/20.

With regard to the "in the course of" element of the accident, the Petitioner's unrebutted testimony is that she was employed by Respondent as a caregiver for Megan. She testified that her understanding of her job was to take direction from Megan's father as to what she was to do throughout her shift, and that this included running various errands. She testified that she was asked to take Megan out on 4/29/20 by Megan's father during the Covid pandemic, and the trip included taking Megan to Casey's that day for a soda. This appears to the Arbitrator to be a reasonable activity that took place in the course and scope of Petitioner's employment as a caregiver for a patient with cerebral palsy 2020. Respondent produced no evidence which would tend to show this testimony was inaccurate or that Petitioner was not to follow the instructions of Megan's father as to her work activities.

As to the "arising out of" element of the claim, the employment must relate to some risk connected to or incidental to the employment. Petitioner testified she slipped and fell on a wet concrete floor inside of Casey's while at the direction of her immediate supervisor, Megan's father, on an outing which included obtaining sodas for Megan and getting her out of the house. Her risk of slipping and falling was increased by the rain and water on the floor at the Casey's. Additionally in this case, the Petitioner was traveling outside the home of Megan and would be considered a traveling employee. In either case, the facts sufficiently show that the Petitioner's risk of injury was directly related to her employment with Respondent.

The Respondent submitted no evidence either on cross examination or through exhibits to dispute Petitioner's testimony that her job as an aide or caregiver for Respondent is to provide any services necessary to care for her client. In doing so, she is given a variety of daily tasks, including outings outside of the home. Megan's father serves as her immediate supervisor, signs her timesheets, and submits them to Respondent for the Petitioner to be paid. The Petitioner testified that her job encompasses full care of Megan which includes everything from physically moving and lifting her from and to places to taking her to fast food restaurants for food or getting her out of the house at the direction of her father.

Therefore, the Arbitrator hereby finds that the Petitioner sustained an accidental injury on 4/29/20 which arose out of and in the course of Petitioner's employment with Respondent in her capacity as a caregiver/aide.

**WITH RESPECT TO ISSUE (E), WAS TIMELY NOTICE OF THE ACCIDENT GIVEN TO THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:**

Pursuant to the Illinois Workers' Compensation Act, a claimant is required to give notice within 45 days of the accident in question. The Arbitrator finds the Petitioner has met her burden of proof in this matter.

The Petitioner's testimony at hearing was that she reported the accident to her immediate supervisor, Megan's father, on the date of accident in question. He then proceeded to immediately contact the next aide on the schedule, Sue, who also worked for Respondent to come in and begin her shift early given the Petitioner's ongoing pain and complaints of disability. This is corroborated by the timesheets in question confirming the time the Petitioner clocked out.

The Petitioner testified she then reported the accident via phone to the DORS Center in Aurora due to the Covid 19 crisis. She testified that she called the Aurora facility 2 to 3 times over the course of the first month of her treatment before she stopped getting in touch with somebody or having anyone return her phone calls from the DORS Aurora facility. The Petitioner credibly testified that she was told on the phone that due to the Covid 19 crisis that they would fill out the accident report based upon the information given by her and send it for processing. As of the time of hearing, the Petitioner had never seen that accident report and was unaware if anyone at the DORS office had truly filled it out. Additionally, the Petitioner confirmed at hearing that she

continued to send in copies of her work statuses related to the incident in question to the DORS facility in Aurora as a result of her ongoing care and restrictions to see if they had accommodated work but that she had never heard back from them.

The Request for Hearing form referenced that Petitioner reported the injury to "Asia." Again, Respondent did not produce evidence rebutting this allegation by Petitioner.

The Arbitrator also notes with interest that the Application for Adjustment of Claim was filed on 6/15/20, just 47 days after the accident, with notice provided to the Commission and Respondent as a part of the filed application.

The Arbitrator hereby finds that notice was appropriately given to the Respondent within 45 days of the accident as is required under the Act.

**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 finds that the Petitioner's left shoulder condition is causally related to the 4/29/20 accident. Her unrebutted testimony was that she landed on her left elbow, jamming her arm into the right shoulder, resulting in a dislocation and fracture of the shoulder socket. It was objectively determined that this injury was acute, and the contemporaneous medical records support her testimony as to how she fell.

Dr. Johnson on 4/19/21 opined the left shoulder injury, the surgery and any possible future left shoulder treatment are directly related to the 4/26/21 accident, as that is when Petitioner likely dislocated the shoulder and fractured the glenoid rim. He noted that Petitioner specified to him that her prior shoulder dislocations were to the right shoulder, and that she had no prior left shoulder dislocations, and that: "If this is correct, I can clearly state that her symptoms and subsequent treatment are clearly related to the shoulder injury she sustained on 4/26 to her left shoulder at that time." He opined that left shoulder arthritis is related to the accident and the subsequent resulting dislocations prior to her initial visit with him and the surgery he performed. Dr. Johnson noted multiple possible future treatments up to and including a total shoulder arthroplasty depending on severity of symptoms. Petitioner was given lifting restrictions based on the FCE, noting they were likely permanent barring significant further treatment.

The Arbitrator finds that the greater weight of the evidence indicates that Petitioner's lumbar pain and radicular radiation was preexisting and not related to the 4/30/20 accident.

On 4/21/20, just 9 days prior to the accident at Casey's, Petitioner went to the Morris ER reporting a three day history of right hip pain that radiated around and down the right thigh with pain across the low back, and she was diagnosed with sciatica. The history indicated she had been in bed sick for two weeks and the pain began when she started moving around again, noting no acute injury and that she had experienced left-sided sciatica in the past. At the ER on 4/30/20, there was no indication of low back complaints or injury. On 5/15/20, which was the next medical visit Petitioner had, she denied any prior low back problems, which is clearly not the case.

While Petitioner testified she had been working full duty up until the accident date, her time sheets indicate she worked very little in April 2020, which she testified was due to Megan being hospitalized, and her pre-accident low back and right leg pain were apparently severe enough just 9 days prior to the accident that she felt the need to go to the ER. Petitioner's prior medical records showed complaints of back pain and radiculopathy going back to at least 2015, and on 4/12/16 an ER report states that Petitioner reported "two separate problems in her back", a chronic history of back pain, and that she had a pinched nerve in her L1, L2 and L3 vertebrae that

causes her legs to go numb. He reported having been in a rollover accident a year or two prior. She also stated that her back pain had been exacerbated in November 2015 when she had been ill, making it hard for her to get out of bed, and that her back pain worsened due to the amount of time she has had to spend in bed. On 10/24/19, Petitioner reported left sided back pain radiating to the left leg with numbness when she was cleaning, and x-rays showed degenerative changes.

Similarly to 2015, the greater weight of the evidence reflects that Petitioner experienced a flare up of low back pain with right sided sciatica just prior to the alleged accident, after she had minimally worked throughout the month of April, due to having been in bed for an extended time due to an unrelated illness. There is no demarcation point here where her back had been aggravated by the work accident, as this problem had already been occurring and there is nothing in the contemporaneous medical which indicated an acute low back injury. The greater weight of the evidence indicates Petitioner had a preexisting chronic lumbar and sciatica condition and that the onset of the back and right leg pain occurred just 9 to 12 days prior to 4/29/20. Her testimony that the back condition was exacerbated by the work accident is not supported by the rest of the evidence presented in this case,

**WITH RESPECT TO ISSUE (G), WHAT WERE THE PETITIONER'S EARNINGS, THE ARBITRATOR FINDS AS FOLLOWS:**

The time sheets presented into evidence reflect only times worked by Petitioner in March 2020 prior to the accident date. There is no April time sheet included and, as noted, Petitioner testified that Megan was hospitalized during this period.

For March, the Petitioner worked a total of 67 hours and 27 minutes over the course of 15 days between March 2nd and March 23rd. This is a three week period. Based on the Petitioner's unrebutted testimony, she earned $15.30 per hour. Thus, for the time worked over the three week period, she earned $1,029.23.

Given the lack of other evidence, the Arbitrator finds that Petitioner earned $343.08 per week, based on dividing the $1,029.23 earned by three weeks.

**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, THE ARBITRATOR FINDS AS FOLLOWS:**

With respect to the medical bills being requested by the Petitioner which were submitted at trial as Petitioner's Exhibit 1, the Arbitrator awards payment of those bills finding them reasonably related and necessary for treatment to the Petitioner's left shoulder from the accident date through the date of hearing. The billing related to the Petitioner's lumbar treatment is denied based on the Arbitrator's findings regarding causation.

Pursuant to Arbitrator's Exhibit 1, the Respondent is entitled to credit for any payments made towards the awarded medical expenses which were made through a group medical plan for which Respondent is entitled to credit pursuant to Section 8(j) of the Act. Respondent is only entitled to this credit if they hold the Petitioner harmless with regard to any such credited expenses.

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

The Petitioner is not entitled to prospective medical at this time. With regard to the left shoulder, she was released by Dr. Johnson at MMI. While the doctor notes several possible procedures that the Petitioner may need in the future, up to and including a total shoulder replacement, there is no evidence indicating that there is a current treatment recommendation pending.

Based on the Arbitrator's findings regarding causal connection of Petitioner's lumbar spine condition, any prospective lumbar treatment is denied.

**WITH RESPECT TO ISSUE (L), WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY, TEMPORARY PARTIAL DISABILITY AND/OR MAINTENANCE, THE ARBITRATOR FINDS AS FOLLOWS:**

The Arbitrator finds that, based upon the medical records and the Petitioner's credible testimony at hearing, that she was off work from 5/26/20 through the date of hearing, 4/29/22.

The Arbitrator did not locate any off work notes from the initial ER visit, nor were any located in the initial records of Midwest Orthopedics. The Arbitrator finds that the initial off work status began upon the left shoulder MRI of 5/26/20, Dr. Lilly's indication that this reflected a fracture and his referral to a shoulder surgeon. Prior to that, while the Petitioner indicated she did not work and brought her daughter to work with her to perform her work duties, she did in fact go to work and had at least two entries in her time sheets for May.

Following her surgery with Dr. Johnson, Petitioner was held off work until being provided with light duty restrictions, which she testified Respondent did not accommodate despite her sending the work notes in. She credibly testified that she would be unable to fulfill the restrictions in her regular job given the weight of Megan, which Petitioner estimated as 140 pounds, and her having to lift and move this disabled individual. Petitioner was then given final work restrictions per the FCE by Dr. Johnson. The Respondent produced no evidence indicating they did not receive the work restrictions from Petitioner, that her restrictions could have been accommodated by Respondent, or that Petitioner was ever in fact offered a light duty job. The Petitioner remained on work restrictions per Dr. Johnson through the date of hearing.

Based upon the Petitioner's testimony, the corroborating medical records as well as the work status notes and FCE included within the Petitioner's exhibits, the Arbitrator hereby awards total temporary disability benefits from 5/26/20 through the 4/29/22 hearing date.

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 19WC034738 |
| Case Name | Michael Hudgens v.<br>American Coal |
| Consolidated Cases | |
| Proceeding Type | Petition for Review |
| Decision Type | Commission Decision |
| Commission Decision Number | 23IWCC0528 |
| Number of Pages of Decision | 28 |
| Decision Issued By | Amylee Simonovich, Commissioner,<br>Maria Portela, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Roman Kuppart,<br>Steven Hanagan |
| Respondent Attorney | Julie Webb,<br>Kenneth Werts |

DATE FILED: 12/12/2023

/s/Maria Portela, Commissioner

Signature

DISSENT: /s/Amylee Simonovich, Commissioner

Signature

23IWCC0528

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MICHAEL HUDGENS,

Petitioner,

vs. NO: 19 WC 34738

AMERICAN COAL,

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, causation, and permanent partial disability and being advised of the facts and law, reverses the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Statement of Facts of the Arbitrator, which is attached hereto and made a part hereof.

The Commission reverses the Arbitrator's Decision with respect to accident and finds that the Petitioner failed to prove he sustained a compensable accident.

The burden is on Petitioner to prove by a preponderance of the evidence that coal workers' pneumoconiosis exists in him. *Smith v. Industrial Comm'n*, 98 Ill.2d 201 (1983). To prove his claim by a preponderance of the evidence, Petitioner must show that it is more probably true than not that he has coal workers' pneumoconiosis. *Dubey v. Public Storage*, 395 Ill.3d 342, 353 (1st Dist. 2009).

Petitioner spent approximately 40 years under ground working in the coal mines wherein he was regularly exposed to coal and rock dust. (T. 9-10) His testimony was that he stopped working in the mines because he got laid off. (T. 12) On the date of his last exposure he was 61 years old. (T. 11) He testified that he had breathing problems at the time he was laid off. (T. 12) At the end of his employment he had to have help doing his work. (T. 21) He doesn't think that he could do his last coal mining job, as we sit here today. His breathing has something to do with that. (T. 22) He additionally testified that has breathing problems today. (T. 19)

On August 17, 2020, approximately three years after Petitioner last worked for Respondent, he first sought medical treatment with Dr. Istanbouly at his attorney's request for his alleged respiratory condition. Petitioner told Dr. Istanbouly he left the mine when he did because the mine closed. He did not leave the mine because he was physically unable to perform his job. He did not leave the mine on the advice of a physician due to a respiratory disease. (Px1, p. 24)

Petitioner's treating records were submitted into evidence by Respondent and showed evidence of recurring sinusitis between 2000 and 2020. However, at every doctor's visit Petitioner's lungs were clear. Additionally, Petitioner did not complain of breathing problems on exertion or conditions beyond allergies/sinusitis/upper respiratory infection. Moreover, the spirometry and pulmonary function studies were normal. Petitioner entered into evidence the diagnosis of Dr. Istanbouly and B-reading of Dr. Smith, both of whom found evidence of coal worker's pneumoconiosis. Respondent entered into evidence the B-readings of Drs. Meyer and Lockey, both of which found no evidence of coal worker's pneumoconiosis.

Petitioner introduced the testimony of Dr. Istanbouly who testified that he characterized what he saw on Petitioner's chest x-ray as mild or early pneumoconiosis. Dr. Istanbouly does not provide profusion ratings on the films he interprets for black lung. Dr. Istanbouly could not say whether the film he interpreted for Petitioner had a profusion of 1/0 or 0/1. Dr. Istanbouly, Dr. Meyer and Dr. Lockey testified that the distinction between a 0/1 and 1/0 profusion is a point of emphasis in the B-reader training and examination. Dr. Meyer testified to the training and examination required to become a B-reader. Dr. Istanbouly lacks such training. He is not an A-reader or B-reader of films. While one is not required to be an A-reader or B-reader to interpret films for the presence of pneumoconiosis, having such training and certification certainly lends credibility to a physician's interpretation. The Arbitrator noted that Dr. Istanbouly's testimony revealed his significant experience and credentials in the field of pulmonary studies and that he was board certified in critical care medicine and pulmonary medicine. However, these credentials do not provide any evidence of expertise in interpreting chest x-rays for the presence of pneumoconiosis. In fact, his testimony reveals that he is the least qualified expert in this case to provide interpretations of chest x-rays for pneumoconiosis.

Respondent's Section 12 examiner, Dr. Lockey, testified as to the requirements necessary to properly read a chest x-ray for pneumoconiosis. Dr. Lockey testified that to have a positive interpretation of a film for pneumoconiosis, one needs to have a minimum profusion of 1/0. He testified that a profusion of 0/1 is technically negative for pneumoconiosis. Dr. Lockey testified that the distinction between a profusion of 1/0 and 0/1 is a fine one and is a point of emphasis in the B-reading course and syllabus.

Coal workers' pneumoconiosis typically manifests in the upper zones of the lungs. Experts for both Petitioner and Respondent agreed that upper zone manifestation is more typical. Dr. Meyer testified that coal workers' pneumoconiosis is typically an upper zone predominant process. Dr. Smith agreed that the small opacities of coal workers' pneumoconiosis are usually rounded and involve the upper lung zones first and as the dust exposure continues all the lung zones may become involved. Dr. Lockey also testified that coal workers' pneumoconiosis usually causes a round opacity initially located in the upper lung fields.

Respondent's Section 12 examiners found the October 17, 2019 film to be quality 3 due to poor contrast, underinflation and mottle. Drs. Meyer and Lockey interpreted the chest x-ray as negative for pneumoconiosis. Dr. Meyer testified that mottle can simulate small opacities. He testified that underinflation is the same as low lung volumes and that having low lung volumes crowds everything together and makes it look as if there are more markings in the lungs than there are.

Alternatively, Petitioner's Section 12 examiner found the film to be of diagnostic quality. Dr. Smith found the chest x-rays to be quality 1. He did not note the presence of mottle on the film or that it was underexposed or underinflated. Dr. Lockey testified that it is important to note the quality of the film to see whether the interpreter noted the deficiencies in the film with the presumption that the reader took same into consideration when he interpreted the film. Dr. Smith apparently did not take any deficiencies in the chest x-rays into account when interpreting Petitioner's chest x-rays.

Additionally, the Commission takes the qualifications of each of the Section 12 examiners into account. Dr. Meyer has been certified as a B-reader since 1999 and has passed every subsequent recertification exam. While Dr. Smith has been continuously certified as a B-reader since 1987, he testified that he failed the B-reading recertification examination twice around 1999. He testified that he failed because he was overreading the films. He was finding more disease than was present on the standard film. Dr. Smith testified that the syllabus that he uses to study for the B-reading exam he pretty much takes as gospel and that the panel that puts that together are the peers that he aspires to be. Dr. Smith testified that the leaders in the field have been chosen to put that syllabus together. Dr. Smith testified that Dr. Cris Meyer was one of the authors of the new syllabus that has been authored for NIOSH. Dr. Lockey testified that he was also part of the ACR Pneumoconiosis Task Force with regard to redoing the training manual/syllabus for physicians taking the B-reading course. According to Dr. Smith, Respondent's experts are the leaders in the field of B-reading.

Based on the totality of the evidence, the Commission finds the opinions of Drs. Meyer and Lockey to be more persuasive than those of Drs. Istanbouly or Smith. As such, the Commission finds that Petitioner failed to prove by a preponderance of the evidence that he suffered from coal workers' pneumoconiosis or any other occupational disease and reverses the Arbitrator's Decision as to accident.

Based on these findings, all other issues are moot.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitration Decision, filed February 27, 2023 is hereby reversed and all awards vacated.

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

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

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.

**December 12, 2023**

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

MEP/dmm
O: 110723
49

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

DISSENT

I respectfully dissent from the opinion of the majority and would affirm the well-reasoned Decision of the Arbitrator. After carefully considering the totality of the evidence, I believe Petitioner met his burden of proving he sustained an occupational disease and that his CWP condition is causally connected to his exposure in the employ of Respondent.

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

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 19WC034738 |
| Case Name | Michael Hudgens v. American Coal |
| Consolidated Cases | |
| Proceeding Type | |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 23 |
| Decision Issued By | Linda Cantrell, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Roman Kuppart,<br>Steven Hanagan |
| Respondent Attorney | Kenneth Werts |

DATE FILED: 2/27/2023

**THE INTEREST RATE FOR THE WEEK OF FEBRUARY 22, 2023 4.91%**

/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**

**MICHAEL HUDGENS**
Employee/Petitioner9

v.

**AMERICAN COAL**
Employer/Respondent

Case # **19** WC **034738**

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 **Linda J. Cantrell**, Arbitrator of the Commission, in the city of **Herrin**, **Illinois** on **12/21/22**. After reviewing all 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 **Sections 1(d) – (f) of the Occupational Diseases Act**

**FINDINGS**

On **8/18/17**, 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 $**88,400.00**; the average weekly wage was $**1,700.00**.

On the date of accident, Petitioner was **61** 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 $**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**

Based on the totality of the evidence, and the factual findings above, the Arbitrator finds Petitioner met the requirements of Sections 1(d)-(f) of the Occupational Diseases Act.

Respondent shall pay Petitioner the sum of $**790.64 (Max rate)**/week for a period of **50** weeks, as provided in Section **8(d)2** of the Act, because the injuries sustained caused permanent partial disability to the extent of **10%** loss of Petitioner's body as a whole.

**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.

_____ **FEBRUARY 27, 2023**

Arbitrator Linda J. Cantrell

**STATE OF ILLINOIS )**
**) SS**
**COUNTY OF WILLIAMSON )**

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

| | | |
|---|---|---|
| MICHAEL HUDGENS, | ) | |
| | ) | |
| Employee/Petitioner, | ) | |
| | ) | |
| v. | ) | Case No.: 19-WC-034738 |
| | ) | |
| AMERICAN COAL, | ) | |
| | ) | |
| Employer/Respondent. | ) | |

## FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Herrin on December 21, 2022 on all issues. An Application for Adjustment of Claim was filed on December 3, 2019, wherein Petitioner alleges he sustained an occupational disease of his lungs and/or heart as the result of inhaling coal mine dust, including, but not limited to, coal dust, rock dust, fumes, and vapors for a period in excess of 40 years. The issues in dispute are disease, causal connection, the nature and extent of Petitioner's injuries, and Sections 1(d)-(f) of the Occupational Diseases Act. All other issues have been stipulated.

## TESTIMONY

Petitioner lives in Johnston City, Illinois. Petitioner was 67 years old at the time of arbitration and a widower. His wife passed away in December 2021. He was employed in the coal mines for approximately 40 years with all of that time being underground. In the course of his employment in the coal mines, he was regularly exposed to coal and rock dust. He testified that he was also exposed to a lot of diesel fumes which caused breathing issues. He testified that the diesel fumes would burn his nose and lungs. Petitioner's last day in the coal mine was August 18, 2017, at which time he worked for Respondent at its New Future Mine. Petitioner was 61 years old on his last date of employment and his job classification was long wall maintenance foreman. He testified that he was in charge of keeping everything running and repairing any breakdowns. He testified that he was hands-on, so he was basically a repairman and foreman. His work was performed at the face of the mine. Petitioner testified that on August 18, 2017, he was exposed to and breathed coal dust. He testified that he was laid off on that date and he was having breathing problems at the time of his layoff.

Petitioner graduated from high school in 1973. He worked for Potts Implement as a tractor mechanic while he was still in high school and continued working there until 1977. Petitioner worked at Old Ben Coal from 1977 through 1997 as a belt shoveler, scoop operator, and worked in maintenance and repair. For about six months in 1991 he worked at Eagle Valley Mine. From 1997 through 2001 Old Ben sent him to college and he received an associate's degree in electronics. In 2001, Petitioner worked for Consol Rend Lake Mine for about six months doing long wall repair. From 2001 through 2006, Petitioner worked with Respondent doing long wall repair. During that tenure, he also became a long wall repair foreman. In 2006, he had a short stint of eight or nine months with Monterey Coal Company. Petitioner testified that jumping from jobs for six months here and there was to complete his 20 years of union employment to get his medical card. From 2006 through 2017, Petitioner worked at Respondent doing long wall repair and as long wall foreman.

In his work with Respondent Petitioner had to carry tools weighing approximately 60 pounds. He had tools on his belt and his pockets were full of tools. Petitioner testified that he noticed breathing difficulties during the last few years working for Respondent while carrying the tools. He testified that he had to stop to catch his breath a few times when walking from the head gate to the tailgate. He testified that it was about 1,300 feet between the head gate and tailgate. This was in the early 2000s while working for Respondent. Petitioner testified that in the work that he did, he had to bend, stoop and squat to do his job. He testified that if he bent over quite a bit it was hard to breathe.

Petitioner testified that he was having breathing problems as of the date of arbitration. He testified that he could probably walk about half a block without having any issues with breathing. He testified that from the onset of his breathing problems until arbitration they have gotten worse. He testified that his breathing problems may affect his daily life depending on what he is doing. He testified that if he does any kind of physical work, he has breathing problems. Petitioner testified that he has never gone to a doctor specifically for his breathing problems. Petitioner testified that he smoked about 15 years. Petitioner testified that he was 25 to 28 years old when he quit smoking. He testified that when he smoked, he smoked at least a pack a day.

Petitioner testified that toward the end of his employment with Respondent, he was able to complete his job every day, but it was harder to do it towards the end of his career. He testified that there were times he had to have help doing his work. Petitioner testified that he would have to have help carrying things. Petitioner testified that as of arbitration, he would not be able to do his last coal mining job because he would not be able to do it the way he thought it should be done. He testified that his breathing was part of that.

Petitioner testified that his wife passed away of COVID. He testified that he also had COVID at the time. He testified that as far as he knows he has recovered from COVID. Petitioner testified that the breathing problems that he described at arbitration he had before he contracted COVID.

Petitioner testified that his layoff on August 18, 2017, was part of a general layoff at the mine. He testified that but for being laid off that day, he would have reported for his next shift. Petitioner testified that he was just a couple months shy of his 62nd birthday at the time of the layoff. He signed up for and collected unemployment benefits for a time. He signed up for Social Security once he turned 62. Petitioner testified that he had 20 years credit as a UMW of A member for his pension. At the time of his layoff from the mine Petitioner began collecting his pension and 401(k). Petitioner testified that he received his primary care at Logan Primary Care until the physician there retired and then he switched his care to Heartland Regional Medical Group. Petitioner testified that he was always honest with his primary care providers at Logan Primary Care and Heartland Regional Medical Group regarding any symptoms he had or did not have.

While at the mine Petitioner underwent chest x-ray screening for black lung. Petitioner testified that he did not remember receiving anything after the chest x-ray to tell him what the chest x-ray revealed. He testified that he did not have any of those letters. Petitioner testified that after his layoff he did not look for work. He testified that he would have probably kept working had they not laid him off, but he figured it was time to quit searching. He testified that he had been at several different mines and did not want to start over.

Petitioner testified that he has a six-year old grandson that he takes care of pretty much full time. Petitioner testified that he lives in town. He testified that he might travel once or twice a year. He testified that he has 10 acres south of Marion that he mows with a rider. He testified that he bush hogs it about once a year. He testified that the property was where he grew up and since his folks passed away, he tries to keep the property mowed and may move down there sometime.

Dr. Suhail Istanbouly testified by way of deposition on 12/13/22. (PX1) Dr. Istanbouly specializes in pulmonary, critical care, and sleep medicine. He practiced in Southern Illinois from 2003 through 2019, at which time he took a position at Hines VA in Maywood, Illinois. Dr. Istanbouly testified that in Southern Illinois he was a community physician seeing all kinds of cases related to his specialty. He testified that being a pulmonologist practicing in Southern Illinois gave him good exposure to black lung cases which accounted for 30 to 40% of the patients he saw on a daily basis for 16 years. Dr. Istanbouly still has a clinic in Southern Illinois where he goes once a month, so he is still in touch with black lung cases. Dr. Istanbouly used to be affiliated with the Respiratory Disease Clinic in Southern Illinois and was the Medical Director of the Pulmonary Department at Herrin Hospital from 2005 until 2019. He was the Director of the Intensive Care Unit at Carbondale Memorial Hospital for eight years.

Dr. Istanbouly saw Petitioner one time on 8/17/20 at the request of his counsel for a workup in his state black lung claim. Dr. Istanbouly noted that Petitioner worked as a coal miner for 40 years with all that time being underground. Petitioner's last month of employment in the coal mine was August 2017 at which time he was a maintenance foreman. Petitioner quit smoking more than 30 years ago and smoked one pack per day for 15 years. Petitioner complained of having intermittent cough for years. He noticed a correlation between postnasal drip and cough. He

described the cough as mild to moderate in intensity and productive of slight white yellowish sputum. Petitioner also complained of exertional dyspnea. He was getting tired by walking a half a block or less.

Dr. Istanbouly testified that his physical examination of Petitioner's chest did not reveal any abnormalities. He testified that the pulmonary function studies performed on Petitioner were valid and revealed a mild non-specific ventilatory limitation. Dr. Istanbouly testified that based on the flow volume loop in Petitioner's testing, there was significant scooping in the expiratory limb suggestive of underlying obstructive defect. Dr. Istanbouly testified that he is familiar with the *AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition*, especially Table 5-4. He testified that according to Table 5-4 Petitioner would fall in category 2 impairment. Dr. Istanbouly testified that the cause of his obstructive lung disease would be a combination of long-term coal dust inhalation and smoking. He reviewed a chest x-ray of Petitioner dated 10/17/19 and diagnosed Petitioner with coal workers' pneumoconiosis (CWP), which he opined was caused by his long-term coal dust inhalation.

Dr. Istanbouly testified that the disease process of CWP is caused by fine particles being inhaled and reaching the deep parts of the airways ending in the alveoli creating a local irritation or inflammation that will end up with tiny scars, which are the small round opacities seen on the x-ray. Dr. Istanbouly testified that the tiny scars will replace normal lung tissue and will affect the gas exchange through the vascular parenchymal barrier. Dr. Istanbouly testified that not every coal miner who is exposed to coal dust gets CWP. He testified that the scarring and fibrosis of pneumoconiosis are permanent and cannot carry on the function of normal healthy lung tissue. He testified that by definition if one has CWP, he would have an impairment of the function of the lung at least at the site of the scar or fibrosis. Dr. Istanbouly testified that Petitioner had clinically significant pulmonary impairment based upon his cough, sputum production and exertional dyspnea. Dr. Istanbouly testified that Petitioner has an environmental impairment in terms of being precluded from safely returning to the environment of the coal mine because of his CWP. He testified that it was advisable for Petitioner to not have any further coal dust exposure to prevent the progression of his pulmonary disease.

Dr. Istanbouly testified that Petitioner reported to him a past history of on and off cough with sputum which he related to postnasal drip. Petitioner did not relate a chronic daily cough. Dr. Istanbouly testified that when he diagnoses someone with chronic bronchitis, he specifies chronic daily cough. Dr. Istanbouly did not diagnose Petitioner with chronic bronchitis. Dr. Istanbouly testified that allergic rhinitis or sinusitis is something associated with postnasal drip. He testified that Petitioner's 15 pack year history of smoking was fairly significant. He testified that a significant history of tobacco use was associated with cough, sputum, and shortness of breath. Dr. Istanbouly testified that Petitioner was not taking any breathing medications at the time he saw him and based upon the history he obtained, Petitioner had not done so in the past. Petitioner was taking Levocetirizine for allergies. He testified that allergy is something that goes with rhinitis and sinusitis.

Petitioner told Dr. Istanbouly that he left the mine because of mine closure. Petitioner did not leave the mine because of a problem in physically performing his job. Dr. Istanbouly testified

that based upon the history he obtained, Petitioner did not leave the mine on the advice of a physician due to a respiratory disease. Dr. Istanbouly testified that there are causes for exertional dyspnea other than pulmonary disease. These would include heart disease and deconditioning. Dr. Istanbouly testified that Petitioner had a BMI of 32.9 at the time of his examination which was obese. Petitioner told Dr. Istanbouly that he had gained 30 pounds since he left the mine. Dr. Istanbouly did not know what Petitioner had done since he left the mine to stay in shape. Dr. Istanbouly did not review any treatment records regarding Petitioner.

Dr. Istanbouly testified that on physical examination of the extremities, Petitioner had mild digital clubbing bilaterally. He testified that this finding can be seen in patients with chronic respiratory disease. Dr. Istanbouly testified that Petitioner was not hypoxic. Dr. Istanbouly testified that the lower limit of normal for Petitioner's FEV1/FVC ratio was 65.2%. Petitioner's FEV1/FVC ratio was 71%. His FEV1/FVC ratio was 95% of predicted. Dr. Istanbouly testified that in order to know whether Petitioner had a restriction or not, he would want to know what his lung volumes were. Dr. Istanbouly did not measure Petitioner's lung volumes. He testified that when an impairment results from scarring of the lungs due to pneumoconiosis, that impairment is permanent. On cross examination, Dr. Istanbouly corrected himself and testified that Petitioner's pulmonary function testing was not normal and was consistent with a Class 1 pulmonary impairment based on the *AMA Guides for Pulmonary Disability*. He testified that this finding was based upon Petitioner's reduced FEV1 in the testing that he performed.

Dr. Istanbouly testified that when he met with Petitioner, he was presented with a chest x-ray performed on 10/17/19, along with Dr. Henry K. Smith's interpretation of same. He testified that he has not seen any other chest imaging or interpretation of chest imaging for Petitioner. Dr. Istanbouly testified that in his review of the film, he saw interstitial changes throughout the lungs, but more prominent in the mid and lower lung zones. Dr. Istanbouly testified that Dr. Smith indicated on his B-reading form what lung zones he saw opacities in. Dr. Smith did not check the upper lung zones. Dr. Istanbouly is neither an A or B-reader of films. He does not provide profusion ratings on the films he interprets for black lung. When he interprets a film for black lung, he determines whether the film is positive or negative for same and if it is positive, he classifies what he sees as mild or early, moderate, or severe. He testified that he classified what he saw on Petitioner's film as mild or early pneumoconiosis. Dr. Istanbouly testified that he did not do a side by side reading of Petitioner's film with the standard ILO films. He could not say whether the film he reviewed had a profusion of 1/0 or 0/1. Dr. Istanbouly testified that one must be a susceptible host to develop CWP. He testified that not all coal miners develop CWP. Dr. Istanbouly's sole assessment for Petitioner was simple CWP.

Dr. Henry K. Smith testified by way of deposition on 11/4/21. (PX2). Dr. Smith is a diagnostic radiologist. He has been board certified in radiology since 1973. He took the B-reading exam for the first time in 1987 and has been continuously certified as a B-reader since that time. Dr. Smith received his Doctor of Osteopathic Medicine in 1968 from Kirksville College of Osteopathic Medicine. He did a rotating general internship at Carson City Hospital in Carson City, Michigan and a radiology residency at Memorial Osteopathic Hospital in York, Pennsylvania. Dr. Smith operated his own private radiology practice from 1988 to 2016. Since leaving his practice,

he has been doing consulting work in the field of radiology including a lot of B-readings.

Dr. Smith testified that in performing the B-reading, he starts with determining the quality of the film. The next step is to determine if there are small opacities present. If opacities are present, he determines if there are enough to be called pneumoconiosis. If so, then he determines whether they are round or linear opacities and categorizes them by size. Dr. Smith testified that with CWP the preponderance of the small opacities are round. He testified that with other kinds of pneumoconiosis, such as asbestos-related, they are linear or irregular opacities. In CWP, opacities occur primarily in the upper to mid lung zones. Dr. Smith next considers the profusion which is the concentration or density of the findings in the lungs. He testified that the profusion tells the reader what degree of involvement is present. Dr. Smith testified that the last thing included in completing the B-reading form are the obligatory findings which are things which need to be recorded other than the findings of black lung. He described an opacity as a small abnormal density one would not see on a normal chest x-ray. It is often seen in people who have occupational disease or pneumoconiosis. Dr. Smith testified that reading films for pneumoconiosis is an art.

At the request of Petitioner's counsel, Dr. Smith reviewed a chest x-ray of Petitioner dated 10/17/19. He testified that the film was quality 1 and revealed interstitial fibrosis classification P/Q in the mid and lower lung zones bilaterally of profusion 1/1. Dr. Smith testified that Petitioner had CWP and as a result of same he had damage to his lungs. He testified that he did not see any improper positioning, mottle, or poor contrast on the film. He testified that if he would have seen those, he would have recorded those on his report.

Dr. Smith testified he has never sat on any committee with NIOSH or held any office with the College of Osteopathic Medicine or the Osteopathic Board of Radiology. He testified that the syllabus that he uses to study for the B-reading exam he pretty much takes as gospel. He testified that the panel that puts that together are the peers that he aspires to be. He testified that he respects them highly. He testified that the leaders in the field have been chosen to put the syllabus together. Dr. Smith testified that a new syllabus has been authored for NIOSH and that Dr. Cris Meyer was one of the authors of that syllabus. Dr. Smith testified that he agrees with the current B-reading syllabus that small opacities associated with exposure to silica and coal dust are usually rounded. Dr. Smith agreed with the B-reading syllabus that small round opacities usually involve the upper lung zones first and as the dust exposure continues, all of the lung zones may become involved. Dr. Smith agreed that CWP is unlikely to progress once the exposure ceases. He testified that pulmonary impairment is determined by appropriate pulmonary function testing and not by chest x-ray. Dr. Smith testified that if one wants to know whether there is any functional impairment and if present, the degree of same, he would want to have valid pulmonary function testing.

Dr. Smith did not know if the monitors he uses for interpreting chest x-rays were in compliance with the guidelines that are set forth in the Code of Federal Regulations. He did not know whether the equipment complied with the DICOM Standard that is set forth in the Code of Federal Regulations.

Dr. Smith testified that adoption of profusion ratings was done to avoid imprecise

descriptive terms of what was seen on the films such as early, moderate, or severe pneumoconiosis. He testified that any A or B-reader knows what is meant by 1/0 profusion. He testified that describing 1/0 profusion is something different than saying early because what is early to one person may not be early to another.

Dr. Cristopher Meyer testified by way of deposition on 6/3/22. (RX1) Dr. Meyer reviewed a chest x-ray of Petitioner dated 10/17/19. He testified that the film was of a quality 3 due to poor contrast, under inflation, and mottle. Dr. Meyer testified that mottle makes the film look grainy, very similar to photographs that used a 400 ASA would have kind of little polka dot look to them. He testified that mottle can simulate small opacities. He testified that under inflation is the same as low lung volumes. He testified that having low lung volumes basically crowds everything together and makes it look as if there are more markings in the lung than there are. Dr. Meyer's interpretation was some mild plate atelectasis at the bases. He testified that there were no findings of CWP. Dr. Meyer described plate-like atelectasis as an area of the lung where the lung volume is so low that portions of the lung have collapsed down on themselves. He testified that it is not a sequela of lung disease.

Dr. Meyer has been board-certified in radiology since 1992. He has been a B-reader since 1999. Dr. Meyer is currently co-director of the ACR B-Reader Course. He was a member of the ACR Pneumoconiosis Task Force which completed a new syllabus for the course as well as a test that was delivered to NIOSH in 2017. Dr. Meyer's testified that radiologists have a better sense of what the variation of normal is. He testified that one of the most important parts of the B-reading training and examination is making the distinction between a 0/1 and 1/0 film. Dr. Meyer testified that this distinction is an emphasis in the B-reading course as well as on the examination.

Dr. Meyer testified that the B-reader looks at the lungs to decide whether there are any small nodular opacities and based on the size and appearance of the small opacities they are given a letter score. He testified that specific occupational lung diseases are described by specific opacity types. CWP is characteristically described by small round opacities. Diseases that cause pulmonary fibrosis, like asbestosis, would be described by small linear opacities. The distribution of the opacities is also described because different pneumoconioses are seen in different regions of the lung. CWP is typically an upper lung zone predominant process. Idiopathic pulmonary fibrosis or asbestosis is a basilar or linear process. The last component of the interpretation is the extent of the lung involvement or the so-called profusion. Dr. Meyer testified that the profusion is basically trying to describe the densities of the small opacities in the lung. Dr. Meyer testified that although he read the chest x-ray as negative, Petitioner could still have CWP on a pathological level. He testified that simple pneumoconiosis typically will not progress once exposure ceases.

Dr. Meyer testified that in an article by Cohen & Velho from 2002, the author cited a study that revealed that with CWP, round opacities were most commonly seen and indicated that 69% of subjects had such opacities. Dr. Meyer testified that same was in accord with his experience. He testified that there was an article by Remy-Jardin a few years ago correlating CTs and chest x-rays that had also demonstrated small round opacities with a clear upper zone predominance in

CWP. In the Cohen, et al article from 2008, the authors stated that the classic feature of CWP is nodular opacities predominantly in the upper lung zones on chest x-ray. Dr. Meyer testified that this has been his experience.

Dr. Meyer testified that there are federal regulations with regard to the types of monitors a physician is to use in interpreting a film for black lung. Dr. Meyer testified that if an individual fails to comply with those federal regulations he might miss such things as mottle, under-inflation and contrast problems with the image. He testified that under inflation on a film is something he sees fairly often. He testified that basilar atelectasis is a tell-tale marker of underinflation for him as a radiologist.

Dr. James Lockey testified by way of deposition on 6/10/22. (RX2). Dr. Lockey is a physician at the University of Cincinnati Medical Center. He completed a pulmonary fellowship in 1978. He is board-certified in internal medicine as well as in pulmonary and occupational medicine. Dr. Lockey has been certified as a B-reader continuously since 1988. He is on the American College of Radiology Task Force for redoing the B-reading training program using the ILO system. That committee updated the training films for the B-reader instruction pamphlet and also updated the training course and exam. Dr. Lockey was recruited to the University of Cincinnati to run the Division of Occupational and Environmental Medicine starting in 1986. He has been heavily involved in research in occupational lung disease. He has treated individuals with pneumoconiosis.

Dr. Lockey reviewed a chest x-ray of Petitioner dated 10/17/19 and provided a B-reading for same. He interpreted the chest x-ray of Petitioner as negative for CWP. He found the film to be quality 3 due to under inflation and mottle. Dr. Lockey testified that he performed a reading of Petitioner's chest x-ray side by side with the standard ILO films. Dr. Lockey testified that for a proper B-reading of a chest x-ray for pneumoconiosis, one must evaluate the film for quality. Then the reader compares it against the standard ILO films for comparison purposes. The reader interprets the film for either round or irregular opacities within the lung fields. The reader also notes the profusion, which is the number of opacities within the lung parenchyma itself. Finally, the reader looks for other diseases or conditions. Dr. Lockey testified that from a clinical perspective a film that is 0/1 is considered a normal film. A film with profusion 1/0 would be considered positive for pneumoconiosis. Dr. Lockey testified that the distinction between a film with 1/0 and 0/1 profusion is the distinction between whether a film is positive or negative. He testified that this distinction is a point of emphasis in the B-reading syllabus and course as well as the examination that is given to be certified as a B-reader.

Dr. Lockey testified that it is unlikely for simple pneumoconiosis to progress once the exposure ceases. He agreed with the position of the American Thoracic Society that an older worker with a mild pneumoconiosis may be at low risk for working in currently permissible dust levels in the mine until he reaches retirement age. Dr. Lockey testified that he is familiar with the *AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition*, Chapter 5, The Pulmonary

System. He testified that according to the *Guides*, chest imaging is not a factor, let alone a key factor, in the determination of impairment. Dr. Lockey testified that there is not any clinical significance to subradiographic pneumoconiosis. Dr. Lockey testified that Petitioner's diffusion capacity indicates that should there be subradiographic pneumoconiosis present, there has been insufficient scarring to cause a problem with Petitioner's diffusion capacity. A normal diffusion capacity indicates from a physiological perspective the passing of gas across the alveolar capillary membrane is normal. He testified that one must be a susceptible host to develop CWP because the majority of people exposed to coal dust do not develop CWP.

Dr. Lockey testified that in regard to the pulmonary function testing that was last performed on Petitioner, same was normal whether his height was 69.5 or 71 inches. Dr. Lockey testified that the last testing did not reveal the presence of obstruction or indication of restriction. Based upon the results from the last pulmonary function testing, regardless of whether Petitioner's height was 69.5 inches or 71 inches, applying Table 5-4 of the *AMA Guides* to that testing and using NHANES III predictive equations, Petitioner would fall in class 0 impairment. Dr. Lockey testified that the best way to determine whether there is a restrictive abnormality in the patient is to look at lung volumes. He testified that lung volumes were performed in the pulmonary function testing conducted on Petitioner on 10/15/20 and Petitioner's total lung capacity was normal, his residual volume was above the predicted value of 3.52 liters, and there was no evidence of a restrictive pattern.

Dr. Lockey testified that chronic bronchitis is a persistent cough with sputum production of three months' duration of two years' duration. This definition comes from the American Thoracic Society. Dr. Lockey testified that the diagnosis of chronic bronchitis did not appear anywhere in the medical records he reviewed. He testified that cough is not considered an objective determinant of pulmonary impairment. Dr. Lockey testified that allergic rhinosinusitis is intermittent nasal congestion, usually seasonal in character due to an allergy to some type of environmental antigen that usually occurs in the spring or fall or summer. Dr. Lockey testified that Petitioner suffered from rhinosinusitis. He testified that same is a disease common to the general population. The symptoms commonly associated with rhinosinusitis are itchy eyes, runny nose, nasal congestion, and sinusitis and usually occurs in the spring, summer or fall based on seasonal allergies. Dr. Lockey testified that postnasal drainage can cause a cough. Dr. Lockey testified that Petitioner did not suffer any permanent aggravation of his rhinosinusitis as a consequence of his workplace exposure. He testified that METs is a major of energy expenditure based on exercise. He testified that a MET level of 13.4 was excellent and means that the individual was able to reach a level of exercise tolerance that would be normal for his age and height.

Dr. Lockey testified that Petitioner had a long history of allergic rhinosinusitis dating back at least until May 10, 2000. His symptoms included recurrent upper respiratory infections, mucopurulent discharge, headache with sinus pressure and cough associated with postnasal drainage. Petitioner was evaluated for this condition on average three to five times a year and was treated with various decongestants, nasal and systemic steroids and antibiotics. Dr. Lockey testified that pulmonary function test, including spirometry and diffusion capacity results,

performed in October 2020 were within normal limits.

Dr. Lockey testified that the changes noted by Dr. Smith on the chest x-ray of 10/17/19, involving the middle and lower lung fields were not the typical location for radiographic findings consistent with coal and/or rock dust exposure. He testified that those changes reflected crowding of normal lung structures due to marked under inflation.

Dr. Lockey testified that in susceptible individuals, CWP is an interstitial lung disease. He testified that in certain individuals along with the disease process of CWP one can see scarring and fibrosis. Dr. Lockey testified that if the scar tissue interferes with the aveolar capillary membrane it will interfere with the exchange of oxygen and carbon dioxide. He testified that the scarring and fibrosis related to CWP is permanent in nature. Dr. Lockey testified that Petitioner could have coal macules in his lung and have a negative chest x-ray.

## MEDICAL HISTORY

Medical records of Logan Primary Care were admitted into evidence. Petitioner was seen on May 10, 2000, for sinusitis. He complained of sinus pressure, drainage and congestion as well as cough and sore throat. His lungs were clear to auscultation with no adventitious sounds. The diagnosis was sinusitis. (RX4, p. 233). Petitioner was seen on March 16, 2001, with complaint of cough. He reported same had been productive and present for three days with fever. Physical examination of the chest revealed diminished breath sounds with crackles in the bases. The assessment was upper respiratory infection and bronchitis. (RX4, p. 232). Petitioner was seen on June 1, 2001, for sinusitis. He complained of nasal discharge, cough, and face pain. Petitioner was noted to be a non-smoker. Physical examination of the chest revealed the lungs clear to auscultation and percussion bilaterally. (RX4, pp. 230-231). Petitioner was seen on October 5, 2001, with complaint of sinus congestion for two days. Diagnosis was acute sinusitis. (RX4, p. 228). Petitioner was seen on October 15, 2001, with complaint of sinusitis. His course of Humibid and Amoxicillin had been completed and he was better but having drainage and cough. His lungs were clear to auscultation and percussion bilaterally. The diagnosis was sinusitis improved but not resolved. (RX4, pp. 226-227).

Petitioner was seen on February 8, 2002, with cough. He had a history of congestion and mucopurulent nasal drainage with cough and sneezing for days. His lungs were clear to auscultation and percussion bilaterally. Diagnosis was upper respiratory infection. (RX4, pp. 224-225). Petitioner was seen on March 6, 2002, with upper respiratory complaints. His lungs were clear to auscultation. The diagnosis was upper respiratory infection and mild sinusitis. (RX4, pp. 222-223). Petitioner was seen on April 24, 2002, for sinusitis. His lungs were clear to auscultation with no adventitious sounds. Diagnosis was sinus infection. (RX4, pp. 218-220). Petitioner was seen on November 8, 2002, with sinus congestion present for four days. The diagnosis was acute sinusitis. (RX4, pp. 215-216). Petitioner was seen on November 22, 2002, with complaint of upper respiratory infection. Examination revealed the lungs clear to auscultation and percussion bilaterally. The diagnosis was upper respiratory infection. (RX4, pp. 215-216).

Petitioner was seen on January 15, 2003, complaining of nasal discharge, cough, face pain, fever and maxillary toothache. His lungs were clear to auscultation and percussion bilaterally. The diagnosis was sinusitis. (RX4, pp. 211-212). Petitioner was seen on March 8, 2003, with complaint of sinusitis. His lungs were clear to auscultation. Assessment was upper respiratory infection. (RX4, pp. 209-210). Petitioner was seen on April 9, 2003, with symptoms of nasal discharge, cough, face pain and fever. His lungs were clear to auscultation and percussion bilaterally. (RX4, pp. 206-207). Petitioner was seen on October 13, 2003, with complaint of congestion. He related sinus pressure at times for two weeks. His lungs were clear to auscultation with no adventitious sounds and the diagnosis was sinus infection. (RX4, pp. 204-205).

Petitioner was seen on February 9, 2004, with complaint of head and sinus congestion. His symptoms had been present for three days. His lungs were clear to auscultation with no adventitious sounds. The diagnosis was upper respiratory infection. (RX4, pp. 201-202). Petitioner was seen on March 11, 2004, with complaint of sinus congestion. The diagnosis was acute sinusitis. (RX4, p. 200). Petitioner was seen on May 28, 2004, with complaint of sinusitis. His lungs were clear to auscultation and percussion bilaterally. His symptoms included nasal drainage and cough. (RX4, pp. 197-198). Petitioner was seen on October 11, 2004, with complaint of rhinorrhea, congestion and post- nasal drip. Lungs were clear to auscultation with no adventitious sounds. The diagnosis was upper respiratory infection. (RX4, pp. 195-196). Petitioner was seen on December 7, 2004, with complaint of sinusitis. His lungs were clear to auscultation with no adventitious sounds. The diagnosis was sinus infection. (RX4, pp. 193-194).

Petitioner was seen on January 27, 2005, with complaint of sinus congestion. Symptoms had been present for seven days and included headache, facial pressure, post- nasal drainage and low-grade fever. The diagnosis was acute sinusitis. (RX4, p. 191). Petitioner was seen on March 2, 2005, with complaint of sinus congestion. Diagnosis was acute sinusitis. (RX4, p. 190). Petitioner was seen on August 27, 2005, with complaint of sinus congestion. Symptoms had been present for three days and included headache, facial pressure and postnasal drainage. Diagnosis was acute sinusitis. (RX4, p. 189). Petitioner was seen on September 6, 2005, with complaint of sinusitis. His symptoms included nasal discharge, cough and face pain of one week duration. Past medical history was significant for allergic rhinitis and sinusitis. Medication was Flonase. Petitioner's lungs were clear to auscultation and percussion bilaterally. He was given injection of Depo Medrol. (RX4, pp. 186-187). Petitioner was seen on October 14, 2015, with complaint of sinusitis. His lungs were clear to auscultation and percussion bilaterally. (RX4, pp. 184-185). Petitioner was seen on November 3, 2006, with complaint of sinusitis. His symptoms included nasal discharge, cough and face pain. He was noted to be a non-smoker. The diagnosis was sinusitis. (RX4, pp. 181-182). Petitioner was seen on December 28, 2006, with complaint of sinus congestion. Petitioner related nasal discharge, cough and face pain of four days duration. His lungs were clear to auscultation and percussion bilaterally. The diagnosis was sinusitis. (RX4, pp. 179-180).

Petitioner was seen on January 29, 2007, with complaint of sinus congestion. His symptoms included nasal discharge, cough and face pain. His lungs were clear to auscultation and percussion bilaterally. The diagnosis was sinusitis. (RX4, pp. 177-178). Petitioner was seen on

February 5, 2007, with complaint of sinus congestion. His symptoms included nasal discharge, cough and face pain. His symptoms had been present for 10 days. His lungs were clear to auscultation and percussion bilaterally. (RX4, pp. 175-176). Petitioner was seen on April 13, 2007, with complaint of upper respiratory symptoms. These symptoms included runny nose, nasal discharge and cough. His lungs were clear to auscultation and percussion bilaterally. The assessment was upper respiratory infection. (RX4, pp. 173-174). Petitioner was seen on August 18, 2007, with complaint of sinus congestion. He had a cough and nasal discharge. His lungs were clear to auscultation and percussion bilaterally. (RX4, pp. 171-172). Petitioner was seen on December 10, 2007, with complaint of sinus congestion. His lungs were clear to auscultation and percussion bilaterally. (RX4, pp. 169-170).

Petitioner was seen on March 25, 2008, with complaint of sinusitis. Symptoms had been present for two to three days. Examination of the chest revealed the lungs clear to auscultation and percussion bilaterally. Diagnosis was acute sinusitis. (RX4, pp. 166-167). Petitioner was seen on October 23, 2008, with complaint of sinus congestion. His lungs were clear to auscultation and percussion bilaterally. The diagnosis was acute sinusitis and cough. (RX4, pp. 163-164). Petitioner was seen on December 11, 2008, with complaint of upper respiratory infection. Symptoms included postnasal drip, sore throat, productive sputum and shortness of breath. Petitioner denied smoking history. It was noted he suffered from allergic rhinitis and sinusitis. The lungs were clear to auscultation bilaterally with normal inspiration and expiration. Diagnosis was upper respiratory infection, acute. (RX4, pp. 160-161).

Petitioner was seen on February 16, 2009, with complaint of sinusitis. Symptoms included purulent nasal discharge, face pain and sneezing. Review of systems respiratory was negative. Petitioner denied dyspnea. His lungs were clear to auscultation and percussion. Assessment was acute sinusitis. (RX4, pp. 154-155). Petitioner was seen on April 6, 2009, with complaint of sinusitis. His symptoms included cough. He denied dyspnea. His review of systems respiratory was negative. The lungs were clear to auscultation and percussion. The diagnosis was acute sinusitis. (RX4, pp. 150-151). Petitioner was seen on May 12, 2009, with complaint of sinusitis. He denied shortness of breath. His lungs were clear to auscultation and percussion. The diagnosis was acute sinusitis. (RX4, pp. 146-147). Petitioner was seen on June 11, 2009, with complaint of sinus congestion. His symptoms included cough. His lungs were clear to auscultation and percussion. The diagnosis was acute sinusitis. (RX4, pp. 144-145). Petitioner was seen on August 18, 2009, with complaint of sinusitis. He denied shortness of breath. His lungs were clear to auscultation and percussion. The diagnosis was acute sinusitis and vertigo. (RX4, pp. 140-141). Petitioner was seen on October 10, 2009, with complaint of sinus congestion. Symptoms included runny nose, nasal discharge, cough and sneeze. His lungs were clear to auscultation and percussion. (RX4, pp. 137-138).

Petitioner was seen on January 22, 2010, with complaint of sinusitis. His symptoms included nasal discharge, cough, and face pain. He denied shortness of breath. His lungs were clear to auscultation and percussion. The diagnosis was acute sinusitis. (RX4, pp. 134-135). Petitioner was seen on March 29, 2010, with complaint of sinusitis. His lungs were clear to auscultation and percussion. (RX4, pp. 130-131). Petitioner was seen on July 7, 2010, with sinus infection. His

symptoms included nasal discharge, cough and face pain. His lungs were clear to auscultation and percussion. The diagnosis was acute sinusitis. (RX 4, pp. 128-129). Petitioner was seen on October 15, 2010, with complaint of sinusitis. His symptoms included nasal discharge, cough, and face pain. Petitioner denied shortness of breath. It was charted that he had a family history of allergies and sinusitis. His lungs were clear to auscultation and percussion. The diagnosis was acute sinusitis. (RX4, pp. 124-126). Petitioner was seen on December 3, 2010, with complaint of upper respiratory infection and sinusitis. Symptoms included nasal congestion, postnasal drip, sore throat and cough. His lungs were clear to auscultation with no adventitious sounds. The assessment was upper respiratory infection. He was given a sample of Singular. (RX4, pp. 121-122).

Petitioner was seen on April 27, 2011, with complaint of sinusitis. His symptoms included nasal discharge and cough for three weeks. His lungs were clear to auscultation and percussion. The diagnosis was acute sinusitis. (RX4, pp. 114-115). Petitioner was seen on June 13, 2011, with complaint of sinus congestion. His symptoms included nasal discharge and cough of four days duration. His lungs were clear to auscultation. The diagnosis was upper respiratory infection. (RX4, pp. 112-113). Petitioner was seen on October 19, 2011, with complaint of sinusitis. Symptoms included nasal discharge, cough, sore throat, body aches and congestion. Symptoms had been present for two weeks. His lungs were clear to auscultation and percussion. The diagnosis was acute sinusitis. (RX4, pp. 109-110). Petitioner was seen on December 26, 2011, with complaint of sinusitis. Symptoms were noted to be intermittent and included runny nose, postnasal drip, sneezing, sinus pressure and cough. His lungs were clear to auscultation bilaterally with normal inspiration and expiration. (RX4, pp. 105-107).

Petitioner was seen on September 25, 2012, with complaint of sinusitis. Symptoms included cough, nasal discharge and headache. His lungs were clear to auscultation and percussion. The diagnosis was acute sinusitis and cough. (RX4, pp. 101-102). Petitioner was seen on October 4, 2012, with upper respiratory infection and sinusitis. He complained of sore throat and postnasal drip. His lungs were clear to auscultation bilaterally with normal inspiration and expiration. The diagnosis was acute sinusitis and dysfunction of eustachian tube. (RX4, pp. 96-98). Petitioner was seen on December 19, 2012, with complaint of upper respiratory infection and sinusitis. The onset had been gradual and present for three days. His symptoms included sore throat, headache, sinus pressure and sputum. He had no shortness of breath. His lungs were clear to auscultation bilaterally with no adventitious sounds. The diagnosis was acute sinusitis and dysfunction of eustachian tube. (RX4, pp. 93-95).

Petitioner was seen on January 19, 2013, with complaint of upper respiratory infection and sinusitis. Symptoms were intermittent and included runny nose, nasal congestion, postnasal drip, sneezing, sore throat, headache, sinus pressure, ear pain, chest congestion and sputum. He had no shortness of breath. His lungs were clear to auscultation bilaterally with normal inspiration and expiration. (RX4, pp. 89-91). Petitioner was seen on March 8, 2013, with complaint of upper respiratory infection and sinusitis. His symptoms were noted to be intermittent and included runny nose, nasal congestion, post- nasal drip and cough. He had no shortness of breath. His lungs were clear to auscultation bilaterally with normal inspiration and expiration. The diagnosis was sinusitis. (RX4, pp. 84-86). Petitioner complained of upper respiratory infection and sinusitis on April 5,

2013. His symptoms included nasal congestion, postnasal drip and cough. He had no shortness of breath. His lungs were clear to auscultation bilaterally with no adventitious sounds. The diagnosis was upper respiratory infection. (RX4, pp. 80-82). Petitioner was seen on May 10, 2013, with complaint of upper respiratory infection and sinusitis. His symptoms included runny nose, nasal congestion, and postnasal drip. He had no cough or shortness of breath. His lungs were clear to auscultation bilaterally with no adventitious sounds. (RX4, pp. 76-78). Petitioner was seen on August 23, 2013, with complaint of sinusitis. His symptoms included cough. His lungs were clear to auscultation and percussion. The diagnosis was acute sinusitis, cough, and sore throat. (RX4, pp. 73-75). Petitioner was seen on October 1, 2013, with complaint of sinusitis. His symptoms included cough which had been present for three or four days. His lungs were clear to auscultation and percussion. The diagnosis was acute sinusitis. (RX4, pp. 70-71). Petitioner was seen on December 9, 2013, with complaint of upper respiratory infection and sinusitis. Onset had been gradual over the last three days. His symptoms included postnasal drip and cough with sputum. He had no shortness of breath. His lungs were clear to auscultation bilaterally with no adventitious sounds. (RX4, pp. 67-68). Petitioner returned on December 20, 2013, with complaint of upper respiratory infection and sinusitis. Duration of same was two weeks. There was no cough or shortness of breath. His lungs were clear to auscultation with no adventitious sounds. (RX4, pp. 64-65).

Petitioner was seen on January 27, 2014, with complaint of sinus congestion. His symptoms included nasal discharge and cough. His lungs were clear to auscultation. Diagnoses were acute sinusitis and dysfunction of eustachian tube. (RX4, pp. 62-63). Petitioner was seen on February 22, 2014, complaining of sinus congestion for three days duration. His symptoms included nasal discharge and cough. His lungs were clear to auscultation. The diagnoses were acute sinusitis and dysfunction of eustachian tube. (RX4, pp. 60-61). Petitioner was seen on March 6, 2014, with complaint of sinus congestion and cough. He had no shortness of breath. His lungs were clear to auscultation bilaterally with no adventitious sounds. The diagnoses were acute sinusitis and cough. (RX4, pp. 58-59). Petitioner was seen on November 4, 2014, with complaint of sinus congestion. His symptoms included nasal discharge, cough, and sneeze. His lungs were clear to auscultation. The diagnoses were acute sinusitis, disorder of eustachian tube and dizziness. (RX4, pp. 56-57). Petitioner was seen on November 21, 2014, with complaint of sore throat. He related productive cough and indicated his cough was more prominent at night. His lungs were clear to auscultation with no adventitious sounds. (RX4, pp. 53-54). Petitioner was seen on December 21, 2014, complaining of sinusitis. He had nasal drainage and cough. His lungs were clear to auscultation and percussion. The diagnosis was influenza. (RX4, pp. 50-51).

Petitioner was seen on January 22, 2015, with complaint of cough and congestion which had been present for one week. His lungs were clear to auscultation. The diagnosis were acute sinusitis and disorder of eustachian tube. (RX4, pp. 48-49). Petitioner was seen on December 26, 2015, with complaint of sinus congestion. His symptoms included cough and sneeze. His lungs were clear to auscultation. The diagnoses were acute sinusitis and cough. (RX4, pp. 44-45).

Petitioner was seen on November 26, 2016, with complaint of vomiting and diarrhea. His lungs were clear to auscultation with no adventitious sounds. (RX4, pp. 42-43). Petitioner was

seen on December 9, 2016, with complaint of upper respiratory infection. His symptoms included nasal discharge, cough, and sneeze. He denied shortness of breath. His lungs were clear to auscultation and percussion. The diagnosis was acute upper respiratory infection with cough. (RX4, pp. 39-40).

Petitioner was seen on January 19, 2017, with complaint of sinus congestion. His symptoms included nasal discharge and cough of three days duration. His lungs were clear to auscultation. The diagnoses were acute sinusitis and cough. (RX4, pp. 36-37). Petitioner was seen on February 11, 2017, with complaint of sinusitis. His symptoms began the day before. He stated that he had been working on the other side of a shearer in the mine and sucked in a lot of dust. It was noted that he had a history of sinus problems in the past. He denied shortness of breath. His lungs were clear to auscultation and percussion. The assessment was acute sinusitis. (RX4, pp. 33-34).

Petitioner was seen on February 26, 2018, with upper respiratory infection. His symptoms included congestion, cough, facial pain, rhinorrhea and sore throat. His cough was productive. Examination of the chest revealed normal effort and breath sounds with no adventitious sounds. Diagnoses were acute non-recurrent maxillary sinusitis and cough. (RX4, pp. 27-31). Petitioner was seen on September 7, 2018, with complaint of upper respiratory symptoms. These included cough and rhinorrhea. His review of systems respiratory was positive for cough. Under social history it was noted that Petitioner was a former smoker. Examination of the chest revealed normal effort and breath sounds. (RX4, pp. 22-26). Petitioner was seen on November 29, 2018, complaining of upper respiratory infection for three to four days. His symptoms included congestion, cough and rhinorrhea. His cough was productive. His review of systems respiratory was negative for shortness of breath or wheezing. The diagnoses were non-recurrent maxillary sinusitis and cough. (RX4, pp. 16-20).

Petitioner was seen on March 19, 2019, for complaint of upper respiratory infection. He had been coughing out green phlegm for over two weeks. He had a lot of drainage in the back of his throat. It was worse at night. Review of systems respiratory was negative for shortness of breath or wheeze. Examination of the chest revealed normal breath sounds with no adventitious sounds. The diagnoses were acute maxillary sinusitis and cough. (RX4, pp. 9-12).

Petitioner was seen in Prompt Care on March 16, 2020, for upper respiratory infection. Symptoms include congestion, coughing, rhinorrhea, sinus pain and sore throat. Review of systems was negative for shortness of breath or wheeze. Assessment was acute non-recurrent pain and sinusitis. (RX4, pp. 4-7).

Medical records of HMC Clinic at Harrisburg were admitted into evidence. Petitioner was seen on January 26, 2017, with history of a right hand injury. Review of systems respiratory was negative for dyspnea or cough. His lungs were clear to auscultation with no indication adventitious sounds. He was given a release to return to work full duty. (RX5, pp. 18-20). Petitioner was seen on January 30, 2017, for recheck of the right hand. Review of systems pulmonary was negative for dyspnea or cough. His lungs were clear to auscultation without indication of adventitious sounds. (RX5, pp. 15-16). Petitioner was seen for recheck of his right hand on March 23, 2017.

Review of systems pulmonary was negative for dyspnea or cough. His lungs were clear to auscultation without indication of adventitious sounds. (RX5, pp. 10-11).

Medical records of Herrin Hospital were admitted into evidence. Petitioner was seen on March 20, 2017, for treadmill nuclear stress test. The indication for same was chest pain. He exercised for a total of eleven minutes one second reaching his maximum work level. His maximum METS level was 13.4. The testing was stopped due to dyspnea. His functional capacity was noted to be normal. On the outpatient form he was noted to be a former tobacco user. The boxes were not checked for asthma, COPD, bronchitis or emphysema. (RX6, pp. 13-15, 41).

Medical records of Heartland Regional Medical Group were admitted into evidence. Petitioner was seen on November 22, 2021, with chief complaint of hyperlipidemia. Petitioner was noted to be a never smoker. He related no respiratory problems. Physical examination of the chest revealed normal effort with no dyspnea or adventitious sounds. (RX7, pp. 33-35). Petitioner returned for follow up on February 24, 2022. He related he thought he had a sinus infection. He also related a history of COVID. He denied any respiratory problems. Physical examination of the chest revealed normal effort without dyspnea and no adventitious sounds. (RX7, pp. 28-31). Petitioner was seen on March 1, 2022. He denied dyspnea on exertion. He reported no wheezing, shortness of breath or sputum production. (RX7, pp. 20-22). Petitioner was seen on March 23, 2022. His problem list on this date included allergic rhinitis with onset for same being March 18, 2022. Physical examination of the chest revealed normal effort with no dyspnea or adventitious sounds. (RX7, pp. 16-19). Petitioner was seen on July 15, 2022, in follow up. Under review of systems it was noted that Petitioner reported fatigue and a six pound weight gain. He reported no respiratory problems. Physical examination of the chest revealed normal effort with no dyspnea or adventitious sounds. (RX7, pp. 11-15). Petitioner was seen on October 17, 2022. He reported no respiratory problems. Physical examination of the chest revealed normal effort with no dyspnea or adventitious sounds. (RX7, pp. 5-9).

## CONCLUSIONS OF LAW

**Issue (C): Did an occupational disease occur that arose out of and in the course of Petitioner's employment with Respondent?**

**Issue (F): Is Petitioner's current condition of ill-being casually related to his occupational exposure?**

The Arbitrator finds that Petitioner was exposed to an occupational disease that arose out of and in the course of his employment with Respondent. Section 1(d) of the Illinois Workers' Compensation Diseases Act states, in pertinent part:

> "A disease shall be deemed to arise out of the employment if there is apparent to the rational mind, upon consideration of all the circumstances, a causal

> connection between the conditions under which the work is performed and the occupational disease. The disease needs not to have been foreseen or expected but after its contraction it must appear to have had its origin or aggravation in a risk connected with the employment and to have flowed from that source as a rational consequence. An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when, for any length of time however short, he or she is employed in an occupation or process in which the hazard of the disease exists...If a miner who is suffering or suffered from pneumoconiosis was employed for 10 years or more in one or more coal mines there shall, effective July 1, 1973 be a rebuttable presumption that his or her pneumoconiosis arose out of such employment." 820 ILCS 310/1(d)

On 10/17/19, Petitioner underwent a chest x-ray for pneumoconiosis. Dr. Istanbouly reviewed the chest x-ray and found it revealed interstitial changes throughout the lungs, but more prominent in the mid and lower lung zones. He testified that he classified what he saw on Petitioner's film as mild or early pneumoconiosis. He testified that the pulmonary function studies performed on Petitioner were valid and revealed a mild non-specific ventilatory limitation. He testified that based on the flow volume loop in Petitioner's testing, there was significant scooping in the expiratory limb suggestive of underlying obstructive defect. He opined that the cause of Petitioner's obstructive lung disease was a combination of long-term coal dust inhalation and smoking. He diagnosed Petitioner with coal workers' pneumoconiosis and opined the condition was caused by his long-term coal dust inhalation.

Dr. Istanbouly testified that Petitioner had clinically significant pulmonary impairment based upon his cough, sputum production, and exertional dyspnea. He testified that Petitioner has an environmental impairment in terms of being precluded from safely returning to the environment of the coal mine because of his CWP. He testified that it was advisable for Petitioner to not have any further coal dust exposure to prevent the progression of his pulmonary disease.

Dr. Smith reviewed the chest x-ray of Petitioner dated 10/17/19. He testified that the film was quality 1 and revealed interstitial fibrosis classification P/Q in the mid and lower lung zones bilaterally of profusion 1/1. Dr. Smith testified that Petitioner had CWP which caused damage to his lungs. He testified that he did not see any improper positioning, mottle, or poor contrast on the film.

Dr. Istanbouly's testimony reveals his significant experience and credentials in the field of pulmonary studies. He is board-certified in critical care and pulmonary medicine and performs black lung examinations for the U.S. Department of Labor. He has been the medical director of the pulmonary department at Herrin Hospital since 2005 and the director of the Intensive Care Units at Carbondale Memorial Hospital and Herrin Hospital.

Although Respondent's experts, Dr. Meyer and Dr. Lockey, disagree with the findings and diagnosis of Drs. Smith and Istanbouly, their opinions are found to be less credible by way

of their own testimony. On cross-examination, Dr. Meyer agreed that a negative chest x-ray for CWP does not necessarily rule out the disease. He further agreed that many coal miners have had negative chest x-rays for CWP, but on biopsy or autopsy it is shown they actually had the condition pathologically. Dr. Meyers agreed with the Laney and Petsonk study which stated, "[i]ndividual coal macules are generally too small to be appreciated on chest x-rays".

Dr. Lockey agreed that a person could have CWP without having chest x-ray evidence of the disease. He also agreed that a person can have CWP and not know they have the disease. He agreed that a person could have shortness of breath despite normal pulmonary function. He also agreed that a person could have normal pulmonary function and have CWP, stating it would not be unusual, and most would have normal pulmonary function. He agreed that a person could have a certain amount of their lungs with focal areas of impairment, yet their global function be normal. He testified that a person could have a normal diffusing capacity and have simple CWP.

Given the totality of the evidence, the Arbitrator finds Petitioner has satisfied the requirements of Section (d) of the Act, that Petitioner's CWP arose out of and in the course of his employment with Respondent, and that his condition is causally connected to his work exposure. Petitioner worked as a coal miner for over 40 years, which is well over the statutorily required 10 years, and he was diagnosed with CWP. According to Section (d), there is a rebuttable presumption that his CWP arose out of his employment in the coal mines. The Respondent has not credibly rebutted that presumption.

**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**: Dr. Istanbouly testified that the pulmonary function test he performed on Petitioner was valid and revealed a mild non-specific ventilatory limitation. He testified that based on the flow volume loop in Petitioner's testing, there was significant scooping in the expiratory limb suggestive of underlying obstructive defect. The Arbitrator gives some weight to this factor.

**(ii)** **Occupation**: Petitioner last worked in the coal mines on 8/18/17 when he was laid off by Respondent. Petitioner was 61 years of age at the time of his last exposure and 67 years old at the time of arbitration. Petitioner retired after 8/18/17 and has not worked since that time. The Arbitrator places some weight on this factor.

**(iii)** **Age**: Petitioner is 67 years old and currently retired. The Arbitrator places some weight to this factor.

**(iv)** **Earning Capacity**: There is no evidence of reduced earning capacity contained in the record. The Arbitrator places some weight on this factor.

**(v)** **Disability**: The medical testimony supports there is no cure for CWP and the condition is chronic. Petitioner worked as a coal miner for over 40 years, all of which were underground. Petitioner last worked in the coal mines on 8/18/17 where he was a long wall maintenance foreman. His work was performed at the face of the mine.

Petitioner testified his breathing difficulties have worsened since their onset. He testified that he could walk about half a block without having any issues with breathing. His breathing difficulties increase with any kind of physical activities. 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 10% loss of use of his body as a whole, as provided in Section 8(d)2 of the Act.

**Issue (O): Sections 1(e)-(f) of the Occupational Diseases Act.**

Section 1(e) of the Occupational Diseases Act states, in pertinent part, "{d}isablement" means an impairment or partial impairment, temporary or permanent, in the function of the body or any of the members of the body." 820 ILCS 310/1(e). The Arbitrator finds Petitioner has satisfied the requirements of Section (e) of the Act. Petitioner testified to increased respiratory difficulty with activities of daily living that have worsened since onset. Dr. Istanbouly testified that the inhalation of coal dust that causes irritation and inflammation will ultimately end up forming tiny scars. He testified there is no cure for CWP, and that it is a chronic condition. Dr. Lockey agreed that the scarring and fibrosis that occurs in the lungs from pneumoconiosis is irreversible and permanent. Dr. Lockey testified that the scarring and fibrosis is an alteration of the lung tissue and the function of the involved lung tissue.

Section 1(f) of the Occupational Diseases Act states, in pertinent part, "[n]o compensation shall be payable for or on account of any occupational disease unless disablement, as herein defined, occurs within two years after the last day of the last exposure to the hazards of the disease." 820 ILCS 310/1(f). Petitioner last worked a day of coal mine employment on 8/18/17. Petitioner has not worked in the coal mines and has not had any other exposure to coal mine dust since that date. On 10/17/19, Petitioner underwent an x-ray for pneumoconiosis. Dr. Istanbouly impression of that chest x-ray revealed interstitial changes throughout the lungs, but more prominent in the mid and lower lung zones, which he classified as mild or early pneumoconiosis. He testified that the pulmonary function studies performed on Petitioner were valid and revealed a mild non-specific ventilatory limitation. He testified that based on the flow

volume loop in Petitioner's testing, there was significant scooping in the expiratory limb suggestive of underlying obstructive defect. Dr. Smith found the film was quality 1 and revealed interstitial fibrosis classification P/Q in the mid and lower lung zones bilaterally of profusion 1/1. Dr. Smith testified that Petitioner had CWP which caused damage to his lungs. Since Petitioner obtained the CWP diagnosis within two years of leaving Respondent's employment, he meets the requirement under Section 1(f) of the Act.

Based on the totality of the evidence, and the factual findings above, the Arbitrator finds Petitioner met the requirements of Sections 1(e)-(f) of the Occupational Diseases Act.

Arbitrator Linda J. Cantrell DATE

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 18WC005741 |
| Case Name | Andrea Wilson v.<br>LSC Communications |
| Consolidated Cases | |
| Proceeding Type | Petition for Review |
| Decision Type | Commission Decision |
| Commission Decision Number | 23IWCC0529 |
| Number of Pages of Decision | 19 |
| Decision Issued By | Deborah Simpson, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Daniel Jones |
| Respondent Attorney | Christine Jagodzinski |

DATE FILED: 12/12/2023

/s/ Deborah Simpson, 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

Andrea Wilson,
Petitioner,

vs. NO: 18 WC 5741

LSC Communications,
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, notice, permanent disability, temporary disability, and any questions of law or fact which appear from the transcript of evidence 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 $60,000.00. 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.

**December 12, 2023**

o11/15/23
DLS/rm
046

/s/*Deborah L. Simpson*
Deborah L. Simpson

/s/*Stephen J. Mathis*
Stephen J. Mathis

/s/*Marc Parker*
Marc Parker

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 18WC005741 |
| Case Name | Andrea Wilson v. LSC Communications |
| Consolidated Cases | |
| Proceeding Type | Request for Hearing |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 17 |
| Decision Issued By | Edward Lee, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Daniel Jones |
| Respondent Attorney | Christine Jagodzinski |

DATE FILED: 9/6/2022

/s/Edward Lee, Arbitrator

Signature

**INTEREST RATE WEEK OF AUGUST 30, 2022 3.23%**

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

**Andrea Wilson**
Employee/Petitioner

v.

**LSC Communications**
Employer/Respondent

Case # 18-WC-005741

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 **Urbana**, 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 or about **August 17, 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 $2,236.96; the average weekly wage was $559.24.

On the date of accident, Petitioner was **45** years of age, **married** with **3** dependent children.

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

Respondent **has not** stipulated it will pay 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 SEE CONCLUSION**

## FACTS

On August 17, 2017, Petitioner, ANDREA WILSON, was employed working for Respondent, LSC COMMUNICATIONS, in Mattoon, Illinois (Tr. pp. 9-10; Arb. Exh. 1; Pet. Exh. 13). At that time, she had 3 dependent daughters (Tr. p. 9). The oldest was 14 or 15, the middle child was 10, and the youngest was 5 or 6 (Tr. p. 9). She had earned $2,236.96 during her employment with Respondent, and had an Average Weekly Wage of $559.24 (Arb. Exh. 1; Pet. Exh. 13). She worked as a material handler on the "roto" line at LSC, and was referred to as a PTA, or a "press takeaway" (Tr. pp. 9-10). She received her nursing degree in 2005, and is an LPN (Tr. p. 10). She had previously worked at LSC prior to 2017 (Tr. p. 10).

Respondent is a printing company that prints magazines and scholastic flyers (Tr. p. 14). Prior to working at LSC in 2017, Petitioner had worked part-time at Wal-Mart, but she had basically been a stay-at-home mom after her youngest daughter was born (Tr. p. 15). She worked in an assembly line situation (Tr. p. 14).

Petitioner had a prior surgery on her left wrist for carpal tunnel on September 14, 2011 (Tr. p. 11). The surgery was performed by Dr. McKechnie at Carle Clinic in Urbana (Tr. pp. 11-12). The pain at that time had been in her hand and wrist (Tr. p. 12). The surgery was successful, and she had no further treatment with Dr. McKechnie after 2013 (Tr. p. 12). She had no further treatment for her hand after 2013 before her work injury of August 17, 2017 (Tr. p. 12). Between the surgery of 2011 and the work injury of August 17, 2017, she had no issues with her hand (Tr. p. 13). In the two years prior to working at LSC in 2017, she had not had any medical treatment for her left wrist, nor did she have any problems with the palm of her left hand (Tr. p.13). She had not had any numbness or tingling in her hand, pain, or swelling in her left wrist and hand in that two-year period (Tr. p. 13). She had no surgeries on her left hand after the 2011 surgery (Tr. p. 14).

Petitioner was supposed to work a 37.5 hour week for Respondent when she hired in (Tr. p. 15). She was hired at a base salary of $12.40 per hour (Tr. p. 14, 108; Pet. Exh. 13). Petitioner's Exhibit 13 is her W-2

for 2017, and shows her income for the time she worked at LSC that year (Tr. pp. 15-16; Pet. Exh. 13). During the time she worked for Respondent in 2017, she earned $4,228.48 (Tr. p. 16). Her last day of work was September 29, 2017 (Tr. pp. 47-48, 110; Pet. Exh. 13).

Her first day at LSC was on Thursday, July 20, 2017 (Tr. pp. 16-17; Pet. Exh. 13, p. 2). Normally, a new employee has orientation for a week, but since Petitioner had worked there before, she had one day of orientation and then started working on the line on Friday, July 21, 2017 (Tr. pp. 16-17). Her regular work week began on Monday, July 24, 2017 (Tr. p. 17).

Petitioner worked in the "roto" department, and she worked on presses numbered 28, 29, and 30 (Tr. p. 17). Number 31 was out of commission (Tr. pp. 17, 114). There were two other machines in the department she worked on occasionally, which required the operator to use a hydraulic hand crane and squeeze a trigger to move and stack papers (Tr. p. 18). Usually, she worked on machines 28 and 29 (Tr. p. 18). If 29 was running, that was her press, but if 29 was down, she worked on 28 (Tr. p. 18). Machines 28 and 29 were basically the same kind of machine (Tr. pp. 18, 114). Each machine had a press operator, and several other people working on the machine (Tr. p. 19).

She worked with inserts into the magazines which were called "sigs" (Tr. p. 14). A sig was a piece of paper about a foot and a half long, with pages of the magazine on each side (Tr. p. 19). The sigs would come out of the machine folded in half, and so each sig contained four magazine pages (Tr. pp. 19-20). The sigs would come out in stacks, and the size of the stack depended on which machine she was working on (Tr. pp. 19-20, 115). They were delivered to her on a conveyor belt (Tr. pp. 22, 115). She would take the stacks off the conveyor belt (Tr. pp. 24, 115). The stacks came out rapidly, and if something got jammed up on the line, the sigs would start shooting out onto the floor (Tr. p. 22). As soon as she would pull a stack off the line, the next stack would be building up again (Tr. pp. 22-23). If things were running smoothly, three people could handle the stacks coming off the conveyor belt (Tr. p. 22).

A stack of sigs for scholastic publications was almost a foot tall, and when it came off the line, and she would put her thumbs on top of the stack, push it down, stick her fingers underneath, would lift up the sigs, and put them on a pallet (Tr. pp. 14, 20). The stacks would have lots of air in them, and the machine blew cornstarch in between the pages so they were slippery and could stack easily (Tr. p. 20). The scholastic materials were made of recycled cardboard, did not weigh as much, and you could push down on a lot more of these and move them (Tr. p. 20). The weight of the magazine sigs depended on the magazine itself (Tr. p. 20). Martha Stewart's magazine was on a super heavy stock (Tr. pp. 20-21, 114). The stacks of the magazine sigs varied in size (Tr. p. 21).

Once she had used her thumbs and wrist to squish a stack down, and grab it, she would hold the stack at waist level, take one or two steps, turn around, and set the stack down on a pallet on the part of the pallet closest to her (Tr. p. 23). She would then go get the next stack, and set it on the pallet behind the previously placed stack (Tr. p. 23). This would continue until she would have to walk 3 or 4 feet with the stack to place them on the pallet (Tr. p. 23). Once she had completed a level on the pallet, she would start another level (Tr. p. 23). She would get a pallet off of a stack of pallets and put it near the machine (Tr. p. 23). Sometimes, she would place the pallet on a hand jack that would require her to crank on the hand jack with her hands to adjust the level of the pallet (Tr. pp. 23-24). When there was no hand jack, she simply put the pallet on the floor, set a piece of cardboard on top, and started stacking the sigs from the ground up (Tr. p. 24). A regular run would have stacks four and a half to five feet tall on a pallet (Tr. p. 25). Each person working on the machine had their own pallet (Tr. p. 25).

When the pallet was five feet high or so, Petitioner would put a piece of cardboard on top, and then put bent pieces of cardboard that were about four feet long on each corner (Tr. p. 26). She would then get a roll of cellophane wrap, stick the end piece underneath the bottom layer of cardboard, and walk around the pallet while

holding the wrap in her hands in order to wrap the whole pallet from bottom to top, and them back down again (Tr. pp. 26-27). She would then use the pallet jack, squeezing the handles to adjust the height, and pull on the hand jack to move the pallet about twenty feet so the fork truck drivers could come get it (Tr. p. 27). It would take her about a minute and a half to grab a stack of sigs and put them on the pallet, and about 18 of the stacks to make one layer on the pallet (Tr. pp. 35-36, 117). It would take 8 to 10 layers to fill a pallet (Tr. p. 36).

She would then put the forks of the hand jack back on the floor, pull it back over to her area, turn the hand jack around towards the press, go grab another pallet off the stack of pallets, put the pallet on the ground, drag the pallet to the hand jack, and then place the pallet where the forks of the hand jack could be placed in the pallet (Tr. pp. 27-28). She would then start the process again by grabbing the next stack of sigs off the machine (Tr. p. 28).

Each worker was supposed to work for 40 minutes, and then get a 20 minute break (Tr. p. 29). She did not always get her 20 minute break, because there was not enough people working on the machine (Tr. p.30). This happened frequently, although she never went a full shift without getting a break (Tr. p. 30).

Petitioner's first day was her orientation day of July 20, 2017, and she worked 6.5 hours that day (Tr. p. 30; Pet. Exh. 13). The next day was Friday, July 21, 2017, and she worked 7.5 hours that day, and was doing her regular job and all the squeezing and lifting described above (Tr. p. 31; Pet. Exh. 13). Her first full week of work started Monday, July 24, 2017, and she worked 30 hours that week (Tr. p. 31; Pet. Exh. 13). The next week started July 31, 2017, and she worked a total of six days, and worked a total of 56.4 hours (Tr. p. 31; Pet. Exh. 13). The week that began on August 7, 2017, was also a six day work week, and Petitioner worked 49.5 hours that week (Tr. p. 32; Pet. Exh. 13). The next week began on August 14, 2017, and was a five day work week (Tr. p. 33; Pet. Exh. 13). This is the week when Petitioner's injury first began to manifest itself, and she still managed to work 53.5 hours that week (Tr. p. 33). The next week is the week that began on August 21, 2017, and Petitioner worked 7.5 hours each day for 5 days that week, which totaled 37.5 hours (Tr. pp. 33-34; Pet. Exh. 13). During the week that began on August 28, 2017, she worked 18.9 hours (Tr. p. 34; Pet. Exh. 13). The next week was the week of September 4, and she worked 30 hours that week (Tr. p. 34; Pet. Exh. 13). Her last week of work for Respondent on the line was the week of September 11, 2017, and she worked 30 hours that week (Tr. pp. 34-35; Pet. Exh. 13). This is the last time Petitioner worked at LSC Communications (Tr. p. 35).

August 17, 2017, was the first day Petitioner noticed a problem (Tr. p. 36). She worked almost 12 hours that day, and began noticing wrist pain around 2:00 in the morning, which was 3 to 4 hours into her shift (Tr. pp. 36-37; Pet. Exh. 13). They were working on sigs for Martha Stewart Living and doing office copies for Chicago, which were on a very heavy stock of paper (Tr. p. 37). She had not received all of her 20 minute breaks that day, and may have had one break up until this point (Tr. p. 37). Her left wrist started burning across her wrist in a diagonal fashion and was painful (Tr. pp. 37-38). A bruise developed across her wrist and turned purple (Tr. p. 38). It had not been there before (Tr. p. 38). Her wrist also looked swollen (Tr. p. 38). She worked her entire shift that day (Tr. p. 38). She notified her supervisor, named Craig, that night (Tr. pp. 38-40). Craig told her to see the plant nurse before she left that day, which she did (Tr. pp. 40-41). She saw the plant nurse multiple times, and at some point, the nurse gave her a brace, and she continued to work (Tr. pp. 41-42).

At first her condition did not get any worse, but it did not get any better (Tr. p. 42). On August 30, 2017, she decided to see a medical doctor (Tr. p. 43; Pet. Exh. 1, pp. 2-49). On that day, her ring finger and pinky finger locked in a bent position, and she could not straighten them out (Tr. p. 43). It was also starting to ache up into her left elbow (Tr. pp. 43-44). She decided to go to the Emergency Room at Sarah Bush Lincoln Health Center in Mattoon, Illinois (Tr. p. 44; Pet. Exh. 1, pp. 2-49). At the Emergency Room, Dr. Joseph Burton noted a chief complaint of left wrist pain for the last two weeks, but also noted elbow pain, and further noted she had a previous carpal tunnel release (Pet. Exh. 1, p. 8). The doctor further noted she worked in a factory and did a lot of repetitive movements (Pet. Exh. 1, p. 8). Although she was on a lifting restriction, she

was still doing the repetitive movements (Pet. Exh. 1, p. 8). She described pain in the ulnar aspect of the wrist, pain in to the second and third fingers, and pain radiating down the lateral aspect of the arm (Pet. Exh. 1, p. 8). She had been to see the nurse at the factory and had been given a wrist brace, which she had been wearing for the past two weeks (Pet. Exh. 1, p. 8). Upon exam, the doctor noted swelling in the lateral aspect of the left wrist (Pet. Exh., p. 9). Phalen's and Tinel's test were positive (Pet. Exh. 1, p. 9). There was pain with palpation to the medial epicondyles and tingling down the arm with palpation (Pet. Exh. 1, p. 9). They gave her some pain medication and a muscle relaxer, and she continued working (Tr. p. 44; Pet. Exh. 1, p. 9). His assessment was carpal tunnel syndrome and medial epicondylitis of the left elbow (Pet. Exh. 1, p. 10). He recommended Petitioner maintain her wrist splint at bedtime and while at work, prescribed medication, and advised her to follow up with an orthopedic doctor (Pet. Exh. 1, p. 10). At some point, she was placed on light duty (Tr. p. 44).

On September 8, 2017, Petitioner saw Physician's Assistant Stacy Harminson at Sarah Bush Lincoln Occupational Medicine (Tr. p. 44; Pet. Exh. 2, p. 132). The history given was consistent with the events described above (Pet. Exh. 2, p. 131). Her complaints were of pain in the left wrist and forearm, which was deep and constant, and made worse with movement (Pet. Exh. 2, p. 133). Examination revealed pain to palpation over the distal radius of the left wrist, the distal ulna, the ulnar styloid, and the wrist flexor surface (Pet. Exh. 2, p. 133). Swelling was also noted in the lateral aspect of the wrist (Pet. Exh. 2, p. 133). Tenderness to palpation was noted in the left elbow area, in the lateral epicondyle area, and over the flexor muscles of the left forearm (Pet. Exh. 2, p. 133). Petitioner was given a different brace, and was also given lifting restrictions (Tr. pp. 44-45; Pet. Exh. 2, p. 133). She was also scheduled for a course of occupational therapy (Tr. p. 46; Pet. Exh. 2, p. 133). Petitioner told her employer about the lifting restriction, but was asked to exceed the lifting restriction every day (Tr. p. 45). At some point she was not supposed to use her left hand at all, but she had to keep working and use her left hand (Tr. pp. 45-46). The occupational therapy last 6 sessions, but it made her condition worse and was discontinued (Tr. p. 46; Pet. Exh. 2, p. 128).

She was eventually taken off the line work on September 14, 2017, and asked to stack boards and sweep with one hand (Tr. p. 47). On September 29, 2017, Petitioner was told Respondent had run out of light duty work, and her employment with Respondent was terminated (Tr. pp. 47-48, 110). She was sent to see the nurse, and when she returned, she was told by a man from Human Resources that since she could not perform the job, Respondent was taking her off work and putting her on TTD, and she would get full TTD benefits (Tr. pp. 48-49). She never received any TTD benefits (Tr. p. 49). At the time of her termination, she was still under a doctor's care and receiving medical treatment (Tr. pp. 100-01). She had not been placed at maximum medical improvement (Tr. p. 101).

Petitioner had health insurance when she worked for Respondent (Tr. p. 49). However, when Respondent terminated her employment, Petitioner lost her health insurance and had no way to pay for medical care (Tr. pp. 49-50). Her treatment became sporadic (Tr. p. 50). She had one visit with Dr. Donald Sandercock of Sarah Bush Lincoln on August 26, 2017 (Tr. p. 50; Pet. Exh. 3, p. 146). Upon examination, Dr. Sandercock noted tremendous tenderness along the ulnar aspect of the wrist, as well as a great deal of discomfort (Pet. Exh. 3, p. 148). Petitioner also suffered from a limited range of motion (Pet. Exh. 3, p. 146). He also noted a great deal of tenderness ulnarly at the ulnar carpal area of the left wrist (Pet. Exh. 3, pp. 148-49). Dr. Sandercock recommended an MRI (Pet. Exh. 3, p. 149), but that did not happen until December 30, 2017 (Tr. p. 50; Pet. Exh. 1, p. 111). Eventually, Petitioner qualified for Medicaid from the State of Illinois, and this is when her medical treatment started again (Tr. p. 51).

There was no further treatment after that until May 7, 2018, when she saw Physician's Assistant Chelsea LaGrange at Carle Clinic in Champaign, Urbana, Illinois (Tr. pp. 50-51; Pet. Exh. 5, p. 267). PA LaGrange noted Petitioner presented complaining of left wrist pain that had started in August of 2017, that she had previously worked for LSC Communications as a material handler, and that her pain started when she was lifting heavy reams of paper (Pet. Exh. 5, p. 267). The pain would start in the ulnar side of her wrist and radiate

to her medial elbow (Pet. Exh. 5, p. 267). The pain was described as sharp and constant, and rated a 7 of 10 (Pet. Exh. 5, p. 267). The pain was worse with wrist pronation and resting her elbow on the edge of a table, and associated symptoms included swelling over the ulnar styloid and numbness and tingling in the left ring and pinky fingers (Pet. Exh. 5, p. 267). She was wearing a wrist brace that helped decrease the intensity of the pain (Pet. Exh. 5, p. 267). She was taking Norco and Flexeril for back pain, but they did not help with her wrist pain (Pet. Exh. 5, p. 267). Examination revealed mild swelling at the left ulnar styloid, left wrist decreased flexion and extension, and decreased ulnar and radial deviation due to pain (Pet. Exh. 5, p. 269). Petitioner was able to pronate or supinate, but only with great pain at the ulnar side of the left wrist volar surface (Pet. Exh. 5, p. 269). Testing revealed extremely positive provocative testing a left cubital tunnel, but was negative for provocative testing at the right cubital tunnel (Pet. Exh. 5, p. 269). The diagnoses were cubital tunnel syndrome on the left (Pet. Exh. 5, p. 269). Ms. LaGrange felt that most of Petitioner's pain was due to compression of her left medial nerve, and noted that due to the severity of Petitioner's symptoms and the obvious physical exam findings, that surgical management would be best of Petitioner, and recommended surgical release of the cubital tunnel (Pet. Exh. 5, p. 270).

On June 6, 2018, Petitioner met with Dr. Mark Shima of Carle Clinic (Tr. p. 51; Pet. Exh. 5, p. 279). Petitioner again gave a history of being injured in August while lifting bales of magazines she had to compress to ger her hand around, and then lift up to stack them on pallets (Pet. Exh. 5, p. 280). Upon exam, the doctor noted swelling of the soft tissue adjacent to the ulnar head which was tender to palpation (Pet. Exh. 5, p. 280). There was an extremely positive Tinel test at the cubital tunnel, as well as a positive Tinel sign along the ulnar nerve int eh forearm as well as at the swelling located at the ulnar head (Pet. Exh. 5, p. 280). The doctor's assessment was that her entire ulnar nerve was irritated as a result of compression at the cubital tunnel, and recommended cubital tunnel release (Pet. Exh. 5, p. 280).

On July 3, 2018, Dr. Shima performed a left cubital tunnel release on her left elbow (Tr. p. 52; Pet. Exh. 5, p. 296-98). His pre-operative and post-operative diagnoses were the same – left cubital tunnel syndrome (Pet. Exh. 5, p. 296).

Petitioner reported that the surgery did relieve some of the pain that had been going up her arm, but did not completely correct her condition (Tr. p. 52). However, as time went on, she went from experiencing hand pain, to forearm pain, to elbow pain, which eventually worked into her shoulder (Tr. p. 52). Petitioner continued to treat with Dr. Shima, and on October 18, 2018, three months after the surgery, Dr. Shima noted that Petitioner had improved substantially, but still had occasional numbness in her ulnar nerve distribution (Tr. p. 52; Pet. Exh. 5, pp. 308-09). She also reported occasional shocks of pain that traveled from her wrist proximally or from her wrist out to her small finger (Pet. Exh. 5, p. 309). The swelling or mass she was sensing on the ulnar side of her wrist had disappeared since surgery, but noted that if she leaned her forearm against a table for an extended period of the, the swelling may return (Pet. Exh. 5, p. 309). Examination showed a positive Tinel and Durkan test at the left Guyon's Canal (Pet. Exh. 5, p. 309). He noted symptoms of ulnar compressive neuropathy at Guyon's Canal, and recommended an EMG to further evaluate her condition (Pet. Exh. 5, p. 309). If the EMG supported this diagnosis, they would discuss Guyon's Canal decompression (Pet. Exh. 5, p. 309).

The EMG took place on February 18, 2019 (Pet. Exh. 5, p. 328). It revealed mild left cubital tunnel syndrome and mild bilateral carpal tunnel syndrome (Pet. Exh. 5, p. 330). Dr. Shima met with Petitioner again on February 27, 2019, and noted that the EMG did not find evidence of compression at Guyon's Canal, but there was a strong Tinel sign at Guyon's Canal (Pet. Exh. 5, p. 337).

On June 28, 2019, Dr. Shima performed the second surgery, a Guyon's Canal release procedure in Petitioner's left wrist (Tr. p. 53; Pet. Exh. 5, p. 382). The pre-operative and post-operative diagnoses were the same – Left Guyon's Canal Syndrome (Pet. Exh. 5, p. 382-83). Petitioner recovered well after that, but still has some aches and some stiffness (Tr. p. 53). Today, she still has occasional pain in her wrist, but not her elbow

(Tr. p. 61). The wrist will ache in the area of the Guyon's Canal surgery (Tr. p. 61). Every once in a while, if she puts her elbow on a surface it will sill cause pain (Tr. p. 61). When her hand gets achy, it affects her job in that it affects her ability to type (Tr. p. 62). She will take Ibuprofen or Tylenol to deal with the pain (Tr. p. 62). There is a lot of typing associated with her job, as the medical records are all electronic (Tr. p. 62). She used to enjoy doing yoga, but she cannot do it as well anymore, as she cannot put her hands flat on the floor and put weight on them (Tr. pp. 62-63).

In his deposition, Dr. Shima testified that he is an orthopedic hand surgeon with Carle Foundation Hospital in Champaign, Urbana, Illinois (Pet. Exh. 16, p. 6, Dep. Exh. 1). He testified that his Physician's Assistant, Chelsea LaGrange, first started treating Petitioner in May of 2018, and he began his direct treatment of her on June 6, 2018 (Pet. Exh. 16, p. 8). He took a history that day, and Petitioner described her injury, and that it had taken place on August 17, 2017 (Pet. Exh. 16, pp. 11-12). He testified that the history during the first meeting is important for a patient he suspects may have peripheral nerve compression, as knowing the exact symptoms and when they occurred is critical in making a correct diagnosis (Pet Exh.16, p. 10). At all times in his dealings with Petitioner, he believed she was honest, and not magnifying her symptoms in any way (Pet. Exh. 16, p. 11). Upon examination, his first assessment was cubital tunnel syndrome (Pet. Exh. 16, pp. 15-16).

Dr. Shima testified he performed the left cubital tunnel release on July 3, 2018, and decompressed the nerve (Pet. Exh. 16, pp. 16-17). The surgery went well, however, on October 18, 2018, Petitioner reported she still had occasional numbness in the ulnar nerve distribution, the small finger, and the ring finger (Pet. Exh. 16, p. 20). She also experienced occasional shocks of pain that would travel from her wrist out towards her small finger (Pet. Exh. 16, p. 20). The swelling at the ulnar head had gone away since the surgery, but if she leaned her forearm against a table to an extended period of time, the swelling would return (Pet. Exh. 16, pp. 20-21). He felt there was a second site of compression at the Guyon's Canal (Pet. Exh. 16, p. 22). An EMG was ordered, and recommended a left Guyon's Carnal release surgery (Pet. Exh. 16, pp. 22-23). He performed this surgical procedure on June 18, 2019 (Pet. Exh. 16, pp. 23-24).

Dr. Shima testified that the frequent or repetitive gripping, grasping, pushing, pulling, and reaching across the elbow with extension and flexion were known risk factors for the development of cubital tunnel syndrome, as well as the development of ulnar nerve neuropathy (Pet. Exh. 20, p. 26). He testified he was aware of Petitioner's prior issue with carpal tunnel syndrome in her left hand, as well as her other medical conditions (Pet. Exh. 20, pp. 25, 35-36, 46). The doctor then testified that, to a reasonable degree of medical certainty, based on the job description as testified to by Petitioner, and the number of hours worked for Respondent by Petitioner, it was "very likely" that Petitioner's cubital tunnel syndrome was related to her work injury (Pet. Exh. 16, pp. 26-30). This is because Petitioner performed a strenuous upper extremity activity more than she was previously used to, repetitively, and over an extended period of time (Pet. Exh. 16, p. 30). Such activity vey well could have exacerbated any pre-existing conditions she may have had in her left arm (Pet. Exh. 16, p. 30).

He testified the two surgeries he performed were likely related to Petitioner's repetitive work injury, that the medical treatment he provided was related to the work injury, and medically necessary (Pet. Exh. 16, pp. 30-31). He explained that there could be two possible reasons why Petitioner developed cubital tunnel symptoms on her left side, and not her right (Pet. Exh. 16, pp. 41-42). One reason is that people do not always get the same symptoms bilaterally; many patients only have one nerve that gets compressed (Pet. Exh. 16, pp. 41-42). Also composite motions may be very similar bilaterally, like grabbing something and lifting it, but there may be smaller aspects to the motion that are less visible that can change the stressors on an extremity, such as turning primarily in one direction, which can further load one extremity over the other (Pet. Exh. 16, pp. 41-42). The other reason is that people tend to try and keep their dominant arm, such as Petitioner's right arm, free to carry more weight on their non-dominant side (Pet. Exh. 16, p. 42). An example of this is people who hold a grocery bag in their non-dominant arm and use their dominant arm to turn the key in the lock (Pet. Exh. 16, p. 42). Dr. Shima further testified that he disagrees with Respondent's Section 12 examiner's conclusions that Petitioner

had not worked long enough at LSC for her symptoms to have developed (Pet. Exh. 16, p. 32). This opinion is based upon his own clinical experience of seeing patients who develop cubital tunnel syndrome because of things unrelated to their job (Pet. Exh. 16, p.32).

Following her termination from employment with Respondent on September 29, 2017, Petitioner looked for work, but did not find anything at first, as she still could not use her left hand (Tr. p. 54). Petitioner applied for several jobs online, in person, and through Indeed (Tr. p. 54). She eventually found seasonal work at Rural King in Mattoon, Illinois, and started there on November 4, 2018, after her cubital tunnel surgery (Tr. p. 55). She was out of work for 59 weeks after being terminated by Respondent, and had no income during that time (Tr. p. 55). She worked in the office at Rural King, and as it was a seasonal job for the holidays, lasted for 15 weeks (Tr. p. 56; Pet. Exh. 14). The job ended on February 19, 2019 (Tr. p. 56; Pet. Exh. 14). During her time at Rural King, Petitioner earned $4,879.00, or $325.27 (Tr. p. 57; Pet. Exh. 14). While she worked at Rural King, she was still having problems with her left wrist, and she was given muscle relaxers following her cubital tunnel surgery (Tr. p. 56; Pet. Exh. 5). She would not use her left arm to perform the job (Tr. p. 99). She would lay it on the desk and type mostly with her right hand, and only occasionally with her left hand (Tr. p. 99). There was no lifting involved with this job (Tr. p. 99).

Following her time at Rural King, Petitioner was off work for one week (Tr. p. 57). This covers the time period of February 24, 2019, to March 4, 2019 (Tr. p. 57).

On March 4, 2019, Petitioner started at new job at Home Depot in Mattoon, Illinois (Tr. p. 57; Pet. Exh. 15). She worked there from March 4, 2019, through June 23, 2019, a period of 16 weeks (Tr. p. 57; Pet. Exh. 15). While working there, Petitioner worked in the lawn and garden department, watering flowers and assisting customers (Tr. p. 58). She was still experiencing problems with her left wrist (Tr. p. 58; Pet. Exh.5). She took off work from Home Depot in order to have the Guyon's Canal surgery (Tr. p. 58; Pet. Exh. 5). During her time at Home Depot, Petitioner earned $4,160.75, or $260.05 per week (Tr. p. 58; Pet. Exh. 5).

Following the Guyon's Canal procedure, Petitioner was off work for 5 weeks (Tr. p. 59). She had no income and no TTD benefits during this time (Tr. p. 59).

On July 20, 2019, Petitioner went back to being a nurse and found new employment at Crest Health Care (Tr. pp. 59-60). At this job, she earned a larger salary than she had with Respondent (Tr. p. 59). She worked in a care facility changing bandages, changing dressings, and passing medications (Tr. p. 60).

During her course of treatment, Petitioner attended, at Respondent's request, a Section 12 Exam with Dr. John Fernandez of Midwest Orthopedics Hand & Shoulder Center on July 24, 2019, which was approximately 1 month after Petitioner's Guyon's Canal surgery (Tr. pp. 63-64, Resp. Exh. 7, p. 49). Although she was at Dr. Fernandez's office for some time, and met with an office assistant (Tr. p. 67), Petitioner testified that her examination with the doctor lasted about 10 minutes (Tr. p. 63). The doctor came into the room, looked at her hand, and asked her some questions (Tr. p. 63). The doctor asked her if she had numbness or tingling in a certain area, pushed on her hands and fingers a little bit, and that was the extent of the exam (Tr. pp. 63-64). This testimony, based on specific recollection of the Petitioner, differs from Dr. Fernandez's testimony, who has no recollection of this particular encounter (Resp. Exh. 7, p. 11), but testified that his report states that there was "thirty minutes face-to-face time" during the history and physical (Resp. Exh. 7, p. 55). He then also testified he was in the examining room with her for 45 minutes that day (Resp. Exh. 7, p. 55). Petitioner denies any assertion that she was with the doctor for 30 minutes (Tr. p. 64). The doctor's assistant was present, but he was not there for 30 minutes (Tr. p. 64).

Dr. Fernandez admitted he never saw Petitioner before or after his July 24, 2019, exam, did not speak or consult with any of her treating physicians, and did not speak with her bosses, supervisors, co-employees, or family members about her condition (Resp. Exh. 7, pp. 53-54). The doctor also testified that Petitioner was

cooperative, her subjective complaints matched well with her objective findings, and she was not symptom magnifying or exaggerating or malingering (Resp. Exh. 7, pp. 33-34, 57). He testified that there were no complaints by Petitioner of any elbow pain right after the injury, meaning when she initially presented to the Emergency Room on August 30, 2017, and at the occupational clinic on September 8, 2017 (Resp. Exh. 7, pp. 56-57). This differs from the Emergency Room records of August 30, 2017, which states, "She's also had some medial elbow pain with radiation of pain down the lateral aspect of the arm" (Pet. Exh. 1, p. 8). It also differs from what is stated in the records of September 8, 2017, in which she states that while her main complaints are with her left wrist, she has pain radiating up into her forearm (Pet. Exh. 2, p. 132). Examination of the left elbow that day showed tenderness to palpation of the left elbow (Pet. Exh. 2, p. 133).

Dr. Fernandez testified that it is not uncommon for someone with ulnar nerve issues to have symptoms on one side versus another; there does not have to be symmetry in this regard (Resp. Exh. 7, p. 36). He testified that it was his opinion that the amount of work exposure that Petitioner had at LSC was not sufficient to cause or aggravate her underlying condition of cubital tunnel syndrome or Guyon's tunnel syndrome (Resp. Exh. 7, p. 39). His opinion was that the pinching use of her hands and wrists by Petitioner, as described above and in his deposition for 30 hours the first week, 56.4 hours the second week, 49.5 hours the third week, and over 42 hours the week the injury manifested itself had absolutely nothing to do with her left wrist and elbow condition (Resp. Exh. 7, p. 68). He testified she would need at least 2 months of exposure at that intensity for the work to have a relation to her condition (Resp. Exh. 7, pp. 41-42). He did admit that "there can be differences in opinion" (Resp. Exh. 7, pp. 41-42).

Respondent called Craig Frantz as a witness at trial (Tr. p. 101). Mr. Franz retired from LSC in January of 2022 (Tr. p. 102). He started working at R.R. Donnelley, the predecessor of LSC in June of 1982, and retired with the title of HR Manager (Tr. p. 102). He worked at the LSC plant in Mattoon as the HR Manager until it closed (Tr. p. 103). In 2017, he was an HR Generalist III, which was the same as a supervisor (Tr. p. 104). He testified that a rehired employee starting at LSC may not have undergone the same orientation procedure as a completely new hire, depending on what they knew (Tr. p. 105). He further testified Petitioner was an employee of Respondent, and worked as a material handler and roto presser, and was hired on July 20, 2017 (Tr. p. 106). He did not know if Petitioner had worked for Respondent previously (Tr. p. 106). Her rate of pay was $12.00 per hour, and was given a shift differential increase of 40 cents per hour because she worked third shift; making her pay $12.40 per hour (Tr. p. 108). She was eligible for health insurance and life insurance benefits (Tr. p. 109). Mr. Frantz further confirmed that 95% of Petitioner's job with Respondent consisted of picking up stacks of sigs from the press machines as testified to by Petitioner (Tr. p. 115). He further confirmed that Petitioner's employment with Respondent ended in September of 2017, and that he terminated her employment (Tr. pp. 110, 121-22). At the time, he was aware she had been having medical issues, and he knew those medical issues were ongoing when he terminated her (Tr. pp. 121-22). He also confirmed that the Martha Stewart magazine was run through Machine 28, and was on heavy stock (Tr. p. 114).

## DISPUTED ISSUES

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

As to the issue of credibility, the Arbitrator finds that Petitioner's testimony at arbitration was credible. Her history of accident, complaints, and treatment were consistent with the medical records introduced into evidence. Her complaints, both in the medical records, and at arbitration did not appear out of proportion to her objective physical findings. In his examination of Petitioner, Respondent's Section 12 examiner found Petitioner was cooperative, her subjective complaints match well with her objective findings, and she was not symptom magnifying, exaggerating, or malingering.

The evidence demonstrates that a repetitive work injury occurred, that it first manifested itself on August 17, 2017, and it arose out of and in the course of Petitioner's employment with Respondent. The unrebutted and credible evidence shows that Petitioner suffered an injury to her left wrist and elbow after repetitive lifting and carrying of stacks of paper from Respondent's press machine to a pallet, stacking the papers on the pallet, wrapping the pallet in cellophane, and dragging the pallet to a location where the forklift drivers could get it; and then repeating this process over and over again.

To obtain compensation under the Workers' Compensation Act, a claimant must show, by a preponderance of the evidence, that he or she suffered a disabling injury that arose out of and in the course of the claimant's employment. 820 ILCS 305/2. An injury "arises out of" one's employment if it originates from a risk connected with, or incidental to, the employment and involves a causal connection between the employment and the accidental injury. Mores-Harvey v. Industrial Comm'n, 345 Ill.App.3d 1034, 1037, 804 N.E.2d 1086, 1090 (3d Dist. 2004). "In the course of" refers to the time, place, and circumstances under which the accident occurred. Suter v. Illinois Workers' Compensation Comm'n, 2013 IL App (4th) 130049WC, ¶ 18, 998 N.E.2d 976, 971. Accidental injuries sustained on an employer's premises within a reasonable time before and after work are generally deemed to arise in the course of the employment. Mores-Harvey, 345 Ill.App.3d at 1037, 804 N.E.2d at 1090; Suter, at ¶ 18, 998 N.E.2d at 971.

The unrebutted evidence demonstrates that Petitioner suffered a disabling injury which first appeared on August 17, 2017. Although Petitioner had left carpal tunnel surgery in 2011, some 6 years prior to this injury, and suffered from other physical ailments, she had no further treatment for her 2011 surgery after 2013 before her work injury of August 17, 2017 (Tr. p. 12). Between the surgery of 2011 and the work injury of August 17, 2017, she had no issues with her hand, and in the two years prior to starting her work at LSC in 2017, she had not had any medical treatment for her left wrist, nor did she have any problems with the palm of her left hand (Tr. p.13). She had not had any numbness or tingling in her hand, pain, or swelling in her left wrist and hand in that two-year period, and had not had any further surgeries on her left hand after the 2011 surgery (Tr. pp. 13-14).

Petitioner was consistent in her description of her job to her medical providers and the Arbitrator. Petitioner had a very physically demanding job that required her to reach up with her palms extended and her thumbs up to grab the stacks of sigs, push them down with her thumbs, squeeze the stacks, lift them up, take a step or two, and then place the stacks on a pallet. She did this over and over, arranging the stacks on the pallet until the pallet was covered, and then beginning a new layer on the pallet. When the pallet was approximately 5 feet high, she would walk around the pallet, using her hands to cover the pallet in cellophane. She was also required to use her hands and wrists to use a hand jack, and to pull full pallets away from the machine to a pickup point (Tr. pp. 14, 20-36, 114, 117). No evidence was offered as to any other cause of Petitioner's injury other than the events leading up to her injury of August 17, 2017, and Petitioner has demonstrated that she suffered a disabling injury on that date.

Petitioner has also demonstrated that her injury "arose out of" her employment, in that it undoubtedly originated from a risk connected with her job with Respondent. As described above, Petitioner is required to reach out with her wrists and arms, clamp down on the sigs, and lift and carry them to a pallet, and then arrange them on the pallet. Her ultimate diagnoses of cubital tunnel syndrome and Guyon's Canal syndrome were certainly a risk connected with her employment. Petitioner has met her burden of showing her injury "arose out of" her employment with Respondent.

Petitioner has also met her burden of showing her injury was suffered "in the course of" her employment. Petitioner has shown that the injury incurred while she was working for Respondent, under circumstances which could lead to injury. Petitioner has established that an accident occurred that arose out of, and in the course, of her employment with Respondent.

**E. Was timely notice of the accident give to Respondent?**

Petitioner testified that she informed her supervisor of the injury on August 17, 2017, and that the supervisor told her to see the plant nurse before she left work for the day (Tr. pp. 38-41). She saw the plant nurse multiple times while she continued to work in the days following the injury (Tr. pp. 41-42). Chris Frantz, an HR Supervisor with Respondent at the time, testified that he was aware of Petitioner's injury, and was in contact with the plant nurse regarding Respondent's condition (Tr. pp. 101-122). No claim was made at trial by Respondent that it was unaware of Petitioner's claim of injury. Timely notice of the Petitioner's injury was given to Respondent

**F. Is Petitioner's current condition of ill-being causally related to the injury?**

The evidence demonstrates that Petitioner's condition of a left cubital tunnel syndrome and left Guyon's Canal syndrome were causally related to her work injury which first manifested itself on August 17, 2017. The testimony and medical records show that Petitioner has been consistent in her testimony and in her reports to her medical providers. Petitioner was also credible in her testimony.

The evidence demonstrates that in the weeks preceding August 17, 2017, injury, Petitioner was injured within the course and scope of her employment with Respondent while working as a press operator and repetitively using her hands and wrists to grab, squeeze and lift pages of heavy stock magazine inserts, stacking them on a pallet until they covered the entire pallet and were approximately 5 feet in the air, wrapping them with cellophane, and then dragging the pallets to a drop off location (Tr. pp. 14, 20-36). Although Petitioner had suffered a previous carpal tunnel syndrome in her left wrist, and suffered concurrently from unrelated medical conditions, she had no further treatment for her 2011 carpal tunnel surgery after 2013 before her work injury of August 17, 2017 (Tr. p. 12). Between the surgery of 2011 and the work injury of August 17, 2017, she had no issues with her hand, and in the two years prior to starting her work at LSC in 2017, she had not had any medical treatment for her left wrist, nor did she have any problems with the palm of her left hand (Tr. p.13). She had not had any numbness or tingling in her hand, pain, or swelling in her left wrist and hand in that two-year period, and had not had any further surgeries on her left hand after the 2011 surgery (Tr. pp. 13-14).

The unrebutted evidence shows that, in the weeks of working for the Respondent prior to the injury manifesting itself, she worked 7.5 hours on the line on Friday, July 21, 2017 (Tr. p. 31; Pet. Exh. 13), 30 hours her first full week of work starting July 24, 2017 (Tr. p. 31; Pet. Exh. 13), 56.4 hours during the week of July 31, 2017 (Tr. p. 31; Pet. Exh. 13), 49.5 hours the week of August 7, 2017 (Tr. p. 32; Pet. Exh. 13), and 53.5 hours the week of August 14, 2017, the week the injury manifested itself (Tr. p. 33; Pet. Exh. 13). Petitioner continued on the job for several more weeks after that, until she was removed from the line on September 14, 2017 (Tr. pp. 34-35; Pet. Exh. 13).

No evidence was offered to challenge Petitioner's consistent and credible testimony, and the testimony provided was consistent with the medical records introduced into evidence. Respondent offered no evidence of any other explanation for Petitioner's injuries. The evidence demonstrates that Petitioner's left wrist and elbow injuries were caused by her work injury which manifested itself on August 17, 2021.

Support for this conclusion is seen in the testimony of Dr. Shima, who met with Petitioner many times, and provided her with hands on treatment. Dr. Shima testified that the frequent or repetitive gripping, grasping, pushing, pulling, and reaching across the elbow with extension and flexion were known risk factors for the development of cubital tunnel syndrome, as well as the development of ulnar nerve neuropathy (Pet. Exh. 20, p. 26). He testified he was aware of Petitioner's prior issue with carpal tunnel syndrome in her left hand, as well as her other medical conditions (Pet. Exh. 20, pp. 25, 35-36, 46). The doctor then testified that, to a reasonable

degree of medical certainty, based on the job description as testified to by Petitioner, and the number of hours worked for Respondent by Petitioner, it was "very likely" that Petitioner's cubital tunnel syndrome was related to her work injury (Pet. Exh. 16, pp. 26-30). This is because Petitioner performed a strenuous upper extremity activity more than she was previously used to, repetitively, and over an extended period of time, and that such activity very well could have exacerbated any pre-existing conditions she may have had in her left arm (Pet. Exh. 16, p. 30). He further testified the two surgeries he performed were likely related to Petitioner's repetitive work injury, that the medical treatment he provided was related to the work injury, and medically necessary (Pet. Exh. 16, pp. 30-31).

Respondent has also offered the Section 12 Examination Report and deposition testimony of Dr. Fernandez in opposition of Petitioner's claim (Resp. Exh. 7). However, the Commission may attach greater weight to medical opinions of a treating physician. International Vermiculite Co. v. Industrial Comm'n, 77 Ill.2d 1, 4, 394 N.E.2d 1166, 1168 (1979). Here, the more credible testimony comes from Petitioner's treating physician, who had the opportunity to provide hands on treatment of Petitioner, and conclude that the work injury caused or exacerbated Petitioner's wrist and elbow condition. More credible evidence also came from Petitioner, who specifically remembers her time with the doctor during the Section 12 Exam was no more than 10 minutes, while Dr. Fernandez, who admitted not remembering the encounter, testified that he had 30 minutes of "face to face" time with Petitioner, and another 15 minutes in the room with her while his assistant performed the history. Dr. Fernandez also testified that there were no complaints by Petitioner of any elbow pain right after the injury, meaning during her initial presented to the Emergency Room on August 30, 2017, and at the occupational clinic on September 8, 2017 (Resp. Exh. 7, pp. 56-57). However, the Emergency Room records of August 30, 2017, clearly state, "She's also had some medial elbow pain with radiation of pain down the lateral aspect of the arm" (Pet. Exh. 1, p. 8). The records of September 8, 2017, indicate that while her main complaints are with her left wrist, Petitioner had pain radiating up into her forearm, and that examination of the left elbow showed tenderness to palpation of the left elbow (Pet. Exh. 2, p. 133). Finally, Dr. Fernandez offered no other plausible explanation for Petitioner's symptoms, which he found to be reasonable and credible, and could only state that Petitioner's repetitive work activities in the weeks leading up to August 17, 2017, had absolutely nothing to do with her left wrist and elbow condition (Resp. Exh. 7, p. 68). He also admitted "there can be differences in opinion" (Resp. Exh. 7, pp. 41-42).

Petitioner has met her burden of demonstrating a causal connection between the work injury which manifested itself on August 17, 2017, and her subsequent medical condition relating to her left arm and wrist.

**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 consistent and credible medical evidence presented by Petitioner, and the medical records introduced into evidence, the medical treatment provided to Petitioner for her work injury from August 30, 2017, until she last saw Dr. Shima's Physician Assistant was all reasonable and medically necessary.

The unrebutted evidence also shows that Respondent has not paid any of the appropriate charges for such reasonable and necessary medical services. As such, Respondent shall be solely responsible for all reasonable and related medical bills associated with Petitioner's medical care related to this work injury for the time period of August 30, 2017, through July 20, 2019. Respondent shall pay any remaining medical expenses which are still outstanding for such related medical, and repay any third party that has paid related benefits on behalf of Petitioner, including, the Illinois Department of Healthcare and Family Services, Equian and,/or Molina Health Care.

**K. TTD Benefits**

Section 8(b) of the Act provides that an employee that suffers from temporary total incapacity for more than 3 days is entitled to compensation at a rate of 66 2/3% of her Average Weekly Wage, and shall continue so long as the total temporary incapacity lasts. 820 ILCS 305/8(b). As noted above, Petitioner did not receive any payment of TTD benefits, and did not receive payment of any kind after September 14, 2017. She is entitled to temporary benefits from that date until July 20, 2019, when she began working for her current employer, making a larger wage than she made working for Respondent.

The testimony at hearing was that Petitioner was terminated September 29, 2017, but had not received payment of any kind since September 14, 2017 (Tr. pp. 47-48, 110; Pet. Exh. 13). Supervisor Chris Frantz testified that, at the time he terminated Petitioner on behalf of Respondent, he was aware she was having medical issues, and knew those medial issues were still ongoing (Tr. pp. 121-22). The evidence shows that Petitioner was on a work restriction of limited duty. Petitioner was not at MMI at the time of her termination.

The unrebutted testimony is that, following her termination, Petitioner looked for work, but did not find anything at first, as she still could not use her left hand (Tr. p. 54). Petitioner applied for several jobs online, in person, and through Indeed (Tr. p. 54). She was out of work for 59 weeks following her termination (Tr. p. 55). She eventually found seasonal work at Rural King in Mattoon, Illinois, and worked there from November 4, 2018, through February 19, 2019, a period of 15 weeks (Tr. p. 56; Pet. Exh. 14). During her time at Rural King, Petitioner earned $4,879.00, or $325.27 (Tr. p. 57; Pet. Exh. 14). Following her time at Rural King, Petitioner was off work for one week (Tr. p. 57). This covers the time period of February 24, 2019, to March 4, 2019 (Tr. p. 57).

On March 4, 2019, Petitioner started at new job at Home Depot in Mattoon, Illinois, and she worked there from March 4, 2019, through June 23, 2019, a period of 16 weeks (Tr. p. 57; Pet. Exh. 15). During her time at Home Depot, Petitioner earned $4,160.75, or $260.05 per week (Tr. p. 58; Pet. Exh. 5). Following the Guyon's Canal procedure, Petitioner was off work for 5 weeks (Tr. p. 59). She had no income and no TTD benefits during this time (Tr. p. 59). On July 20, 2019, Petitioner went back to being a nurse and found new employment at Crest Health Care (Tr. pp. 59-60).

The Illinois Supreme Court has held, "It is a well-settled principle that when a claimant seeks TTD benefits, the dispositive inquiry is whether the claimant's condition has stabilized, *i.e.* whether the claimant has reached maximum medical improvement." *Interstate Scaffolding Inc. v. Illinois Workers' Compensation Comm'n*, 236 Ill.2d 132, 142, 923 N.E.2d 266, 271 (2010). Looking to the Act, there is no reasonable construction of its provisions which supports a finding that TTD benefits may be denied an employee who remains injured, yet has been discharged by his employer for "volitional conduct "unrelated to his injury. *Id.* at 146, 923 N.E.2d at 274. A thorough review of the Act shows it contains no provision for the denial, suspension, or termination of TTD benefits as a result of an employee's discharge by the employer. *Id.* Nor does the Act condition TTD benefits on whether there has been "cause" for the employee's dismissal. *Id.*

The ruling of *Interstate Scaffolding* is clear, termination of the employee is not a basis for the termination of temporary benefits. On September 29, 2017, Petitioner had not been placed at MMI. Therefore, Respondent had the option of employing her pursuant to whatever restrictions her treating physicians had placed on him, or paying her TTD. Respondent chose to do neither. Since it did not employ or pay Petitioner after September 29, 2017, it was responsible for paying him TTD until she began her subsequent employer paying her a better salary on July 20, 2019.

At the time of her termination, Petitioner's Average Weekly Wage was $559.24. Her TTD rate is therefore 2/3 of this amount, or $372.83. She was out of work completely until she found seasonal work at

Rural King, and is therefore entitled to TTD of $372.83 from September 15, 2017, through November 3, 2018, a period of 59 weeks, which computes to $21,996.97.

At Rural King, Petitioner earned an Average Weekly wage of $325.27. There is a difference of $233.97 between her Average Weekly Wage at LSC of $559.24, and her Average Weekly Wage of $325.27 she earned at Rural King. Ms. Wilson is entitled to 2/3 of this difference, or $155.98, for each week of this 15 week period. Taking $155.98 times 15 weeks equates to Temporary Partial Disability payments of $2,339.70 during her time at Rural King.

Petitioner was then off work from February 24, 2019, until the week of March 4, 2019, a period of 1 week. She is therefore entitled to her entire TTD rate in the amount of $372.83 for this time period.

Petitioner then worked for 16 weeks at Home Depot, and during this time period, she had an Average Weekly Wage of $260.05 for this 16 week period. There is a difference of $299.19 between her Average Weekly Wage at LSC of $559.24, and her Average Weekly Wage of $260.05 earned at Home Depot. Ms. Wilson is entitled to 2/3 of this difference, or $199.46, for each week of this 16 week period. Taking $199.46 times 16 weeks equates to TPD payments of $3,191.36 during her time at Home Depot.

Petitioner was then off for 5 weeks following her Guyon's Canal surgery before she found her current employment. Petitioner is entitled to her entire TTD rate, $372.83, for this 5 week period. This computes to a TTD payment of $1,864.15.

Therefore, Petitioner is entitled to 61 weeks of TTD payments, or $24,233.95, and 31 weeks of TPD payments, or $5,531.06. The total amount of temporary benefits owed to Respondent totals $29,765.01.

**L. What is the nature and extent of the injury?**

Petitioner has proven that she sustained a permanent partial disability as a result of this work injury to her left hand and her left arm. The medical evidence reveals that Petitioner had to endure many painful months where she could not receive medical treatment, as she had no income and no health insurance after she was terminated by Respondent. It was only after she qualified for assistance from the State of Illinois that she could get the necessary medical treatment. She has returned to work, but it is a different kind of work, as she has returned to nursing. She still has some issues with her wrist and arm Today, she still has occasional pain in her wrist, but not her elbow (Tr. p. 61). The wrist will ache in the area of the Guyon's Canal surgery (Tr. p. 61). Every once in a while, if she puts her elbow on a surface it will sill cause pain (Tr. p. 61). When her hand gets achy, it affects her job in that it affects her ability to type (Tr. p. 62). She will take Ibuprofen or Tylenol to deal with the pain (Tr. p. 62). There is a lot of typing associated with her job, as the medical records are all electronic (Tr. p. 62). She used to enjoy doing yoga, but she cannot do it as well anymore, as she cannot put her hands flat on the floor and put weight on them (Tr. pp. 62-63).

According to Section 8.1(b) of the Illinois Workers' Compensation Act, in determining the level of permanent partial disability, the Commission shall base its determination on the following factors:

1. The reported level of impairment pursuant to the AMA Guidelines;
2. The occupation of the injured employee;
3. The age of the employee at the time of the injury;
4. The employee's future earning capacity; and
5. 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. As there was no AMA impairment report made in this case, only factors 2 through 5 should be considered.

The occupation of the injured employee is an important factor. Here, the evidence shows that the job that Petitioner performed for Respondent was physical, requiring a lot of repetitive motion, and was such that Respondent's employees on the line were entitled to frequent breaks lasting 20 minutes. Although Petitioner has found a different job that is less physical, she will surely not be able to do the kind of job she was doing with Respondent. This factor should be given great weight.

The next Section 8.1(b) factor to consider is Petitioner's age at the time of injury. At the time she was injured, Petitioner was 45 years old, and could expect to be in the workforce for another 20 years. Given the nature of Petitioner's injuries, the physical requirements of the job, her age is a significant factor.

The next Section 8.1(b) factor to consider is the employee's future earning capacity. Petitioner has found employment at a greater salary, and so this factor is given little weight.

The final Section 8.1(b) factor to consider is evidence of disability corroborated by the treating medical records. As noted above, the medical records demonstrate that Petitioner suffered from injury to her left wrist and arm, and continues to suffer soreness to this day. This factor is given significant weight.

Section 8(b) of the Workers' Compensation Act provides that, if after the accidental injury has been sustained, the employee becomes partially incapacity from pursuing her usual and customary line of employment, she shall receive compensation equal to 60% of her average weekly wage. As Petitioner's Average weekly wage was $559.24, her Permanent Partial Disability rate is $335.54. Petitioner is entitled to Permanent Partial Disability based on 12.5% loss of a hand, and 12.5% loss of an arm. This equates to payment for 23.75 weeks for loss of a hand, 31.375 weeks for loss of an arm, or a total of 55.375 weeks.

## CONCLUSION

The Arbitrator has carefully reviewed the medical records, all of the Exhibits submitted by the Petitioner and the Respondent, and has carefully observed the demeanor and credibility of the witnesses during testimony. The Arbitrator finds that the Petitioner has met her burden of proof to demonstrate that an accident occurred that arose out of and in the course of her employment with Respondent, that timely notice was provided to Respondent, and that a work-related accident occurred on August 17, 2017, causing Petitioner to suffer a left cubital tunnel syndrome and a left Guyon's Canal syndrome. The Arbitrator further finds that all medical services provided to Petitioner for these conditions were reasonable and necessary. The Arbitrator finds that Respondent shall pay for all related medical services, pursuant to the Illinois medical fee schedule, associated with Petitioner's related medical treatment from August 17, 2021, through July 20, 2019, as provided in Sections 8(a) and 8.2 of the Act, including reimbursement to the Illinois Department of Healthcare and Family Services and any of its related providers, Molina and/or Equian. The Arbitrator finds that Petitioner is entitled to Temporary Total Disability Payments, as provided in Section 8(b) of the Act, for 61 weeks totaling $24,233.95, and further entitled to Temporary Partial Disability Payments for 31 weeks totaling $5,531.06. Petitioner is further entitled to an award of Permanent Partial Disability, as provided in Section 8(e) of the Act, at a rate of $335.54 for 55.375 weeks, for a total amount of $18,580.53.

**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 | 18WC038310 |
| Case Name | Beverly Wehking v.<br>State of Illinois - Murray Developmental Center |
| Consolidated Cases | |
| Proceeding Type | Petition for Review |
| Decision Type | Commission Decision |
| Commission Decision Number | 23IWCC0530 |
| Number of Pages of Decision | 12 |
| Decision Issued By | Deborah Simpson, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Jim Vainikos |
| Respondent Attorney | Kenton Owens |

DATE FILED: 12/12/2023

/s/ Deborah Simpson, 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

Beverly Wehking,
Petitioner,

vs. NO: 18 WC 38310

State of Illinois Murray Developmental Center,
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, 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 July 5, 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.

**December 12, 2023**
o11/15/23
DLS/rm
046

/s/*Deborah L. Simpson*
Deborah L. Simpson

/s/*Stephen J. Mathis*
Stephen J. Mathis

/s/*Marc Parker*
Marc Parker

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 18WC038310 |
| Case Name | Beverly Wehking v. State of Illinois Murray Developmental Center |
| Consolidated Cases | |
| Proceeding Type | |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 10 |
| Decision Issued By | Jeanne AuBuchon, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Jim Vainikos |
| Respondent Attorney | Kenton Owens |

DATE FILED: 7/5/2022

**THE INTEREST RATE FOR THE WEEK OF JUNE 28, 2022 2.50%**

/s/ Jeanne AuBuchon, Arbitrator

Signature

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

July 5, 2022

/s/ Michele Kowalski

Michele Kowalski, Secretary

Illinois Workers' Compensation Commission

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**

**BEVERLY WEHKING**
Employee/Petitioner

v.

**STATE OF ILLINOIS**
**MURRAY DEVELOPMENTAL CENTER**
Employer/Respondent

Case # **18** WC **38310**

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 **Jeanne L. AuBuchon**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **March 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. ☐ 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 26, 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 $**44,903.54**; the average weekly wage was $**863.53**.

On the date of accident, Petitioner was **55** years of age, ***married*** with **0** dependent children.

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

Respondent ***hasnot*** 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 $**any paid** under Section 8(j) of the Act.

**ORDER**

Respondent shall pay reasonable and necessary medical services shown in Petitioner's Exhibits 5-7, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of **$518.11**/week for **6.45** weeks, because the injuries sustained caused the **3%** 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.

Jeanne L. AuBuchon

Signature of Arbitrator

**JULY 5, 2022**

## PROCEDURAL HISTORY

This matter proceeded to trial on March 10, 2022, on all issues. The issues in dispute are: 1) whether the Petitioner sustained accidental injuries that arose out of and in the course of her employment; 2) the causal connection between the accident and the Petitioner's right knee condition; 3) payment of medical bills; and 4) nature and extent. The parties stipulated that if there was an award of medical bills, the Respondent would pay them directly to the providers.

## FINDINGS OF FACT

At the time of the accident, the Petitioner was 55 years old and had been employed by the Respondent as a switchboard operator. (AX1, T. 11) The Petitioner sat behind the counter in the lobby area of the administration building and answered phones, directed calls, greeted visitors and made phone books. (T. 11-13) She also helped the business office, making reports and security lists. (T. 11) She retired in September 2019. (T. 12)

On November 26, 2018, the Petitioner got up from her desk and walked to the front door to get some fresh air. (T. 14) She testified that when she shut the door and proceeded back to her desk, her shoe got stuck while walking from a rug in front of the door onto the carpet, causing her to jerk her knee. (Id.) The Petitioner pointed out on photographs where the rug in front of the door was stained and soaking wet from a black substance that had been leaking from the roof area. (T. 17, PX4) She said it had rained the day before, causing the black substance to come down. (T. 18) She said she experienced pain immediately after her knee jerked. (T. 21-22)

Teresa Meyers, a co-worker of the Petitioner, testified as to the stain from the leaking substance shown on the photographs. (T. 48-49, PX4) She said the Petitioner told her that her foot got stuck on the rug and she twisted her knee. (T. 50) She acknowledged that she wrote a letter on November 15, 2019, at the request of the Petitioner (T. 50-51) The letter described the

leaking substance. (RX4) Steven Christ, another co-worker, testified that on the day after the accident, the Petitioner was in a lot of pain, and he had to help her from her car to her desk and back to her car because she was not "really able to walk." (T. 54-56) He testified that around the time of the accident, the roof leaked onto the front door and the carpet in the lobby. (T. 55-56) The Petitioner's supervisor at the time of the accident, Dedra Koehler, testified that when the Petitioner reported the accident, she did not say anything about a brown liquid or her foot getting stuck on the rug. (T. 58, 62) Ms. Koehler testified that the substance leaking from the roof was a known problem at the facility and identified the substance on the photographs. (T. 63-64)

The Petitioner testified that the following day she was still in pain and reported the injury. (T. 25) In her report, the Petitioner wrote: "I was just walking in lobby when I turned and my knee twisted." (RX1) She described her injury as: "right knee – swollen – lots of pain." (Id.) The Petitioner also reported the incident by phone to the Respondent's insurance carrier. (RX2) The recording consisted only of the Petitioner's answers. (Id.) Her description was: "All I was doing was walking in the lobby. I just turned and when I did, my knee twisted." (Id.) The Petitioner testified that she did not finish her shift that day because of the pain. (T. 26) She sought treatment from her primary care physician, Dr. Aziz Rahman. (T. 26-27)

At her visit to Dr. Rahman, the Petitioner reported that she was walking in the lobby, turned around, heard her knee "crunch" and experienced pain. (PX1) Dr. Rahman examined the Petitioner, diagnosed her with pain in the right knee, ordered X-rays, prescribed oral steroids and physical/occupational therapy, gave her a knee immobilizer and referred her to orthopedic surgeon, Dr. Angela Freehill at the Orthopaedic Center of Southern Illinois (Id.)

The Petitioner saw Dr. Freehill on December 6, 2018, described the accident consistently with her testimony. (PX3) Dr. Freehill reviewed X-rays and examined the Petitioner. (Id.) The

examination was normal except for moderate effusion in the knee and tenderness at the medial joint line. (Id.) Dr. Freehill diagnosed the Petitioner with acute exacerbation of underlying arthritis of the right knee and performed a cortisone injection. (Id.) At a follow-up visit on February 6, 2019, Family Nurse Practitioner Jamie Smith reported that the Petitioner had excellent relief from the injection and that the Petitioner's pain was 0/10. (Id.) An examination was normal, and there was no effusion. (Id.) The Petitioner was released to return on an as needed basis. (Id.)

The Petitioner testified that she had no prior injuries to her right knee but had osteoarthritis. (T. 29) At the time of Arbitration, the Petitioner was experiencing pain in her knees. (T. 29) She said she had to sleep with pillows between her knees. (Id.)

## CONCLUSIONS OF LAW

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

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

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 the claimant's employment and (2) that the injury arose out of the claimant's employment. *McAllister v. Ill. Workers' Comp. Com'n*, 2020 IL 12484, ¶ 32.

The phrase "in the course of employment" refers to the time, place and circumstances of the injury. *Id*. at ¶34. A compensable injury occurs in the course of employment when it is sustained while a clamant is at work or while he or she performs reasonable activities in conjunction with his or her employment. *Id.* In this case, the Petitioner was at work and returning

to her desk after getting a breath of fresh air. Although her earlier descriptions of the accident were less detailed than her report to Dr. Freehill and her testimony, that does not mean they were inconsistent. In spite of an early lack of specificity in describing the accident, the Arbitrator finds the Petitioner to be credible. Further, the Petitioner's testimony is supported by the photographs showing the substance in which she stepped and by the testimony of her co-workers.

As to whether the Petitioner was performing reasonable activities in conjunction with her employment, engaging in acts that are necessary to an employee's health and comfort, even though they are personal to herself, will be considered incidental to the employment. *Hunter Packing Co. v. Industrial Comm'n*, 1 Ill. 2d 99, 104, 115 N.E.2d 236 (1953). See also *Chicago Extruded Metals v. Industrial Comm'n,* 77 Ill. 2d 81, 84, 395 N.E.2d 569, 32 Ill. Dec. 339 (1979) and *Eagle Discount Supermarket v. Industrial Comm'n*, 82 Ill. 2d 331, 339-40, 412 N.E.2d 492, 45 Ill. Dec. 141 (1980)

The Petitioner's actions fall within the personal comfort doctrine. Therefore, the Arbitrator finds that the Petitioner's injury occurred in the course of her employment.

The "arising out of" component is primarily concerned with causal connection. *McAllister*, 2020 IL 12484, ¶ 36. 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.* The three categories of risk 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.*

A risk is distinctly associated with an employee's employment if, at the time of the occurrence, the employee was performing: (1) acts he or she was instructed to perform by the employer; (2) acts that he or she had a common-law or statutory duty to perform; or (3) acts that the employee might reasonably be expected to perform incident to his or her assigned duties. *Id*.

at ¶46. As stated above, the Petitioner's actions fall under the personal comfort doctrine and are considered incident to her duties.

Regarding the causal connection, Dr. Freehill diagnosed the Petitioner with an acute exacerbation of the osteoarthritis in her right knee. It is apparent from the medical records that in describing the injury as acute, Dr. Freehill was referring to the incident described by the Petitioner. In addition, 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. Industrial. Comm'n*, 77 Ill. 2d 469, 471-472, 397 N.E.2d 834, 34 Ill.Dec. 162 (1979); *Gano Elec. Contracting v. Industrial Comm'n*, 260 Ill.App.3d 92, 96–97, 631 N.E.2d 724, 197 Ill.Dec. 502 (4th Dist. 1994); *International Harvester v. Industrial Com.*, 93 Ill.2d 59, 63-64, 442 N.E.2d 908, 66 Ill.Dec. 347 (1982). In this case, the Petitioner appeared to be having no problems with her knee before twisting it. She had pain and swelling afterwards, and her co-workers' testimony corroborate her testimony.

Therefore, the Arbitrator finds that the Petitioner has proved by a preponderance of the evidence that her injuries had their origin in a risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury. Thus, the Arbitrator finds that the Petitioner has proved by a preponderance of the evidence that the Petitioner's injuries occurred in the course of and arose out of her employment.

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

This issued is addressed above in the analysis of whether the Petitioner's injuries arose out of and in the course of her employment, and the findings above are incorporated herein.

Therefore, the Arbitrator finds that the Petitioner's right knee condition is causally related to the work accident.

**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?**

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).

Based on the findings above, all other medical services as listed in Petitioner's Exhibits 5-7 are found to be reasonable and necessary. Therefore, the Arbitrator orders the Respondent to pay the medical expenses contained in Petitioner's Exhibits 5-7 pursuant to Section 8(a) of the Act and in accordance with medical fee schedules. The Respondent shall have credit for any amounts already paid or paid through its group carrier. Respondent shall indemnify and hold Petitioner harmless from any claims arising out of the expenses for which it claims credit.

**Issue L: What is the nature and extent of the Petitioner's injury?**

Pursuant to Section 8.1b of the Act, permanent partial disability from injuries that occur after September 1, 2011, is to be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of Section 8.1; (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." *Id.*

(i) **Level of Impairment.** No AMA impairment ratings were produced, therefore the Arbitrator gives this factor no weight.

(ii) **Occupation.** The Petitioner has retired. Therefore, the Arbitrator places little weight on this factor.

(iii) **Age.** The Petitioner was 55 years old at the time of the injury. The Arbitrator places some weight on this factor.

(iv) **Earning Capacity.** There was no evidence of limitation of the Petitioner's earning capacity. Therefore, the Arbitrator places no weight on this factor.

(v) **Disability.** The Petitioner testified that she still experiences pain in her knees. She did not differentiate between the injured knee and the uninjured knee. Most of this pain can be attributed to her arthritis. The Arbitrator puts some weight on this factor.

Therefore, the Arbitrator finds the Petitioner's permanent partial disability to be 3 percent of the Petitioner's right leg.

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 21WC025276 |
| Case Name | Jimmie Rice v.<br>Prairie State Energy Campus |
| Consolidated Cases | |
| Proceeding Type | Petition for Review under 19(b)<br>Remand Arbitration |
| Decision Type | Commission Decision |
| Commission Decision Number | 23IWCC0531 |
| Number of Pages of Decision | 19 |
| Decision Issued By | Deborah Simpson, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Thomas C Rich |
| Respondent Attorney | Michael Karr |

DATE FILED: 12/12/2023

/s/ Deborah Simpson, 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

Jimmie Rice,

Petitioner,

vs. NO: 21 WC 25276

Prairie State Energy Campus,

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 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 August 19, 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.

**December 12, 2023**
o11/15/23
DLS/rm
046

/s/*Deborah L. Simpson*
Deborah L. Simpson

/s/*Stephen J. Mathis*
Stephen J. Mathis

/s/*Marc Parker*
Marc Parker

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 21WC025276 |
| Case Name | Jimmie Rice v. Prairie State Energy Campus |
| 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 | Michael Karr |

DATE FILED: 8/19/2022

/s/Linda Cantrell, Arbitrator

Signature

**INTEREST RATE WEEK OF AUGUST 16, 2022 3.02%**

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)**

**JIMMIE RICE**
Employee/Petitioner

v.

**PRAIRIE STATE ENERGY CAMPUS**
Employer/Respondent

Case # **21** WC **025276**

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 **June 17, 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, **8/12/20**, 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 $**91,864.76**; the average weekly wage was $**1,766.63**.

On the date of accident, Petitioner was **36** years of age, ***married*** 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 $**40,037.15** for TTD, $**0** for TPD, $**0** for maintenance, and $**59,497.91 in medical benefits paid and $10,460.76 for a PPD advance of 2.4% loss of Petitioner's body as a whole (12 weeks)**, for a total credit of $**109,995.82**.

Respondent is entitled to a credit of $**0** 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 and pursuant to the Illinois medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act. Petitioner shall receive credit for medical expenses paid in the amount of $59,497.91.

The Arbitrator finds that Petitioner is entitled to receive the additional care recommended by Dr. Gornet as he has not reached maximum medical improvement. Respondent shall authorize and pay for prospective medical treatment, including, but not limited to, a cervical disc replacement at C3-4 and C4-5 with a right-sided foraminotomy at C3-4, and post-operative care until Petitioner reaches maximum medical improvement.

Respondent shall pay Petitioner temporary total disability benefits of $**1,177.75**/week for **46-4/7th** weeks, for the periods **9/9/20 through 12/14/20, 10/12/21 through 1/19/22, and 2/9/22 through 6/17/22**, as provided in Section 8(a) of the Act. Respondent shall receive credit for temporary total disability benefits paid in the amount of $40,037.15 and a credit for a permanent partial disability advance of $10,460.76 representing 2.4% (12 weeks) loss of Petitioner's body as a whole.

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 **August 19, 2022**

ICArbDec19(b)

STATE OF ILLINOIS )
) SS
COUNTY OF WILLIAMSON )

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

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|---|---|---|
| **JIMMIE RICE,** | ) | |
| | ) | |
| **Employee/Petitioner,** | ) | |
| | ) | |
| **v.** | ) | **Case No.: 21-WC-025276** |
| | ) | |
| **PRAIRIE STATE ENERGY CAMPUS,** | ) | |
| | ) | |
| **Employer/Respondent.** | ) | |

## FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Herrin on June 17, 2022 pursuant to Section 19(b) of the Act. The parties stipulated that on August 12, 2020 Petitioner sustained accidental injuries that arose out of and in the course of his employment with Respondent. Petitioner stipulates that Respondent is entitled to a credit for medical expenses paid in the amount of $59,497.91. Petitioner claims entitlement to temporary total disability benefits for the periods 9/8/20 through 12/14/20, 10/11/21 through 1/20/22, and 2/7/22 through 6/17/22, for a period of 47-2/7$^{th}$ weeks. Respondent claims it paid TTD benefits for the periods 9/9/20 through 12/15/20, 10/12/21 through 1/24/22, 2/9/22 through 2/22/22, and 3/15/22 through 4/4/22, representing 34 weeks, and claims an overpayment of TTD benefits of $841.25 for the period 1/19/22 through 1/24/22. Petitioner agrees Respondent is entitled to a credit for temporary total disability benefits paid in the amount of $40,037.15 and a credit for a permanent partial disability advance of $10,460.76, representing 2.4% (12 weeks) loss of Petitioner's body as a whole.

The issues in dispute are causal connection, medical expenses, temporary total disability benefits, and prospective medical care related to Petitioner's cervical spine only. All other issues have been stipulated.

## TESTIMONY

Petitioner was 36 years old, married, with three dependent children at the time of accident. Petitioner was employed by Respondent as a scoop operator. Respondent has terminated Petitioner's employment. Petitioner testified his job duties included a wide variety of activities, including clean up, trash, moving heavy rocks with equipment, loading bolters with supplies, and driving scoops that sit sideways on rough terrain up to nine hours a day. He testified that his position exposed him to significant vibration and bumping up and down while riding in work vehicles.

Petitioner testified he noticed neck pain shooting into both arms while performing his job duties and numbness from controlling the handles on the equipment. He reported his symptoms to Respondent on 8/12/20 and was referred to Dr. Emanuel for evaluation. Dr. Emanuel performed left and right carpal tunnel releases. Petitioner returned to his previous position and noticed his symptoms continued. He had shooting pain down his arm, neck stiffness, and numbness in his fingers. He sought treatment with Dr. Paletta and a case manager was assigned to his claim.

Dr. Paletta performed a left ulnar nerve transposition. Petitioner testified that his hand and left elbow surgeries relieved the numbness and tingling in his hands and arm, but he continued to have paralyzing pain in his left arm that felt like lightening. He was referred to Dr. Gornet who performed a two-level cervical disc replacement. Petitioner was wearing a hard collar at arbitration from a second cervical surgery he underwent two days prior to arbitration. He anticipated the collar would be removed at his follow-up appointment with Dr. Gornet on 6/30/22.

Petitioner testified that the job duties contained in the medical records of Dr. Emanuel, Dr. Paletta, and Dr. Gornet are accurate. He is not currently receiving TTD benefits.

On cross-examination, Petitioner testified he told Dr. Emanuel he had pain and stiffness in his neck and headaches when he first saw him in August 2020. Dr. Emanuel did not treat Petitioner's cervical spine or refer him to a specialist. Petitioner stated he returned to full duty work when Dr. Emanuel released him from his care. He agreed he did not seek additional medical treatment until September 2021 when he went to Dr. Paletta for stiffness and pain in his neck and constant headaches. Petitioner testified he reported his headaches to Dr. Paletta. He agreed that Dr. Paletta did not recommend treatment for his cervical spine until after his left arm surgery.

Petitioner testified he began feeling numbness/tingling in his thumb and index fingers after his ulnar nerve surgery. Petitioner stated he received cervical traction at Novacare where he received therapy for his hands. He testified he had never received cervical traction prior to 8/12/20. Petitioner testified he has experienced headaches since the accident.

## MEDICAL HISTORY

Petitioner was examined by Dr. James Emanuel on 8/31/20 at the direction of Respondent. (PX3) Petitioner completed a patient intake form indicating he was being seen for his arms, hands, wrist, and neck. Dr. Emanuel took his history, noting since June 2020 Petitioner developed achiness and pain in his bilateral hands and neck pain and stiffness when turning his head that came and went. Dr. Emanuel took a detailed history of Petitioner's job duties, noting he had been employed as a mine technician for Respondent for three years. Petitioner reported he operated a scoop vehicle six out of nine hours per day, which included gripping and steering. He lifted 5 to 8-foot bolts of rebar, picking up 6 to 8 at a time, that weighed 50 to 60 pounds. He stacked plates weighing 10 to 25 pounds, lifted 10-foot long two by fours at least 50 times per day, and placed bundles of glue stick weighing about 40 pounds into the plates. Petitioner

reported the ride in the mine was bumpy and required grasping the handles and operating the scoop with his seat bumping up and down. Dr. Emanuel noted his job also involved roof bolting, scooping, installation, moving and maintenance of ventilation devices, and installation and moving of power distribution equipment. Petitioner was required to stand for five to ten hours on uneven, rocky surfaces, be seated up to 10 hours to operate equipment or vehicles, walk up to four hours at a time in uneven and wet conditions throughout the mine, lift up to 80 pounds without mechanical assistance, work from elevated positions with walking and climbing up and down stairways and ladders and up and off equipment, depending on his assignment each day. Petitioner began to notice symptoms in mid-June 2020 but reported his symptoms on 8/12/20 when they began affecting his ability to work and he was concerned about causing permanent injury. Dr. Emanuel noted his current complaints included numbness and tingling in both hands, left greater than right, loss of grip strength, and neck pain with stiffness turning both to the right and left. Petitioner had no prior accidents or medical problems.

Following his examination, Dr. Emanuel believed Petitioner had bilateral carpal tunnel syndrome and left cubital tunnel syndrome. His diagnosis was confirmed by an EMG study performed by Dr. Daniel Phillips that day. (PX4) The study showed severe chronic median neuropathy across the right carpal tunnel, moderate median neuropathy across the left carpal tunnel, and lower limits of normal ulnar nerve conduction velocities across the left elbow. Dr. Phillips noted Petitioner had a two-month history of bilateral hand pain, numbness, and weakness and neck stiffness with no radicular pain.

Dr. Emanuel believed Petitioner's bilateral carpal tunnel and left cubital tunnel syndrome were caused by his job activities. He recommended bilateral carpal tunnel releases, which were performed on 9/9/20 and 10/28/20. (PX3). Petitioner completed post-operative physical therapy and returned to Dr. Emanuel on 12/14/20 with full range of motion of the hands and fingers and good grip strength. Dr. Emanuel released Petitioner at MMI without restrictions.

On 9/14/21, Petitioner sought treatment with Dr. George Paletta. (PX8) Dr. Paletta noted bilateral elbow pain with numbness and tingling radiating to Petitioner's hands, right greater than left, and neck stiffness. Petitioner reported his pain radiated from his neck to his fingers. Dr. Paletta noted Petitioner's job duties to include operating a scoop about six hours per day. Petitioner reported he was exposed to vibration and had to use hand levers to steer and operate the scoop, as well as perform a lot of hand intensive activities such as lifting bolts of rebar and lifting loads that weighed between 50 and 60 pounds and stacking plates weighing 10 to 25 pounds. Petitioner reported he made a reasonably good recovery from his carpal tunnel releases but continued to have numbness and tingling in both extremities, sometimes radiating from the neck all the way down the arm. Dr. Paletta documented no intervening trauma or injury. Following examination, Dr. Paletta believed Petitioner's symptoms were related to cubital tunnel syndrome. He recommended a repeat EMG/NCS, and if the study was normal a cervical MRI due to Petitioner's complaints of cervicalgia and limited neck motion. Dr. Paletta believed Petitioner's condition was causally related to his heavy repetitive work duties. He was instructed to continue working full duty and to follow up after the EMG/NCS was performed.

Petitioner underwent the repeat EMG/NCS on 9/14/21 by Dr. Phillips. (PX4) Dr. Phillips noted Petitioner reported a two-year history of neck pain radiating bilaterally down both of his

upper extremities, as well as bilateral numbness in his thumbs, fourth, and fifth digits. The results of the studies showed substantial improvement in the median nerve conduction study values, slower left ulnar motor conduction velocities across the elbow, and normal right ulnar nerve values.

On 9/20/21, Dr. Paletta reviewed the results of the EMG/NCS and noted Petitioner complained of persistent cubital tunnel symptoms; however, the EMG/NCS did not show evidence of right cubital tunnel syndrome. Dr. Paletta believed the findings showed mild demyelinative ulnar neuritis or cubital tunnel syndrome on the left and recommended an ulnar nerve decompression and transposition.

On 10/12/21, Dr. Paletta performed a left elbow ulnar nerve transposition. Upon follow up on 10/26/21, Dr. Paletta noted Petitioner had fairly significant pain which he was managing with over-the-counter medication. Dr. Paletta recommended he begin physical therapy.

On 12/7/21, Petitioner reported his elbow was doing quite well, but he continued to have intermittent numbness and tingling involving the thumb and first finger. He also reported difficulty beginning the early strengthening phase of the rehabilitation protocol due to pain in his neck and left shoulder, with pain radiating down his arm into the first two fingers. Dr. Paletta was concerned with Petitioner's ongoing neck and shoulder complaints, as they could interfere with his progression through rehabilitation. He recommended therapy to include shoulder girdle soft tissue and active release and cervical soft tissue and manual traction. He stated that if Petitioner had residual neurologic symptoms upon follow up, he would recommend a repeat EMG/NCS and consider a cervical MRI. He was placed on light duty restrictions of no lifting more than 10 pounds, no repetitive forceful grip with the left arm, and no use of vibratory tools.

On 12/21/21, Petitioner underwent a cervical MRI. (PX10). Dr. Paletta appreciated a left-sided disc protrusion at C5-6 and some compression of the left C6 nerve root. He referred Petitioner to Dr. Matthew Gornet for further consultation.

On 1/19/22, a repeat EMG/NCS was performed by Dr. Phillips. (PX4) Dr. Phillips noted Petitioner had a one-year history of neck problems which more recently became particularly severe with radiation down the C6 and/or C7 distribution, with numbness in his thumb and index finger. He noted that Petitioner's symptoms had improved some with cervical traction. The study showed normal values across the carpal tunnels and ulnar nerves, but chronic denervation at C5-6. Dr. Phillips noted the findings were consistent with left C6 radiculopathy. He found the left ulnar nerve values and left median nerve values had returned to normal.

Petitioner returned to Dr. Paletta who noted Petitioner's left elbow was quite well, but Petitioner continued to have pain radiating down his left arm with numbness and tingling and neck issues. He noted the radiating pain was in the C6 or C7 distribution with numbness involving the thumb and index finger. Dr. Paletta agreed with Dr. Phillips that the EMG/NCS demonstrated resolution of the ulnar nerve abnormalities and showed evidence of left-sided radiculopathy at C6. Dr. Paletta released Petitioner at MMI for his left elbow condition. Petitioner advised he had an appointment with Dr. Gornet for his cervical complaints.

On 1/31/22, Petitioner was examined by Dr. Gornet. (PX11). Dr. Gornet noted Petitioner's chief complaints were neck pain to the left side, left trapezius, left shoulder, and down the left arm into his fingertips, with numbness and tingling particularly in his index finger and thumb. Dr. Gornet noted Petitioner had frequent daily headaches and left scapular pain. He reviewed records from Dr. Emanuel and Dr. Paletta, the MRI and operative reports, and physical therapy notes. Petitioner related his current symptoms to his repetitive activities at work as an underground coal miner. Dr. Gornet documented his job duties to include operating a battery operated scoop with significant vibration for 6 to 9 hours per day. Dr. Gornet noted Petitioner had to turn his head in one direction while working and he performed a lot of lifting. Dr. Gornet noted Petitioner returned to work following his hand surgeries, but he continued to have symptoms in his left arm that resulted in a left ulnar nerve transposition. Petitioner returned to full duty work following the left elbow surgery and continued to have pain and symptoms down his arm. Petitioner stated he had one chiropractic visit in the past and had no previous problems of significance with his neck.

Physical examination revealed decreased sensation at C6-7. X-rays were negative. Dr. Gornet found the MRI showed structural disc pathology centrally at C3-4, C4-5, C5-6, and C6-7, a large, extruded fragment at C5-6, and a smaller fragment with a tear at C6-7. He suspected Petitioner's symptoms were emanating from all the discs but believed the majority of his symptoms were from the large herniation at C5-6 and to a lesser extent at C6-7. Dr. Gornet did not believe injections would provide significant benefit due to the large free fragment of disc at C5-6. He recommended disc replacements at C5-6 and C6-7, with possible treatment at C3-4 and C4-5. Dr. Gornet opined that Petitioner's current symptoms related to his work activities for Respondent. He ordered a CT scan that revealed a congenital fusion at C2-3, but no evidence of facet arthropathy or fracture. Dr. Gornet prescribed Meloxicam, Cyclobenzaprine, Ciprofloxacin, calcium, and vitamin D, and ordered Petitioner to continue working until surgery.

On 2/9/22, Dr. Gornet performed disc replacements at C5-6 and C6-7. (PX11, 13) Intraoperative findings confirmed a large central tear and left-sided hole with a small fragment within it at C6-7, and a large central hole with a fragment of disc at C5-6 on the left. On 2/24/22, Dr. Gornet noted Petitioner was doing very well and he was transitioned to a soft collar. He was continued off work.

On 3/23/22, Dr. Daniel Kitchens performed a records review. (RX1, Ex. 2). Dr. Kitchens did not meet or physically examine Petitioner. He was not provided with a job description of Petitioner's work duties. Dr. Kitchens reviewed records from Parkway Orthopedics, Neurological and Electrodiagnostic Institute, City Place Surgery Center, NovaCare Rehabilitation, Dr. Paletta, MRI Partners of Chesterfield, Dr. Gornet, CT Partners of Chesterfield, and The St. Louis Spine and Orthopedic Surgery Center. He concluded that Petitioner had a degenerative condition of the spine and his work incident of 8/12/20 did not cause or contribute to his condition. Dr. Kitchens included no description of Petitioner's work activities in his report.

On 3/24/22, Dr. Gornet ordered x-rays that revealed good positioning of the devices with no evidence of subsidence. Petitioner was ordered to wean out of his collar and return in six weeks for x-rays and a CT scan. He was continued off work.

On 5/24/22, Petitioner reported dramatic improvement in his left shoulder and arm symptoms, but he had increasing headaches and neck pain with any type of prolonged activity. (PX11) X-rays and a cervical CT scan were negative for abnormalities. Dr. Gornet believed his symptoms of neck pain and headaches were related to the disc pathology at C3-4 and C4-5. Dr. Gornet commented on Dr. Kitchen's records review and stated Dr. Kitchens failed to detail Dr. Phillip's diagnoses of decreased sensation in the left C6 and weakness in the C6 distribution and that the EMG demonstrated C5-6 chronic denervation. He stated that Dr. Kitchens also failed to include Dr. Paletta and Dr. Emanuel's findings that a portion of Petitioner's symptoms were cervical, which prompted their referrals to a spine specialist. Dr. Gornet disagreed with Dr. Kitchens' causation opinion and stated it was inconceivable that Petitioner's condition was not work-related as Petitioner had no previous problems of significance with his neck prior to the onset of symptoms while performing his job duties for Respondent.

Dr. Gornet found Petitioner had additional disc pathology including some foraminal narrowing on the right at C3-4 that he believed contributed to Petitioner's continued neck pain, headaches, and right trapezial pain. He opined that the objective MRI findings correlated with that belief. Dr. Gornet recommended cervical disc replacements at C3-4 and C4-5 with a right-sided foraminotomy at C3-4. He continued Petitioner off work.

Dr. Matthew Gornet testified by way of deposition on 6/6/22. (PX14) Dr. Gornet is a board-certified orthopedic surgeon whose practice is devoted to spinal conditions. Dr. Gornet noted Petitioner's complaints when he saw him in January 20222, which included neck pain, left-sided pain, left trapezial pain, left shoulder pain, left arm pain to his fingertips with numbness and tingling, daily headaches, and left scapular pain. Dr. Gornet testified that Petitioner related his symptoms to his repetitive work activities, including bending and lifting and operating a battery operated scoop which cleared piles of rocks. Petitioner reported his job duties involved a significant amount of vibration 6 to 9 hours per day. Petitioner reported he had to turn his head in one direction while working and he performed a lot of lifting. Dr. Gornet testified that his physical examination, records review, imaging studies, and Petitioner's symptoms were consistent with a cervical disc injury. He testified there is a huge overlap in Petitioner's symptoms. He noted Petitioner already had carpal tunnel surgery and the symptoms Petitioner subjectively described correlated very well with his cervical MRI findings.

Dr. Gornet testified that sudden vibrations and lifting can easily aggravate or cause a cervical disc injury. He opined that Petitioner sustained cervical disc injuries and believed his radicular symptoms correlated best with C5-6 and C6-7. Dr. Gornet also noted that Petitioner had structural issues at C3-4 and C4-5 that contributed to his neck pain and headaches.

Dr. Gornet opined that Petitioner's current symptoms were related to his work activity as described, either as an aggravation of an underlying condition or a new disc injury, most likely a combination of both. He recommended starting with a disc replacement surgery at C5-6 and C6-7 in the hope Petitioner's symptoms would resolve. He opined that Petitioner's other cervical levels may need to be treated in the future. Dr. Gornet testified that intraoperatively he found structural disc pathology present with a large tear at C6-7 and a central hole in the disc at C5-6. He removed the fragments consistent with the MRI scan. Dr. Gornet testified that Petitioner was doing well following surgery and had dramatic improvement in his left shoulder and arm

symptoms, but he continued to have neck pain and headaches. He testified that as Petitioner's activities increased, his axial neck pain and headaches increased. Dr. Gornet noted those were a part of Petitioner's original symptoms, but he first focused on the radicular symptoms with the initial surgery.

Dr. Gornet testified that Petitioner will require treatment at C3-4 and C4-5. He was hopeful that resolving Petitioner's radicular symptoms with the first surgery was enough; however, Petitioner's symptoms of neck pain and headaches have persisted with increased activities. Dr. Gornet testified that the initial surgery and the recommended disc replacements at C3-4 and C4-5 are causally related to Petitioner's work injury.

Dr. Gornet disagreed with Dr. Kichens' opinions stated in his records review report. Dr. Gornet stated there was ample information from multiple providers, including Dr. Phillips, Dr. Paletta, Dr. Emanuel, that Petitioner was experiencing cervical problems and should be referred to a spine specialist. He testified that Dr. Kitchens was the only physician that felt Petitioner's symptoms were not related to his cervical spine.

On cross-examination, Dr. Gornet testified that Petitioner had increased right-sided symptoms and trapezial pain following his cervical surgery as he increased his activities. Dr. Gornet believed Petitioner's right trapezial pain and headaches were related to his cervical condition. He noted that Petitioner had herniation and some narrowing on the right side. Dr. Gornet disagreed with Dr. Kitchens' diagnosis of chronic, aging, degeneration. He stated that Petitioner is not that old and does not have a lot of degeneration by loss of disc height or other issues present. He opined that degeneration is not consistent with Petitioner's problem but that his symptoms are consistent with a disc injury. He opined that unfortunately there was an overlap between Petitioner's symptoms that resulted in a delay of diagnosis and treatment, which is not unusual. Dr. Gornet testified that the majority of Petitioner's radicular symptoms have resolved with the replacement surgery at C5-6 and C6-7.

Dr. Daniel Kitchens testified by way of deposition on 6/8/22. (RX1) Dr. Kitchens testified he reviewed Petitioner's medical records, including a cervical MRI dated 12/21/21, and produced a report dated 3/23/22 based on his findings. Dr. Kitchens noted the MRI showed multiple level cervical degenerative disc disease, a disc protrusion to the left side at C5-6 and C6-7, and a congenital fusion at C2-3. He testified that the only disc pathology he appreciated was degenerative disc disease at C3-4 and C4-5. He diagnosed cervical degenerative disc disease and congenital anomaly at C2-3, and a disc protrusion to the left side at C5-6 and C6-7.

Dr. Kitchens opined that Petitioner had a chronic, aging, degenerative condition of the cervical spine. He opined that Petitioner's work incident of 8/12/20 did not cause or contribute to his current complaints. He explained that cervical discs weaken over time and can bulge and protrude and bone spurs can develop along the margin of the disc causing pain, nerve impingement, and radicular type symptoms. Dr. Kitchens testified that the aging condition in Petitioner's spine is the causative factor of his cervical degenerative disc disease.

Dr. Kitchens testified that Petitioner did not have evidence of cervical radiculopathy soon after 8/12/20 and was not diagnosed with cervical radiculopathy until 1/19/22. Dr. Kitchens

testified that the EMG/NCS performed on 9/14/21 was not impressive for cervical radiculopathy. He testified that the onset of Petitioner's cervical radiculopathy did not occur until some point between 9/14/21 and 1/19/22, or between 13 and 17 months after the alleged 8/12/20 injury.

Dr. Kitchens explained that given the findings of disc protrusions on the left at C5-6 and C6-7, the disc protrusion which led to Petitioner's cervical radiculopathy would have had to occur sometime between 9/14/21 and 12/21/21. He testified it was impossible for an accident or injury from 8/12/20 to have caused or contributed to the disc herniation and subsequent radiculopathy which required surgery by Dr. Gornet. Dr. Kitchens opined that the treatment provided by Dr. Gornet was not reasonable or necessary to cure or relieve the effects of any work-related condition. He opined that Petitioner was at maximum medical improvement as it related to the work incident of 8/12/20. He opined Petitioner did not require work restrictions related to his cervical spine condition as it related to his work accident.

On cross-examination, Dr. Kitchens testified he does not perform disc replacement surgeries and has never done so. He testified he has never met, spoken with, or examined Petitioner. He testified he was not provided a job description for Petitioner. Dr. Kitchens testified that outside of what was contained in Petitioner's medical records that he reviewed, he was not aware what Petitioner's job duties included. He agreed there was no description of Petitioner's job duties contained in his own report. He testified that while he did not include their findings in his report, he agreed that Drs. Emanuel and Phillips documented neck pain and stiffness in August 2020. Dr. Kitchens testified that Petitioner was working full duty at the time he reported his injury, and he was not aware of any complaints of neck pain prior to August 2020. Dr. Kitchens was aware Petitioner underwent a two-level disc replacement at C5-6 and C6-7 but was unaware if the surgery relieved Petitioner's left shoulder and arm symptoms.

Dr. Kitchens testified he could not comment on whether the treatment provided by Dr. Gornet was reasonable or necessary irrespective of causation, as he did not have an opportunity to examine Petitioner to gauge his radiculopathy.

## CONCLUSIONS OF LAW

**Issue (F): Is Petitioner's current condition of ill-being causally related to the injury?**

To obtain benefits, a claimant must show that work activities are a cause of his or her condition; however, the claimant does not have to establish that the work activities are the sole or primary cause, and there is no requirement that a claimant must spend a certain amount of time each day on a specific task before a finding of repetitive trauma can be made. *Dorhesca Randell v. St. Alexius Medical Center*, 13 I.W.C.C. 0135 (2013) citing *All Steel, Inc. v. Indus. Comm'n*, 582 N.E.2d 240 (1991); *Edward Hines Precision Components v. Indus. Comm'n*, 365 Ill.App.3d 186, 825 N.E.2d 773 (2005). A claimant's work may be varied but still considered repetitive, and exact quantitative evidence of the exact nature of repetitive work is not required to prove repetitive injury. *City of Springfield v. Illinois Workers' Comp. Comm'n*, 388 Ill.App.3d 297, 901 N.E.2d 1066, 327 Ill.Dec. 333 (2009); *Darling v. Industrial Comm'n*, 176 Ill.App.3d 186, 195, 530 N.E.2d 1135, 1142 (1988). Stated another way, "[I]n no way can quantitative proof be held as the *sine qua non* of a repetitive trauma case." *Christopher Parker v. IDOT*, 15 I.W.C.C. 0302 (2015). It is well established in Illinois law that a repetitive activity and the gradual denigration

and erosion of a working person's condition of ill being can be tantamount to a compensable injury. *Hunter v. G & K Services*, *00IIC0252* and *Fierke v. Industrial Commission*, *309 Ill.App. 3d 1037*. The courts have long held that when a person is engaged in an activity that requires him to assume awkward positions or repetitively use certain parts of his body which results in the breakdown of that part, that is, in fact, an accidental injury which arises out of and in the course of employment. *Robert Nawrot v. Tower Automotive, Inc.*, 06 I.W.C.C. 25132, 09 I.W.C.C. 0210 (2009)

An injury need not be the sole factor, or even the primary factor of an injury, as long as it is a causative factor. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill.2d 193, 205, 797 N.E.2d 665 (Ill. 2003) [Emphasis added]. Even when other non-occupational factors contribute to the condition of ill-being, "[*A*] Petitioner need only show that some act or phase of the employment was a causative factor of the resulting injury." *Fierke v. Indus. Comm'n*, 309 Ill.App.3d 1037, 723 N.E.2d 846 (3rd Dist. 2000). 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 Supreme Court in *Durand v. Indus. Comm'n* noted that the purpose of the Illinois Workers' Compensation Act is best served by allowing compensation where an injury is gradual but linked to the employee's work. *Durand v. Indus. Comm'n*, 862 N.E.2d 918, 925 (2006).

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).

It is undisputed that Petitioner was working full duty without restrictions prior to 8/12/20. Petitioner credibly testified that he gradually developed symptoms that worsened to the point they interfered with his work, and he reported them in August 2020. There is no evidence in the record that Petitioner experienced neck pain or sought medical treatment for his cervical spine prior to 8/12/20. He reported to Dr. Emanuel on 8/31/20 that his symptoms involved his arms, hands, wrist, and neck. Dr. Emanuel took a detailed history of Petitioner's job duties and noted Petitioner developed achiness and pain in his bilateral hands and neck pain and stiffness when turning his head, which he related to his job duties. Dr. Emanuel performed bilateral carpal tunnel releases on 9/9/20 and 10/28/20. After completing physical therapy, Petitioner was released at MMI on 12/14/20. Dr. Emanuel opined that Petitioner's bilateral carpal tunnel conditions are causally connected to his job duties for Respondent.

Petitioner returned to full duty work and testified he continued to have problems with his neck and upper extremities. He sought treatment with Dr. Paletta on 9/14/21 for bilateral elbow pain with numbness and tingling radiating into his hands, right greater than left, and neck stiffness. Petitioner reported his pain radiated from his neck to his fingers. Dr. Paletta also took a

detailed description of Petitioner's job duties. Dr. Paletta documented no intervening trauma or injury since Petitioner's bilateral carpal tunnel releases. Dr. Paletta suspected Petitioner's symptoms were caused by cubital tunnel syndrome. He recommended a repeat EMG/NCS, and if the study was normal, he would recommend a cervical MRI due to Petitioner's complaints of cervicalgia and limited neck motion. Dr. Paletta opined that Petitioner's condition was causally related to his heavy repetitive work duties for Respondent.

On 10/12/21, Dr. Paletta performed a left elbow ulnar nerve transposition. On 12/7/21, Petitioner reported his elbow was doing quite well, but he continued to have intermittent numbness and tingling involving the thumb and first finger. Rehabilitation was interrupted by his continued complaints of pain in his neck and left shoulder, which radiated down his arm into the first two fingers. Dr. Paletta ordered therapy to include his shoulder and neck, with consideration of a cervical MRI.

A cervical MRI was finally performed on 12/21/21 that demonstrated a left-sided disc protrusion at C5-6 and compression of the left C6 nerve root. Dr. Phillips performed a repeat EMG/NCS on 1/19/22 that revealed chronic denervation at C5-6 and left C6 radiculopathy.

Despite Petitioner's consistent complaints of neck pain with radiculopathy in his arms, Petitioner was not referred to a spine specialist for over 16 months following his report of injury. Petitioner was examined by Dr. Gornet on 1/31/22 who took a detailed history of Petitioner's job duties. Petitioner complained of neck pain to the left side, left trapezius, left shoulder, and down the left arm into his fingertips, with numbness and tingling particularly in his index finger and thumb. Petitioner related his symptoms to his job duties and Dr. Gornet noted that Petitioner's radicular symptoms persisted despite bilateral carpal tunnel releases and a left ulnar nerve decompression and transposition.

Dr. Gornet found the MRI showed structural disc pathology centrally at C3-4, C4-5, C5-6, and C6-7, a large, extruded fragment at C5-6, and a smaller fragment with a tear in the disc at C6-7. He suspected Petitioner's symptoms were emanating from all the discs but believed the majority of his symptoms were from the large herniation at C5-6 and to a lesser extent at C6-7. Dr. Gornet's intraoperative findings showed clear cervical pathology at the C3-4, C4-5, C5-6, and C6-7 levels. These findings were further buttressed by the complete resolution of Petitioner's left-sided radicular symptoms following disc replacements at C5-6 and C6-7.

Despite improvement of his radicular symptoms, Petitioner continued to have neck pain with prolonged activity. As Dr. Gornet suspected prior to performing the disc replacement surgery at C5-6 and C6-7, Petitioner may require treatment at C3-4 and C4-5 to completely resolve his neck pain. Dr. Gornet noted there is objective evidence of pathology including some foraminal narrowing on the right at C3-4 that he believed contributed to Petitioner's continued neck pain, headaches, and right trapezial pain. He opined that the objective MRI findings correlated with that belief. Dr. Gornet recommends disc replacements at C3-4 and C4-5 with a right-sided foraminotomy at C3-4.

The Arbitrator finds the causation opinion of Dr. Gornet more persuasive than Dr. Kitchens' opinion. Dr. Emanuel, Dr. Phillips, and Dr. Paletta all documented Petitioner's

complaints of cervical pain and radicular symptoms. As mentioned above, Dr. Emanuel noted neck pain and stiffness when Petitioner turned his head at his first visit on 8/31/20. All of Petitioner's treating physicians consistently noted Petitioner's cervical and radicular symptoms. Petitioner underwent multiple surgeries to alleviate his radicular symptoms before being referred to a spine specialist. As Dr. Gornet testified, there is a significant overlap in shoulder and cervical conditions and Petitioner's diagnosis and treatment was delayed as a result of same, in addition to his multiple upper extremity surgeries.

Unlike Dr. Kitchens, Dr. Gornet personally examined Petitioner, took a detailed history of his job duties, and found his repetitive duties of bending, lifting, working with significant vibration, and having to turn his head in one direction while working, all contributed to his cervical condition and need for surgery. The Arbitrator notes that Dr. Kitchens did not physically examine Petitioner or document any of his job duties within his report, despite having reviewed detailed descriptions of Petitioner's job duties contained in the medical records. Dr. Kitchens admitted he was never provided with a description of Petitioner's job duties. Additionally, Dr. Kitchens did not provide any reasoning as to the onset of Petitioner's neck pain.

Based on the above evidence, the Arbitrator finds that Petitioner's current condition of ill-being in his cervical spine is causally connected to his work accident of 8/12/20.

**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?**

Respondent disputes liability for medical expenses based on causal connection. The Arbitrator finds that the medical treatment rendered to Petitioner was reasonable and necessary to treat his work-related injuries. Dr. Kitchens admitted he had not personally examined Petitioner and could not provide an opinion as to whether his treatment was reasonable and necessary irrespective of causation. Therefore, Respondent shall pay the reasonable and necessary medical expenses outlined in Petitioner's Group Exhibit 1, directly to the medical providers pursuant to the Illinois medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act. Petitioner stipulates that Respondent is entitled to a credit for medical expenses paid in the amount of $59,497.91.

The evidence supports that Petitioner has not been cured or relieved from the effects of his work-related injuries. Attempts to resolve Petitioner's cervical condition with conservative care and a two-level disc replacement at C5-6 and C6-7 have failed. The Arbitrator finds that Petitioner is entitled to receive the additional care recommended by Dr. Gornet as he has not reached maximum medical improvement. Therefore, Respondent shall authorize and pay for prospective medical treatment, including, but not limited to, a cervical disc replacement at C3-4 and C4-5 with a right-sided foraminotomy at C3-4, and post-operative care until Petitioner reaches maximum medical improvement.

**Issue (L): What temporary benefits are in dispute? (TTD)**

Petitioner claims entitlement to temporary total disability benefits for the periods 9/8/20 through 12/14/20, 10/11/21 through 1/20/22, and 2/7/22 through 6/17/22, for a period of 47-2/7th weeks. Respondent claims it paid TTD benefits for the periods 9/9/20 through 12/15/20, 10/12/21 through 1/24/22, 2/9/22 through 2/22/22, and 3/15/22 through 4/4/22, representing 34 weeks, and claims an overpayment of TTD benefits of $841.25 for the period 1/19/22 through 1/24/22. Petitioner agrees Respondent is entitled to a credit for temporary total disability benefits paid in the amount of $40,037.15 and a credit for a permanent partial disability advance of $10,460.76 representing 2.4% (12 weeks) loss of Petitioner's body as a whole.

On 9/9/20, Dr. Emanuel performed the first carpal tunnel release and placed Petitioner off work. He continued Petitioner off work through the second carpal tunnel surgery and released Petitioner at MMI without restrictions on 12/14/20. Petitioner was again taken off work on 10/12/21 at which time Dr. Paletta performed a left ulnar nerve transposition. Dr. Paletta released Petitioner at MMI without restrictions on 1/19/22. Dr. Gornet placed Petitioner off work on 2/9/22 when he performed a two-level disc replacement at C5-6 and C6-7. Dr. Gornet has continued Petitioner off work pending a second disc replacement surgery at C3-4 and C4-5 with a right-sided foraminotomy at C3-4.

Therefore, the Arbitrator awards total temporary total disability benefits for the periods 9/9/20 through 12/14/20, 10/12/21 through 1/19/22, and 2/9/22 through 6/17/22, for a period of 46-4/7th weeks. Pursuant to the stipulation of the parties, Respondent shall receive credit for temporary total disability benefits paid in the amount of $40,037.15 and a credit for a permanent partial disability advance of $10,460.76 representing 2.4% (12 weeks) loss of Petitioner's body as a whole.

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 | 21WC014604 |
| Case Name | Keith McDaniel v.<br>City of Peoria |
| Consolidated Cases | |
| Proceeding Type | Petition for Review |
| Decision Type | Commission Decision |
| Commission Decision Number | 23IWCC0532 |
| Number of Pages of Decision | 10 |
| Decision Issued By | Christopher Harris, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Stephen Kelly |
| Respondent Attorney | Kevin Day,<br>Taylor Cascia |

DATE FILED: 12/13/2023

/s/Christopher Harris, Commissioner

Signature

23IWCC0532

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 up | ☒ None of the above |

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KEITH MCDANIEL,

Petitioner,

vs. NO: 21 WC 14604

CITY OF 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 causal connection, the reasonableness and necessity of the 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.

While the Commission agrees with the Arbitrator's analysis of Section 8.1(b), the Commission assigns greater weight to subsection (v). The evidence supports that the Petitioner injured his left wrist during the altercation. Following the injury, the Petitioner had diffused tenderness in the left wrist and was diagnosed with a strain of the left wrist. He underwent physical therapy and was discharged from care. He testified at hearing to some occasional left wrist pain. Therefore, the Commission modifies the Decision and finds that the Petitioner is entitled to 1% loss of use of the left hand pursuant to Section 8(e) of the Act. All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed December 28, 2022, is hereby modified as stated above and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner permanent partial disability benefits of $871.73 per week for 2.05 weeks because the injuries

sustained caused 1% loss of use of the left hand pursuant to Section 8(e) 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.

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.

**December 13, 2023**

d: 12-07-23
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 | 21WC014604 |
| Case Name | Keith McDaniel v.<br>City of Peoria |
| Consolidated Cases | |
| Proceeding Type | |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 7 |
| Decision Issued By | Adam Hinrichs, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Stephen Kelly |
| Respondent Attorney | Kenneth M. Snodgrass, Jr. |

DATE FILED: 12/28/2022

**THE INTEREST RATE FOR THE WEEK OF DECEMBER 28, 2022 4.60%**

/s/Adam Hinrichs, 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**

**Keith McDaniel**
Employee/Petitioner

v.

**City of Peoria**
Employer/Respondent

Case # **21** WC **14604**

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 **Adam Hinrichs**, Arbitrator of the Commission, in the city of **Peoria**, on **November 17, 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 **5/27/21**, 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 $**128,719.76**; the average weekly wage was $**2,475.38**.

On the date of accident, Petitioner was **52** 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 shall be given a credit for any medical bills paid through its group carrier, as well as a credit for the four weeks of statutory PPD previously paid.

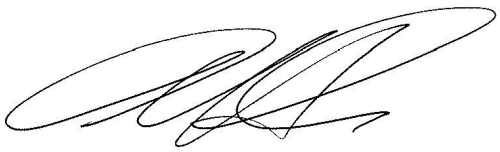
**ORDER**

The Respondent shall pay all reasonable, necessary and related medical and hospital charges, as outlined in Petitioner's Exhibit 6, pursuant to the medical fee schedule, including the outstanding OSF and Gaston Chiropractic charges, for reasonable and necessary medical services provided from the date of the accident through 9/15/2021.

The Respondent shall pay the Petitioner permanent partial disability benefits of $871.73/week for 21.25 weeks, because the injuries sustained caused Petitioner a 4.25% loss of use to his person as a whole. Respondent shall be given a credit against this award for the 4 weeks of statutory PPD it previously 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.



Signature of Arbitrator

**December 28, 2022**

## FINDINGS OF FACT

Keith McDaniel ("Petitioner") testified that his employment began with the City of Peoria ("Respondent") in June 1993 as a police officer (T 10). Petitioner testified that his job duties included patrolling the streets. The Petitioner then moved on to a role working in the Target Offender Unit performing aggressive patrols involving gangs and drugs (T 11). The Petitioner left the Target Offender Unit for the Community Area Target Team where he was a juvenile detective for eight years (T 11). The Petitioner left the juvenile division and worked on violent crimes, which he served on for ten years before being promoted to Sergeant (T 11).

Petitioner testified that he retired from Respondent on June 2, 2021 (T 11). The Petitioner testified that while working for the Respondent some of the scenarios he encountered were armed robbers, bank robbers, drug dealers, domestic situations, and hostile general public (T 12). The Petitioner testified that when he become Sergeant, he was still working on the streets (T 12).

Petitioner testified that he was previously injured while working for the Respondent on July 15, 2011, when he was involved in a motor vehicle accident (AT 12). The Petitioner testified that he was responding to a shooting that occurred, and as he proceeded through an intersection with the emergency lights activated, he was T-boned (T 13). The Petitioner testified that he received medical treatment to his neck and chest. The Petitioner testified that the 2011 injury was settled in July 2012 with the Respondent (T 14-15, RX 3).

Petitioner testified that from 2012 up to May 2021, he was not receiving medical treatment for any left shoulder, low back, or left wrist complaints (T 15). The Petitioner testified that he had never sustained a nasal fracture prior to May 27, 2021 (T 15.).

On May 27, 2021, Petitioner was dispatched to a scene involving a citizen with a mental health issue. The Petitioner testified that once on the scene, he addressed the individual and summoned for a medic to come and assist the individual to the hospital to receive treatment (T 16-17).

The individual in question became aggressive and attacked the Petitioner, punching him several times (T 17). The Petitioner testified that he attempted to maneuver the individual to the ground, but he wasn't able to stop him. Another responding officer at the scene deployed his taser. The taser struck both the Petitioner and the individual causing him to be incapacitated (T 17). Once on the ground, the Petitioner and the responding officer began to wrestle the individual in order to detain him, but the individual was still throwing punches. With the help of many others, the Petitioner was finally able to detain the induvial and placed him in the back of an ambulance (T 17).

Body cam video captured the incident. PX 7. The Petitioner testified that in the video, the individual punches the Petitioner in the nose causing him to bleed (T 19). In the video, it is clear that it was difficult for Petitioner to detain the individual, and it required the help of other officers. (T 20).

The Petitioner testified that he taken immediately to OSF St. Francis Medical Center for his injuries. The Petitioner focused his complaints on the pain he was feeling in his nose following the attack (PX. 5).

Following the incident, the Petitioner began noticing pain to his left wrist, left shoulder and neck area. The Petitioner presented to OSF Occupational Health on June 1, 2021. The Petitioner provided a history that he was hit in the forehead and fell to the ground (PX. 4). The Petitioner informed OSF Occupational Health that he started to have left shoulder, left wrist and back pain in addition to his nose complaints (PX. 4).

At his OSF Occupational Health visit, Petitioner reported that his nose pain was 8/10 and that he had left eye tissue swelling. The Petitioner was provided work restrictions of office work only. At that time, the Petitioner was in the process of retiring from the City of Peoria (PX. 4).

Occupational health provided a referral for the Petitioner to be seen by Dr. Lansford at Christie Clinic, an ear, nose and throat specialist (PX. 4).

The Petitioner presented to Dr. Lansford in June 2021. A CT scan of the nose was performed, and Dr. Lansford diagnosed the Petitioner with a nasal fracture that did not require surgery (PX. 2).

On June 16, 2021, at OSF, a left wrist and left shoulder x-ray was performed. Physical therapy was ordered by occupational health. (PX. 4).

Petitioner underwent physical therapy at OSF Rehabilitation from June 2021 to August 2021. The Petitioner performed stretches and weightlifting. While participating in physical therapy, the Petitioner noticed better range of motion in the left shoulder, left wrist and back.

Petitioner testified that he discussed seeing a chiropractor with occupational health (T 27).

Petitioner presented to Gaston Chiropractic on June 15, 2021 with complaints to the left shoulder, left wrist and mid to low back (PX. 3). The Petitioner provided a history to the chiropractor of the work injury and the chiropractor provided adjustments and regimens of therapy including stretching (PX. 3).

Petitioner received treatment from Gaston Chiropractic throughout June of 2021. During that time period, Petitioner was beginning to feel better and felt the therapy was working on his body (PX. 3).

On July 13, 2021, Petitioner followed up with OSF Occupational Health, indicating that his left shoulder complaints were 2/10, and back complaints were 1/10 (PX. 4).

On August 6, 2021, Petitioner returned to OSF Occupational Health, complaining of some left shoulder issues. Occupational health recommended continuing his stretching regimens and released the Petitioner from care (PX. 4).

Throughout his period of care with OSF, Petitioner continued to receive treatment from Gaston Chiropractic. On September 15, 2021, the Petitioner reported that he was ready to be released from care by Kimberly Gaston, DC, who noted that Petitioner is not back to where he was pre-accident, with his low back giving him pain occasionally, though not severe, and his left shoulder is sore in full abduction, though otherwise has recovered. (PX. 3).

Petitioner testified that as of August 2022, he is back working with the City of Peoria Police Department as the community engagement coordinator (T 32). The Petitioner testified that his job duties include performing

outreach programs in local neighborhoods and attending council meetings (T 33). The Petitioner testified that he is no longer working on the streets as a patrol officer (T 33).

Petitioner testified that since the accident, he notices that he wakes up some mornings sore. He also still experiences left shoulder and left wrist pain but utilizes his stretching regimen every morning to help get himself mobile for the day (T 33).

## Conclusions of Law

**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?**

The attack on the Petitioner, as seen in the body cam footage, was serious (PX 7). Petitioner required emergency care, as well as chiropractic care in addition to the follow up medical services provided by occupational health and the ENT physicians. It is Petitioner's right under the Act to seek his choice of physicians. Petitioner chose Kimberly Gaston, DC, who provided a brief and effective course of chiropractic care to the Petitioner. This treatment was reasonable and necessary. Respondent has not paid all reasonable and necessary medical services as outlined in PX 6.

The Arbitrator orders the Respondent to pay all reasonable, necessary and related medical bills, as outlined in PX. 6, from the date of the injury through September 15, 2021.

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

With regard to the issue of nature and extent, the Arbitrator notes that pursuant to Section 8.1b of the Act, for accidental injuries occurring after September 1, 2011, permanent partial disability shall be established using five enumerated criteria, with no single factor being the sole determinant of disability.

Per 820 ILCS 305/8.1b(b), the criteria to be considered are as follows: (i) the reported level of impairment pursuant to subsection (a) [AMA "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; and (v) evidence of disability corroborated by the treating medical records.

Applying the above standard to this claim, the Arbitrator makes the following findings listed below:

**With regard to Sec. 8.1(b) (i)**; No impairment rating was submitted at hearing. The Arbitrator has considered this factor, and lends it no weight.

**With regard to Sec. 8.1(b) (ii);** the Arbitrator notes that the Petitioner was employed by the Respondent as a Sergeant for the Peoria Police Department, and retired on a pre-determined schedule after this injury. The Arbitrator has considered this factor, and lends it little weight.

**With regard to Sec. 8.1(b) (iii);** the Arbitrator notes that the Petitioner was 52 years old at the time of the injury. The Arbitrator has considered this factor, and lends it some weight.

**With regard to Sec. 8.1(b) (iv);** the Petitioner's future earning capacity, the Arbitrator notes that there was no evidence of loss of future earning capacity. The Arbitrator has considered this factor, and lends it no weight.

**With regard to Sec 8.1(b) (v);** The Petitioner received treatment from occupational health, an ENT specialist, and a chiropractor with diagnoses of a closed non-displaced nasal fracture, as well as left shoulder, left wrist and back pain. Petitioner had ongoing nagging complaints related to his back and left shoulder at the time of his release from Occupational health and his chiropractor.

The Arbitrator finds that, as a consequence of this work injury, the Petitioner has a sustained a 4.25% loss of use of his person as a whole.

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 22WC031041 |
| Case Name | William Starrett v.<br>Twin Lake Trucking, |
| Consolidated Cases | |
| Proceeding Type | Petition for Review<br>Remand Arbitration |
| Decision Type | Commission Decision |
| Commission Decision Number | 23IWCC0533 |
| Number of Pages of Decision | 15 |
| Decision Issued By | Carolyn Doherty, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Michael Glisson |
| Respondent Attorney | James Kelly |

DATE FILED: 12/13/2023

/s/Carolyn Doherty, 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

WILLIAM STARRETT,
Petitioner,

vs. NO: 22 WC 31041

TWIN LAKE TRUCKING,
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, and prospective medical treatment and being advised of the facts and law, affirms and adopts the Corrected Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Corrected Decision of the Arbitrator filed March 20, 2023 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 bond requirement in Section 19(f)(2) of the Act is only applicable when the Commission has entered an award for the payment of money. Therefore, 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.

**December 13, 2023**
o: 12/07/23
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 | 22WC031041 |
| Case Name | William Starrett v. Twin Lake Trucking, |
| Consolidated Cases | |
| Proceeding Type | 19(b)/8(a) Petition |
| Decision Type | Corrected Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 12 |
| Decision Issued By | Maureen Pulia, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Michael Glisson |
| Respondent Attorney | James Kelly |

DATE FILED: 3/20/2023

**THE INTEREST RATE FOR THE WEEK OF MARCH 14, 2023 4.70%**

/s/Maureen Pulia, Arbitrator

Signature

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**
**19(b)/8(a)**

**WILLIAM STARRETT,**
Employee/Petitioner

v.

**TWIN LAKE TRUCKING,**
Employer/Respondent

Case # **22** WC **31041**

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 **Maureen Pulia**, Arbitrator of the Commission, in the city of **Collinsville**, on **2/24/23**. 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, **7/28/21**, 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 $**52,000.00**; the average weekly wage was $**1,000.00**.

On the date of accident, Petitioner was **62** 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 $**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**.

Respondent is entitled to a credit of $**00.00** under Section 8(j) of the Act.

**ORDER**

Respondent shall pay reasonable and necessary medical services for Dr. Gross, and any additional diagnostic tests recommended by Dr. Gross to determine what, if any, additional treatment is recommended to cure or relieve petitioner from the effects of the injury on 7/28/21, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall 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.

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.

MARCH 20, 2023

Signature of Arbitrator

ICArbDec19(b)

**THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:**

Petitioner, a 62 year old truck driver, alleges that he sustained an injury to his right leg, that arose out of and in the course of his employment by respondent on 7/28/21. Petitioner would pick up and deliver intermodal containers. Petitioner testified that he mainly did local runs.

Petitioner testified that his local run would include picking up the container and performing his pretrip inspection. He would then take the load to the designated location where he would either have the container loaded or unloaded. Petitioner testified that the containers are old and rusty, and the back doors get rusty and bent.

Petitioner testified that on 7/28/21 he arrived at the delivery location. He got out of the truck and went to the back of the container to open the doors. The doors were stuck. Petitioner pushed with all his weight to get the doors open and was unable. As he was leaning forward, he stepped up on the curb with his right leg and felt a pop in his right knee. After he got the doors opened, he went into his truck and rested while the container was unloaded. Once unloaded, petitioner drove 2 ½ hours back. Petitioner stated that his right knee was uncomfortable and he could not use it to climb into his truck. He also reported that if held down the gas pedal with his right leg it would get painful real quick. He tried to use the cruise control as often as possible.

Petitioner reported the incident to dispatch the next day. He also asked if her could take it easy and get long rides because he wanted to get in and out of the truck as few times as possible. Three weeks later when his pain was not better, and was getting worse, he formally reported the incident to Nicole in the office. He testified that his right knee was not better, it hurt a lot, and, he wanted to see a doctor. Nicole sent him to Dr. Knapp. Petitioner testified that Dr. Knapp placed him on light duty, but respondent could not accommodate him. He stated that he was then sent to Dr. Gross. Neither party offered Dr. Knapp's records into evidence.

On 9/23/21 petitioner presented to Dr. Gross for his right knee. He provided a consistent history of the injury. Dr. Gross's office note indicated that petitioner was evaluated at Gateway Occupational Medicine on 8/19/21, where he described his initial injury on 7/28/21 and ongoing pain in his right knee. His physical examination on that date showed tenderness to palpation over the popliteal area over the hamstring tendon. X-rays studies revealed joint effusion, and he was diagnosed with a right hamstring strain. It was noted that petitioner was given work restrictions and started on a non-steroidal anti-inflammatory and home exercise. It was noted that petitioner returned for further evaluation on 9/2/21 where he continued to complain of pain in his knee, despite wearing a brace. His examination continued

to show tenderness to palpation over the medial aspect of the knee and posterior aspect of the knee. His diagnosis remained the same and work restrictions were recommended. An MRI was also recommended to rule out any other significant pathology in his right knee that was causing petitioner's ongoing complaints. Dr. Gross noted that petitioner underwent an MRI scan of the right knee on 9/13/21 that showed a fissure of the lateral facet of the trochlea with delaminating cartilage flap and some underlying subchondral edema. Also noted was a small full thickness cartilage lesion from the lateral femoral condyle, a complex tear of the mid body and posterior horn of the medial meniscus, a popliteal cyst, and large joint effusion. It was further noted that petitioner was seen back on 9/16/21 when the MRI was reviewed, and he was referred for orthopedic evaluation.

Petitioner reported to Dr. Gross that although he had some improvement with regards to the pain in his right knee, he still had some pain mostly over the medial aspect of his right knee when he did activities, but believed it had improved since his treatment. Petitioner did not complain of any catching, locking, or giving away of his right knee. He rated his pain at a 2/10 without activities, and a 4/10 with activities. Petitioner noted that he had not returned to regular duty yet, and had been working with restrictions. Petitioner denied any prior injury to his right knee. Following an examination, and review of x-rays and an MRI of the right knee performed 9/13/21, Dr. Gross's impression was right knee medial meniscus tear and chondromalacia. Dr. Gross believed petitioner was having more pain related to his medial meniscus than the chondromalacia of his right knee.

Based on the mechanism of injury, Dr. Gross believed petitioner sustained an injury to the cartilage in his trochlear groove in addition to the medial meniscus with either a tear of the meniscus or propagation of a pre-existing tear related to his 7/28/21work injury. Dr. Gross noted that petitioner had some initial improvement with regards to non-operative management of his knee, so he did not think it unreasonable to proceed with an aspiration and a corticosteroid injection. Dr. Gross also continued petitioner's non-steroidal anti-inflammatory and prescribed a physical therapy so he could be shown a good home exercise program for his knee. Dr. Gross was of the opinion that if his knee continued to improve, he would progress petitioner back to all activities at work. If not, and petitioner continued to be symptomatic, he would further evaluate petitioner and make recommendations as they relate to his right knee and his work-related injury. Dr. Gross continued petitioner on work restrictions for an additional week, and then if no problems, he would have him return to regular duty. These restrictions included no squatting, kneeling, or climbing activities.

On 10/14/21 petitioner returned to Dr. Gross for further evaluation of his right knee. Petitioner stated that he had significant improvement with regards to his knee. He reported no problems with

regard to his right knee. He also reported that he was doing all of the activities required of him at work at that time. Petitioner's examination of his right knee revealed mild swelling; range of motion from 0 to 120 degrees; negative flexion MacMurray test; no tenderness to palpation over the medial or lateral joint lines; normal motor function in the femoral, tibial, and peroneal nerve distribution; and, normal sensation in the femoral, tibial and peroneal nerve distribution. Dr. Gross's impression was improved right knee medial meniscus tear and chondromalacia. Dr. Gross did not recommend any further management due to the fact that petitioner was not symptomatic. Dr. Gross returned petitioner to regular duty and released him from his care.

On 3/23/22 petitioner underwent Employment Testing at Athletico. Petitioner was found fit for duty. Petitioner was able to lower and raise the landing gear; release the 5th pin; secure a load with the tie down bar; tarp handling; climb into the cab; open the hood; pallet jack push/pull; climb into back of the truck; and, open/close the container door handle. It was noted that petitioner met all the test parameters, indicating that he should be able to safely perform all essential functions.

Petitioner testified that following his appointment with Dr. Gross on 10/14/21, he continued working. He testified that during the summer months of 2022 his work hours increased to 60 hours a week, and with the repeated getting in and out of the cab, his right knee pain worsened to the point that it was hurting every day. He stated that these complaints were the same as the complaints he had in July of 2021. Petitioner testified that it finally reached the point where he reported it to respondent, and told them he would like to follow-up with Dr. Gross. Respondent said it was ok to return to Dr. Gross, but when he contacted Dr. Gross, he was told that his case was closed, and they would not see him without worker's compensation authorization. When petitioner reported this to Nicole, in respondent's office, she called workers' compensation and they told her the case was closed, and 'that is it'.

On 12/26/22 petitioner underwent a Section 12 examination performed by Dr. James Williams, at the request of the respondent. Dr. Williams performed a record review (including records and imaging) and examination. Dr. James is board certified in Physical Medicine and Rehabilitation. Petitioner provided a consistent history of the injury on 7/28/21, and treatment to date. Petitioner told Dr. Williams that he worked regular duty until 5 months ago without any knee pain. He stated that he then started noticing that his right knee did not feel right. He stated that it was not pain, but felt like something was wrong. He noted that over the next several weeks he started noticing some pain in his knee, worse with more vigorous activity involving his knee. Petitioner reported that if he was doing more local work and climbing in and out of the truck, he would start to have some pain by the end of the day. He stated that it got to the point where it was bothering him at night, and enough to the point where he went to respondent

and he told them he needed to see a doctor. Petitioner believed it was all related to the injury on 7/28/21. When the employer contacted the worker's compensation insurance carrier, they said the case was closed. The respondent told petitioner to see a doctor through his insurance, but he was concerned about spending thousand of dollars out of pocket. Petitioner contacted Dr. Gross's office and was that told he could not be seen without a letter from the worker's compensation insurance carrier since the case was closed. Petitioner testified that although he continued to work his right knee was getting worse and worse. He also reported some episodes of catching or locking in his right knee, and some swelling in his right knee.

Following petitioner's his history, his examination of petitioner, and his record and imaging review from 8/19/21 through 10/14/21, Dr. Williams was of the opinion that petitioner had nonspecific right knee pain in the setting of right knee osteoarthritis, that is multifactorial and may or may not be related to the specific cartilage and meniscus findings on his MRI dated 9/13/21. Dr. Williams was of the opinion that petitioner's current complaints of right knee pain are not causally related to the incident at work on 7/28/21. He based this opinion on the causation analysis method developed by Kusnetz and Hutchinson in 1970. Dr. Williams found that 4 of the 6 factors were not met. Dr. Williams was of the opinion that the explanatory diagnosis for the relevant clinical presentation was not definitively established based primarily on objective findings; that there were no reliable scientific findings referenced/presented which verify that the exposure to the claimed cause was consistent with the nature and course of the relevant clinical presentation; that there was no scientifically identified risk factor for the relevant clinical presentation; and, that there were inconsistencies, contradictions, or confounding factors of relevance to the information on which the causation claim was based, and on ensuring that there were no inconsistencies for the professional services which contributed to the causation claim.

Despite his causation opinions, Dr. Williams was of the opinion that treatment of petitioner's right knee was indicated. This treatment includes educating petitioner on various modalities before directing him to an appropriate musculoskeletal rehabilitation program. Dr. Williams did not believe petitioner was a surgical candidate. Dr. Williams was of the opinion, that since after seeing Dr. Gross on 10/14/21 petitioner was able to work for 10 months with no right knee pain or symptoms, and that no activity or work restrictions are needed as they relate to his injury on 7/28/21. Dr. Williams, based on the opinions of Dr. Gross's report dated 10/14/21, was of the opinion that petitioner had reached maximum medical improvement as it relates to his injury on 7/28/21.

Respondent offered into evidence petitioner's pay stubs from 12/25/22 through 2/11/23 showing petitioner worked each week. His hours worked appeared to vary. However, the pay stubs do not indicate how many hours petitioner worked during each pay period.

Petitioner testified that currently he cannot sleep on his back or his stomach. He reported that any pressure on the left side of the inside of his right knee causes him excruciating pain. He testified that holding down the gas pedal for a long time, or twisting his right knee also causes him excruciating pain. He stated that these are the same problems he had following the injury on 7/28/21.

Petitioner stated that since being released by Dr. Gross in October of 2021 he has been working full duty, and the symptoms in his right knee returned and continued to where he could not stand it any longer, and he requested authorization to return to Dr. Gross to see what is going on his right knee. Petitioner testified that he climbs the steps to the cab slowly, walks slower, and is very careful when opening the container doors. However, when it is really bad he asks for long hauls so he does not need to get in and out of the cab, and open the container doors as much. Petitioner testified that he had no problems with his right knee prior to the injury on 7/28/21, and has not sustained any new injuries since that date he was released by Dr. Gross and experienced the flare up of his right knee in 2022.

On cross-examination petitioner testified that his injury on 7/28/21 was an unwitnessed injury, and his first treatment was not until 8/19/21. Petitioner testified that he did request that his work week be changed to Monday through Thursday because he was doing construction on his home. Petitioner agreed that he weighs 298 and is 6 feet tall. Petitioner also admitted that when he had unrelated medical visits on 2/2/22, 2/23/22, 3/10/22 and 3/16/22 for a chest x-ray, blood work, a nuclear stress test, and a sleep study, he never made any mention of any right knee pain.

On redirect petitioner testified that his resurgence of symptoms was in the summer of 2022, and shortly thereafter he made mention of this to respondent in August of 2022.

**C. DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT?**

Petitioner alleges that he sustained an accidental injury to his right knee that arose out of and in the course of his employment by respondent on 7/28/21. Respondent disputes this claim.

Petitioner presented unrebutted testimony that he when he arrived at a delivery location on 7/28/21, he got out of the truck and went to the back of the container to open the doors. The doors were stuck. Petitioner pushed with all his weight to get the doors open and was unable. As he was leaning forward, he stepped up on the curb with his right leg and felt a pop in his right knee. After unloading the truck

petitioner drove 2 ½ hours back. Petitioner reported the incident to dispatch the next day, and requested long rides, instead of local rides because there was less in and out of the cab, and unloading. Then, three weeks later when his pain was not better, and was getting worse, he formally reported the incident to Nicole in the office.

Respondent offered no evidence to rebut petitioner's testimony. The arbitrator finds petitioner's accident history to be credible, and consistent throughout the medical records.

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner has proven by a preponderance of the credible evidence that he sustained an accidental injury to his right knee that arose out of and in the course of his employment by respondent.

**F. IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?**

Petitioner claims his current condition of ill-being as it relates to his right knee is causally related to the injury he sustained on 7/28/21. Respondent disputes this claim.

Following his injury on 7/28/21, petitioner sought treatment at Gateway Occupational Medicine, as well as with Dr. Gross, for his right knee pain. At Gateway Occupational Medicine his physical examinations showed tenderness to palpation over the medial and posterior aspect of the knee, and tenderness to the popliteal area over the hamstring tendon. His x-rays revealed joint effusion. He wore a brace with little relief. An MRI of the right knee on 9/13/21 showed a fissure of the lateral facet of the trochlea with delaminating cartilage flap and some underlying subchondral edema; a small full thickness cartilage lesion from the lateral femoral condyle; a complex tear of the mid body and posterior horn of the medial meniscus; a popliteal cyst; and large joint effusion.

When petitioner first saw Dr. Gross on 9/23/21 he was still reporting pain mostly over the medial aspect of his right knee when he did activities. He rated his pain at a 2/10 without activities, and a 4/10 with activities. The petitioner testified that these ratings and complaints were while he was off work. Dr. Gross believed petitioner was having more pain related to his medial meniscus than the chondromalacia of his right knee. He was also of the opinion that based on the mechanism of injury, petitioner sustained an injury to the cartilage in his trochlear groove in addition to the medial meniscus with either a tear of the meniscus or propagation of a pre-existing tear related to his 7/28/21work injury. Given that petitioner had some initial improvement with regards to non-operative management of his knee, Dr. Gross proceeded with a corticosteroid injection, and aspiration of the right knee. He also continued petitioner's non-steroidal anti-inflammatory, and prescribed physical therapy so he could be shown a good home exercise program for his knee. Dr. Gross was of the opinion that if petitioner's right knee continued to

improve, he would progress petitioner back to all activities at work. If not, and petitioner continued to be symptomatic, he would further evaluate petitioner and make recommendations as they relate to his right knee and his work-related injury. Dr. Gross gave petitioner work restrictions for a week, and then had him return to regular duty. These restrictions included no squatting, kneeling, or climbing activities.

Following his corticosteroid injection and aspiration, petitioner worked one week on light duty, and then returned to full duty work. After working full duty for about two weeks, petitioner returned to Dr. Gross on 10/14/21. Petitioner reported significant improvement following the corticosteroid injection and the aspiration. He was experiencing no problems with regard to his right knee. He also reported that he was doing all of the activities required of him at work at that time. Dr. Gross's impression was improved right knee medial meniscus tear and chondromalacia. Dr. Gross did not recommend any further management due to the fact that petitioner was not symptomatic. Dr. Gross returned petitioner to regular duty and released him from his care.

Five months later, on 3/23/22, petitioner underwent Employment Testing at Athletico. Petitioner was found fit for duty. Petitioner was able to lower and raise the landing gear; release the 5th pin; secure a load with the tie down bar; tarp handling; climb into the cab; open the hood; pallet jack push/pull; climb into back of the truck; and, open/close the container door handle. It was noted that petitioner met all the test parameters, indicating that he should be able to safely perform all essential functions.

Then in the summer of 2022 petitioner's hours increased to 60 hours per week, and the frequency of him having to climb in and out of the cab also increased. As a result, petitioner's right knee pain worsened to the point that it was hurting every day. He stated that these complaints were the same as the complaints he had in July of 2021. Petitioner testified that the pain got so bad, that he reported it to respondent in August of 2022, and told them that he would like to follow-up with Dr. Gross. When the office tried to get authorization for petitioner's follow-up visit with Dr. Gross, they were told by workers' compensation that petitioner's case was closed and they would not authorize a follow-up visit with Dr. Gross.

Respondent then had petitioner undergo a Section 12 examination with Dr. James Williams on 12/26/22. Dr. Williams is board certified in Physical Medicine and Rehabilitation. Petitioner reported a recurrence of his right knee pain while working in the summer of 2022, especially with the more vigorous activity of climbing in and out of the truck when doing more local routes. He also noted that it was bothering him at night.

After examining petitioner, and performing a record review, Dr. Williams was of the opinion that petitioner had nonspecific right knee pain in the setting of right knee osteoarthritis that was multifactorial, and may or may not be related to the specific cartilage and meniscus findings on his MRI dated 9/13/21. Despite not being sure if petitioner's right knee pain was or was not related to the cartilage and meniscus findings on the MRI dated 9/13/21, Dr. Williams was of the opinion that petitioner's current complaints of right knee pain were not causally related to the injury on 7/28/21. Dr. William's basis for this opinion was that after seeing Dr. Gross on 10/14/21, petitioner was able to work for 10 months without restrictions, and without any right knee pain or symptoms.

Based on the mechanism of injury, Dr. Gross was of the opinion petitioner sustained an injury to the cartilage in his trochlear groove, in addition to the medial meniscus with either a tear of the meniscus or propagation of a pre-existing tear related to his 7/28/21 work injury. On 9/23/21 Dr. Gross was of the opinion that if petitioner's knee continued to improve, he would progress petitioner back to all activities at work. If not, and petitioner continued to be symptomatic, he would further evaluate petitioner and make recommendations as they relate to his right knee and his work-related injury.

On 10/14/21, after the right knee aspiration and corticosteroid injection, petitioner told Dr. Gross he was doing great. Dr. Gross released petitioner to one week of light duty followed by full duty. Petitioner resumed his full duty work, but in the summer of 2022 his work week increased to 60 hours a week. This resulted in increased climbing in and out of the cab, and increased pain in petitioner's right knee that continued to worsen to the point where in August of 2022 petitioner was also experiencing pain at night, and wanted to see a doctor. Petitioner testified that this pain was the same as he experienced in July of 2021. Petitioner also denied any new injuries between 7/28/21 and the summer of 2022. Respondent offered no credible evidence to rebut petitioner's claims.

The arbitrator does not find Dr. Williams' opinion that petitioner's current condition of ill-being as it relates to his right knee is not causally related to the injury on 7/28/21 very persuasive. The arbitrator notes that Dr. Williams could not even determine if petitioner's current complaints were related to the findings on the MRI on 9/13/21. The arbitrator finds it significant that Dr. Williams based his causation opinion solely on the fact that petitioner worked for 10 months without restrictions or symptoms, but at the same time made no mention of any no new injuries to petitioner's right knee between 7/28/21 and the summer of 2022, or, that once petitioner's hours increased to 60 hours a week in the summer of 2022, and the frequency of his climbing in and out of the cab increased, petitioner was again experiencing the same pain he had in July of 2021.

Based on the above, as well as the credible evidence, the arbitrator finds the causation opinions of Dr. Gross more persuasive than those of Dr. Williams, and finds petitioner's current condition of ill-being as it relates to his right knee causally related to the injury he sustained on 7/28/21. The arbitrator finds it significant that petitioner denied any injuries to his right knee prior to 7/28/21; that there is no credible evidence of any intervening accidents between 7/28/21 and the summer of 2022; that diagnostic tests showed a complex tear of the medial meniscus and large joint effusion following the injury on 7/28/21; that petitioner had temporary relief of his symptoms following a corticosteroid injection and aspiration on 9/23/21 through the beginning of the summer of 2022; that after having his hours increased to 60 hours a week in the summer of 2022, petitioner's climbing in and out of the cab also increased, and petitioner's right knee pain returned and worsened to the point where he sought additional treatment; and, that Dr. Gross told petitioner on 9/23/21 that if his right knee continued to be symptomatic, he would further evaluate petitioner and make recommendations as they relate to his right knee and his work related injury.

**K. IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE?**

Having found the petitioner's current condition of ill-being as it relates to his right knee causally related to the injury he sustained on 7/28/21, the arbitrator finds the petitioner is entitled to prospective medical care with Dr. Gross. This order for prospective medical care is limited to visits with Dr. Gross, and any additional diagnostic tests ordered by Dr. Gross, to determine what, if any, additional treatment is needed to cure or relieve petitioner from the effects of the injury on 7/28/21.

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

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| Case Number | 22WC004297 |
| Case Name | Patrick Thompson v.<br>Crossroads Community Hospital |
| Consolidated Cases | |
| Proceeding Type | Petition for Review under 19(b)<br>Remand Arbitration |
| Decision Type | Commission Decision |
| Commission Decision Number | 23IWCC0534 |
| Number of Pages of Decision | 23 |
| Decision Issued By | Christopher Harris, Commissioner |

| | |
|---|---|
| Petitioner Attorney | James Keefe Jr |
| Respondent Attorney | Khristopher Dunard |

DATE FILED: 12/13/2023

/s/Christopher Harris, Commissioner

Signature

STATE OF ILLINOIS )
) SS.
COUNTY OF MADISON )

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| ☒ 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

PATRICK THOMPSON,

Petitioner,

vs. NO: 22 WC 4297

CROSSROADS COMMUNITY HOSPITAL,

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, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission hereby 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 January 9, 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 receive a 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.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $18,600.00. 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 the Circuit Court.

**December 13, 2023**

CAH/pm
O: 12/7/23
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**

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| Case Number | 22WC004297 |
| Case Name | Patrick Thompson v. Crossroads Community Hospital |
| Consolidated Cases | |
| Proceeding Type | 19(b) Petition |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 20 |
| Decision Issued By | Linda Cantrell, Arbitrator |

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| Petitioner Attorney | James Keefe, Jr. |
| Respondent Attorney | Khristopher Dunard |

DATE FILED: 1/9/2023

**THE INTEREST RATE FOR THE WEEK OF JANUARY 4, 2023 4.63%**

/s/Linda Cantrell, Arbitrator

Signature

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)**

**Patrick Thompson**
Employee/Petitioner

v.

**Crossroads Community Hospital**
Employer/Respondent

Case # **22** WC **004297**

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 **10/31/22**. 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, **12/14/21**, 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 $**5,933.75**; the average weekly wage was $**912.88**.

On the date of accident, Petitioner was **44** years of age, **single** with **1** 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 $**13,069.88** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for medical benefits, for a total credit of $**13,069.88.**

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 medical expenses contained in Petitioner's Group Exhibit 11, pursuant to the Illinois medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act.

The evidence supports that Petitioner has not been cured or relieved from the effects of his work-related injuries. The Arbitrator finds that Petitioner is entitled to receive the additional care recommended by Dr. Rutz as he has not reached maximum medical improvement. Therefore, Respondent shall authorize and pay for prospective medical treatment, including, but not limited to, an L5-S1 discectomy and fusion and post-operative treatment until Petitioner reaches maximum medical improvement.

Respondent shall pay Petitioner temporary total disability benefits of $**608.59**/week for **45-1/7th** weeks, for the period **12/15/21 through 5/24/22, 5/29/22 through 5/31/22, and 6/2/22 through 10/31/22**, pursuant to Section 8(b) of the Act. Pursuant to the stipulation of the parties, Respondent shall receive credit for TTD benefits paid in the amount of $13,069.88.

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.

JANUARY 9, 2023

Arbitrator Linda J. Cantrell

ICArbDec19(b)

STATE OF ILLINOIS )
) SS
COUNTY OF MADISON )

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

| | | |
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| **PATRICK THOMPSON,** | ) | |
| | ) | |
| **Petitioner,** | ) | |
| | ) | |
| **v.** | ) | **IWCC No.: 22-WC-004297** |
| | ) | |
| **CROSSROADS COMMUNITY HOSPITAL,** | ) | |
| | ) | |
| **Respondent.** | ) | |

## FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Collinsville on October 31, 2022, pursuant to Section 19(b) of the Act. The parties stipulate that Petitioner sustained accidental injuries on December 14, 2021 that arose out of and in the course of his employment with Respondent. Petitioner claims entitlement to temporary total disability benefits from 12/15/21 through 10/31/22, representing 45-6/7 weeks. Respondent disputes liability for temporary total disability benefits based on Dr. Bernardi's Section 12 examination and alleges Petitioner refused light duty work. The parties stipulate that Respondent is entitled to a credit for any and all medical bills paid through its group medical plan and a credit for TTD benefits paid in the amount of $13,069.88.

The issues in dispute are causal connection, medical bills, temporary total disability benefits, prospective medical care, and the reasonableness of the recommended surgery.

## TESTIMONY

Petitioner was 44 years old, single, with one dependent child at the time of accident. He was hired by Respondent as a maintenance technician approximately two months prior to his accident on 12/14/21. His job duties included general maintenance, including plumbing, electric, drywall, ceiling repairs, and painting. He described his job duties as physical which required heavy lifting and bending. Petitioner testified he had no problem performing his duties prior to 12/14/21. He worked side-by-side with his co-worker John from 7:00 a.m. to 3:30 p.m., Monday through Friday. He testified he performed more work than his co-worker because John did not know how to perform many of the electrical or heating jobs.

Petitioner testified that on 12/14/21 he was climbing a ladder when his foot slipped on the second step, and he fell backward. He estimated the second step was approximately 1½ to 2 feet

off the ground. He was carrying a screwdriver and wire cutter in his hands. On the way down Petitioner twisted to the left, his feet hit the ground, and his back and buttocks struck a wall that prevented him from falling to the ground. He experienced pain in his low back that radiated down his left leg. Petitioner reported the accident to his supervisor and continued to work 3 to 4 more hours to complete his shift.

Petitioner testified he had an accident in November 2021 while working for Respondent where he twisted his ankle and low back. He reported the accident and did not require medical treatment. Petitioner testified that his symptoms from that accident resolved prior to 12/14/21.

Petitioner went to the emergency room on 12/15/21 and was placed off work for a couple of days. He was instructed to follow up with the Orthopedic Center in Mt. Vernon. He did not recall if the emergency department asked him about any prior lumbar spine injuries. Prior to his appointment at the Orthopedic Center Petitioner returned to the emergency room on 12/19/21 with increasing pain in his low back and left leg. He underwent a CT scan and was placed off work until his orthopedic examination.

Petitioner was examined at the Orthopedic Center on 12/20/21 and was continued off work. He was prescribed Hydrocodone and a muscle relaxer. A lumber MRI was performed on 1/10/22 and he underwent a lumbar injection.

Petitioner admitted he had a lumbar spine injury in 2019 working for a different employer. He underwent a lumbar MRI, physical therapy, and an injection at L5-S1 ordered by Dr. Labore. He last treated with Dr. Labore in late October 2019. Petitioner testified he took the 2019 and 2022 MRIs with him to the Section 12 examination with Dr. Bernardi on 3/11/22. Petitioner also admitted to undergoing chiropractic treatment in 2020 and 2021 as a result of an automobile collision with a deer in June 2020. Petitioner testified he had neck pain, but the chiropractor told him he had to treat his entire spine from neck to low back.

Petitioner began treating with Dr. Rutz on 4/21/22 who placed him off work. He underwent an injection at L5-S1 on 5/4/22 that provided temporary relief. Dr. Rutz released Petitioner to sedentary work on 5/17/22. Petitioner testified that Respondent offered him a job working in security on the weekends. He began working light duty on 5/25/22 and worked 4 to 5 hours before his pain increased, and he went home early. He returned to light duty work on 5/28/22 and his left leg gave out while making “rounds” at Respondent’s hospital causing him to fall and report to the emergency room.

Petitioner testified that the security job required him to make “rounds” three times per shift, which consisted of a three-story hospital building, a basement and parking lot, and other medical buildings around the parking lot. Petitioner did not feel the security guard position was within Dr. Rutz’s restrictions due to the amount of walking required. He testified he never completed a full shift of light duty work.

Dr. Rutz recommends a lumbar fusion at L5-S1 which Petitioner desires to undergo due to unbearable sharp and burning pain in his low back and left leg. He testified he does very minimal activities.

Petitioner testified he was unemployed for nine months to a year prior to being hired by Respondent. He received unemployment benefits during that period and performed a job search. He testified he did not have any restrictions with regard to his lumbar spine prior to being hired by Respondent.

Petitioner identified Facebook posts and photographs from May through October 2021 that depicted multiple activities, including a family vacation to Florida in July 2021, deer hunting in October 2021, landscaping projects in May 2021, and side jobs performing electric work on barns and silos in September and October 2021. (PX14) Petitioner testified he had no low back issues prior to 12/14/21 that interfered with walking, boating, swimming, or gardening. Petitioner testified that his side jobs required a lot of lifting, bending, climbing stairs, and operating hand tools. He had no issues with his low back that interfered with the performance of these jobs. Petitioner testified he could not perform those jobs now with his low back and left leg condition. He was able to dress and drag a 250 to 300-pound deer out of the woods prior to being hired by Respondent in October 2021. He admitted he has various health issues for which he treated with his primary care physician prior to October 2021 and stated he would have told his doctor if he had any low back issues.

On cross-examination, Petitioner admitted to filing prior worker's compensation claims and undergoing two cervical surgeries and a right shoulder surgery. He sustained a work injury on 3/15/19 that involved his lumbar spine. Petitioner denied any treatment for low back issues from the time he was released by Dr. Labore in October 2019 until his work accident on 12/14/21.

Petitioner agreed that the chiropractor records from 2020 and 2021 are accurate that he had low back pain that radiated into his left lower leg but the primary focus of his treatment and pain was his cervical spine. He last received chiropractic treatment on 6/2/21 and reported low back pain of 5/10 and left buttock pain of 6/10. Petitioner testified he was able to play softball in July 2021 and had no ongoing issues. Petitioner agreed he did not inform Dr. Bernardi or Dr. Rutz of his chiropractic treatment because his symptoms were mainly in his neck.

Petitioner applied for social security disability in August or September 2021. He testified he was not experiencing any low back or left leg symptoms when he applied for disability as those symptoms resolved in July 2021. Petitioner identified a letter from the Illinois Department of Human Services Division of Rehabilitation Determination dated November 2021 which outlined his medical conditions, including diabetic, thyroid disease, gout, high blood pressure, high cholesterol, sinus and allergy problems, Barrett's esophagus, acid reflux, hiatal hernia, gastritis, Helicobacter pylori, infection of stomach, neck hurts and the lower back hurts, pain down left leg, and depression. (RX4) Petitioner testified he takes 17 medications and needs a couple of surgeries related to his health conditions. He applied for SSD to have health insurance and money to get back on his feet. He testified he applied for work after submitting his disability application. He explained that the disability application requested that he disclose all health conditions for the last two years, which is why he listed his neck, low back, and left leg. His application for disability benefits was denied.

Petitioner agreed he received TTD benefits until he began working light duty as a security guard for Respondent. He agreed Dr. Rutz released him to sedentary duty on 6/7/22 and he sent a text to Rick Shoemaker. He returned to his primary care physician who placed him off work until he could return to Dr. Rutz. Petitioner agreed he was contacted by Respondent's human resource department on 8/11/22 about returning to light duty work. He communicated with Ms. Alta Welker via text about returning as a security guard and Petitioner refused the position because he could not make the rounds required of the position. He admitted he also could not return to light duty work because he did not have money. Petitioner testified that after his training as a security guard he was supposed to work three consecutive 12-hour shifts.

Alta Welker testified on behalf of Respondent. Ms. Welker is Respondent's Human Resource Manager. She has been employed by Respondent for two and a half years and processed Petitioner's hire. Ms. Welker was directly involved in Petitioner's worker's compensation claim and light duty assignment. She testified that Petitioner was offered a security/greeter position which involved sitting at the front desk. She explained that Petitioner was to inform them if the duties were beyond his restrictions. Ms. Welker was not aware Petitioner had difficulty walking while performing his security guard duties. She testified she requested clarification from work comp what Petitioner's specific restrictions were, but she understood sedentary work to be limited sitting, standing, and walking. She did not know Petitioner's specific sedentary restrictions.

Ms. Welker testified that Petitioner was to inform her or the Security Department supervisor, Rick Shoemaker, if he was not able to report to his light duty position. She reviewed paperwork and did computer training with Petitioner on 5/25/22 and had no further dealings with Petitioner after that date. Ms. Welker did not work weekends. She agreed Petitioner was placed off work after he fell on 5/28/22 and he was released to sedentary work on 6/7/22. Ms. Welker testified that the security guard position remained available to Petitioner when he was released on 6/7/22. She discussed light duty work with Petitioner again in August 2022 and he was scheduled to return to work on 8/12/22. She stated Petitioner sent her a text that he was not able to report to work because he did not have money for gas. Petitioner was supposed to let her know if he would work the next day on 8/13/22 but he never contacted her. She testified that the security guard position has remained available to Petitioner through the date of arbitration.

On cross-examination, Ms. Welker testified she has no knowledge of whether Petitioner is or is not receiving TTD benefits. She does not know how far Petitioner lives from Respondent's facility. Ms. Welker testified that Petitioner trained with the two full-time security guards and did not dispute that Petitioner was being trained to walk rounds at the hospital. She agreed that the security guards make rounds throughout the 3-level hospital, basement, and parking lot. She testified that the guards do not have to cover all locations during each round. She understood that rounds should be made once per hour by full-time guards. Ms. Welker estimated it would take her 15 to 20 minutes to walk Respondent's entire campus at one time. She does not have any medical limitations or restrictions.

## MEDICAL HISTORY

Petitioner's pre-accident medical records were admitted into evidence. On 4/9/19, Petitioner underwent a lumbar MRI for low back pain that radiated down his left leg to his calf. The radiologist interpreted L5-S1 small disc protrusion with no significant stenosis. (PX4)

On 6/20/19, Petitioner was examined by Dr. Adam Labore at Washington University for low back pain radiating to his left lower extremity following a work accident on 3/5/19. His pain varied from sharp to burning and aching and was severe. His symptoms were distributed through the left SI dermatome. Petitioner reported he underwent 16 visits of physical therapy without significant improvement and underwent a lumbar epidural steroid injection on 2/18/16. (RX4, p. 295) On physical examination, range of motion provoked pain with flexion and extension with positive seated straight leg raises on the left. Lumbar x-rays were normal. An outside lumbar MRI revealed mild disc protrusions, most significant at L5-S1. Dr. Labore did not have the films for review. He diagnosed a small disc protrusion at L5-S1 and left L5-S1 radiculopathy. Dr. Labore recommended a left SI transforaminal epidural steroid injection. (RX4, p. 296)

Petitioner returned to Dr. Labore on 8/22/19 and reported no benefit from the injection. Petitioner continued physical therapy and took Flexeril twice daily and Tramadol at night. Dr. Labore noted physical examination strongly suggested SI joint etiology. He recommended a left SI joint injection and provided light duty restrictions. (RX4, p. 300)

On 10/2/19, Petitioner saw PA Braswell for a testosterone injection and complained of chronic back pain rated 5/10. (RX4, p. 387)

Petitioner last saw Dr. Labore on 10/31/19 and reported no significant change in symptoms. Dr. Labore again recommended an SI joint injection and anticipated a functional capacity evaluation. (RX4, p. 289)

Petitioner treated with his primary care physician multiple times from 1/14/20 through 12/1/21. The only mention of back pain was on 1/14/20 when Petitioner reported he was being treated for a work-related back injury. (PX13, p. 248)

Petitioner treated 43 times at Greenville Rehab and Pain Clinic from 6/25/20 through 6/2/21. (RX3) On 6/25/20, Petitioner reported he was involved in a motor vehicle accident on 6/20/20 with an immediate onset of low back pain. He did not receive treatment following the accident and was able to continue working but his pain interfered with his work activities and bodily movement. He reported continuous low back pain rated 7/10. His pain was dull, aching, shooting, and burning on the left side. (RX3, p. 107) Tenderness to palpation was noted on both sides of the lumbar spine and SI joint, edema and swelling bilaterally, and multiple bilateral active trigger points. Muscle spasms with edema and swelling were present over both SI joints with reduced range of motion of the lumbar spine. Petitioner had reduced strength of 4/5 in the psoas muscles bilaterally, and 4/5 in the right extensor hallucis longus muscles. Fabere testing was positive on the right, Milgram's test was positive, and Yeoman's testing produced pain in the SI joint on both sides. Reflexes were noted to be decreased in the L2-4 distribution on the right and pinwheel testing of the L4-5 and L5 dermatomes demonstrated decreased sensation on

the right. (RX3, p. 107-115) Lumbar x-rays showed decreased disc height at L5, mild decrease in the lumbar lordotic curve, rotation subluxation at L1 and L2, unlevel pelvis on the left, and mild encroachment of the obliques on the right. (RX3, p. 115) Dr. Chenault diagnosed a lumbar spine strain, sacroiliitis, and right hip pain. He recommended chiropractic treatment three times a week for four weeks.

Petitioner attended 16 visits of chiropractic treatment from 6/25/20 through 9/29/20. He continued to complain of pain ranging from 6-8/10 and reported multiple flare-ups. (RX3, p. 121-207) Petitioner resumed chiropractic treatment on 12/17/20 and underwent treatment through 4/16/21. (RX3, p. 208-254). His last chiropractic visit was on 6/2/21 at which time he rated his pain 5/10. (RX3, p. 254)

Post-accident medical records show that on 12/15/21, Petitioner presented to St. Mary's Emergency Room with low back and left leg pain that started the day prior when he stepped off the last rung of a ladder at work and felt his back jolt. Physical examination revealed tenderness in the lumbar spine with normal range of motion. Lumbar x-rays were normal. He had a negative straight leg raise. Petitioner was diagnosed with lumbar back pain and placed off work through 12/16/21. He denied any prior lumbar spine injuries. (PX1)

On 12/19/21, Petitioner returned to the emergency room with persistent left-sided low back pain that radiated down his left leg. (PX2) Petitioner reported he was scheduled to see an orthopedic specialist. He denied numbness but had shooting pain down the left leg. Lumbar and pelvic CT scans were normal. Petitioner was placed off work from 12/17/21 through 12/20/21.

On 12/20/21, Petitioner was examined by Nurse Practitioner Jamie Smith, collaborating with Dr. Phillips, at The Orthopedic Center of Mt. Vernon. (PX3) Petitioner reported sharp, stabbing, and burning low back pain with radiculopathy in his left leg rated 6-7/10. He provided a history of climbing a ladder at work when he twisted and fell on his feet and struck his right side against a wall. Examination revealed positive hyperextension test and straight leg raise test on the left and tenderness over the midline of the lumbar spine with palpation at L3-S1. Lumbar spine and pelvic x-rays showed mild degeneration at L5-S1 with well-maintained disc heights and mild facet arthritis. NP Smith assessed low back pain with left lower extremity radiculopathy. She ordered a lumbar spine MRI and prescribed a muscle relaxer with Hydrocodone and physical therapy. Petitioner was kept off work.

The lumbar spine MRI was performed on 1/10/22 and revealed a moderate central disc protrusion causing mild mass effect on the left central S1 nerve root. (PX4)

On 1/13/22, Petitioner returned to NP Smith with ongoing lumbar pain radiating down his left leg to his calf. He denied significant weakness in his lower extremities. Petitioner had a mildly positive straight leg raise on the left. NP Smith assessed low back pain with left lower extremity radiculopathy and disc herniation at L5-S1 on the left. She ordered physical therapy and an epidural steroid injection at L5-S1. Petitioner was continued off work. (PX3)

On 1/20/22, NP Smith provided a work slip placing Petitioner on light duty restrictions of no pushing, pulling, gripping, or lifting with his bilateral arms, no lifting more than 10 pounds with his bilateral arms, and sitting/standing as needed.

On 2/22/22, Petitioner presented to PA Braswell for a six-month checkup. (PX10) He rated his back and leg pain at 7/10. Dr. Braswell noted Petitioner appeared in mild distress and noted tenderness over the paraspinal area of the lumbar spine.

On 3/1/22, Petitioner was examined by Dr. Robert Bernardi pursuant to Section 12 of the Act. (RX3, Ex. 3) Petitioner provided a history of injuring his back at work on 12/14/21 when he stepped off a stepladder and stumbled backward hitting a wall behind him. Petitioner reported instant pain in his left low back that radiated into his buttock. Petitioner reported a history of cervical disc replacement in 2007 followed by disc replacement in 2015 or 2016 with Dr. Zebala. With respect to the lumbar spine, Petitioner reported he previously injured his low back at work in 2019 when he slipped and fell forward into his vehicle and twisted his torso. He developed low back pain radiating into his left leg. He subsequently treated with Dr. Zebala and underwent injections and physical therapy. Petitioner returned to work but lost his job when the COVID-19 pandemic began. He subsequently worked for Matt's Electric throughout 2021. Petitioner reported that his first bout of low back and left leg pain completely resolved, and he did not seek any additional treatment for ongoing issues.

Dr. Bernardi's examination revealed no Waddell's signs and normal strength in the lower extremities. Petitioner exhibited minimally restricted extension with mild tenderness over the left greater trochanter and iliotibial band. Range of motion in the left hip provided left low back and leg pain. Straight leg raise testing provoked low back pain bilaterally greater on the left.

Dr. Bernardi reviewed the lumbar spine MRIs dated 4/9/19 and 1/10/22. He interpreted the 2019 scan as showing degenerative changes at L5-S1 with loss of disc hydration and some slight loss of disc height. He noted a posterior and focal central protrusion at L5-S1, with no mass effect on either nerve root. He opined that the 2022 film was unchanged compared to the 2019 film. Dr. Bernardi opined that the work accident on 12/14/21 did not cause any changes at the L5-S1 level. He opined that if Petitioner's history was factually correct, then the event caused a recurrent aggravation of his underlying lumbar condition. He requested additional medical records and recommended work restrictions. Dr. Bernardi searched the Prescription Monitoring Program website and noted Petitioner had not filled any medications prior to his alleged work incident since 8/7/19. He opined that Petitioner's treatment to date had been reasonable and necessary. He recommended work restrictions of no climbing ladders, avoiding overhead activities, avoiding unsupported lumbar flexion, and no lifting more than 20-25 pounds. He recommended anti-inflammatories and a series of L5-S1 injections and to hold physical therapy.

On 4/21/22, Petitioner was examined by Dr. Kevin Rutz for low back pain radiating down the back of his left leg. (PX5) He reported a consistent history of injury on 12/14/21 and also reported twisting his back in November 2021. He reported that his symptoms resolved after the November 2021 event with injections and therapy, and he continued to work. Petitioner described his present symptoms as sharp and localized pain and he could only sit comfortably for less than an hour, his ability to walk long distances was reduced, and his pain interfered with his

sleep. Dr. Rutz compared the 2019 and 2022 MRIs and opined the L5-S1 disc was slightly larger on the more recent study. Physical examination revealed tenderness over the entire lumbar region on the left, diminished lumbar flexion and extension reproducing low back pain, and mild difficulty toe walking on the left due to pain. Dr. Rutz diagnosed lumbar disc degeneration, lumbar radiculitis, and L5-S1 disc herniation with radiculopathy. He recommended an epidural steroid injection at L5-S1 on the left and possibly surgery if the injection did not provide relief. Dr. Rutz stated that if Petitioner's symptoms improved with the injection, he would return him to work. The injection was performed on 5/4/22. (PX7)

On 5/10/22, Dr. Bernardi reviewed medical records of Dr. Labore from 2019 and records from Petitioner's primary care physician from 2020 and 2021. Based upon the absence of treatment from October 2019 through 12/14/21, Dr. Bernardi opined Petitioner's work accident aggravated an underlying condition. He recommended against epidural steroid injections as they did not provide relief when Petitioner received them in 2019. He recommended Petitioner follow up with Dr. Labore and opined that surgery was not appropriate as Petitioner did not have an abnormality that was amenable to surgical intervention.

On 5/17/22, Dr. Rutz noted the injection provided temporary relief. He recommended an L5-S1 discectomy and fusion and placed Petitioner on restrictions of no lifting over 20 pounds and sitting/standing as needed. (PX5)

On 5/28/22, Mr. Scott of Crossroads Community Hospital authored a Crossroads Daily Security Report that noted around 2:40 p.m. Dustin and Patrick were patrolling the Hospital when Petitioner had severe pain, his leg gave out, and he fell in the hallway by the server room. (PX8)

On 5/28/22, Petitioner presented to St. Mary's Emergency Room with complaints of acute low back and left shoulder pain following a fall. He reported he was walking and suffered a mechanical fall, landing on his left side. He stated he experienced a "common degree" of low back pain at work and he stumbled when his left leg gave out. He complained of sharp and intermittent low back pain radiating down the left posterior buttock and thigh. He had an aching pain in his left shoulder with movement. Petitioner was placed off work until 5/31/22. (PX9)

On 6/2/22, Petitioner followed up with PA Braswell and reported low back pain radiating down his left leg rated 8/10. Petitioner requested an off work slip as the injections and physical therapy were not helping. Petitioner was placed off work until he followed up with Dr. Rutz. (PX10)

On 6/7/22, Petitioner returned to Dr. Rutz and reported several falls at work while walking the grounds as a security person. Dr. Rutz noted he was awaiting approval for surgery and placed Petitioner on sedentary duty. (PX5)

On 6/21/22, Petitioner returned to Dr. Rutz with no improvement in symptoms. They discussed Petitioner's prior treatment with a chiropractor and Dr. Rutz noted the focus of his treatment was more for his neck. Petitioner reported a history of some radicular complaints in the

past, but they never went past his knee, and they improved prior to his work accident on 12/14/21. Dr. Rutz continued to recommend sedentary duty and an L5-S1 fusion.

On 10/4/22, Dr. Bernardi reviewed chiropractic records from Greenville Rehab and Pain Clinic from 6/25/20 through 4/16/21 which documented low back and left lower leg pain. He opined that the exact same pathology was present on the 2019 MRI and Petitioner's fall at work could not have contributed to his pathology. Dr. Bernardi expressed concerns that Petitioner did not disclose his prior motor vehicle accident or chiropractic treatment. He opined it was debatable that Petitioner's symptoms improved prior to the 12/14/21 incident as his symptoms were ongoing for ten months and the chiropractic records noted only marginal improvement. Based upon the additional records, Dr. Bernardi opined Petitioner's lumbar spine condition was not causally related to the work accident. He opined Petitioner reached maximum medical improvement and required no restrictions. (RX1) Dr. Bernardi opined that Petitioner's treatment up until the lumbar MRI on 1/10/22 was causally connected to his work accident. Despite causation, Dr. Bernardi opined that surgery was not appropriate because Petitioner does not have radiculopathy secondary to the small protrusion at L5-S1.

Dr. Kevin Rutz testified by way of deposition on 7/8/22. (PX6) Dr. Rutz is a board-certified, fellowship trained orthopedic spine surgeon. He compared the 2019 and 2022 MRIs and felt they were very similar with the L5-S1 disc herniation being slightly larger on the 2022 study. Dr. Rutz testified that Petitioner's low back and left leg symptoms were consistent with the MRI because the herniation gives pain in the buttock that goes down the back of the thigh to the calf. He recommends an L5-S1 discectomy and fusion because Petitioner has had symptoms for almost six months with failed conservative measures. Dr. Rutz testified that the L5-S1 surgery is reasonable, necessary, and causally related to the 12/14/21 work accident. He explained that Petitioner had a pre-existing condition that improved to the point he was able to work, and since the work accident his symptoms have remained severe.

On cross-examination, Dr. Rutz provided a detailed review of Petitioner's chiropractic records from 2020 and 2021. He continued to believe Petitioner's current condition was related to the work accident. He acknowledged that although Petitioner was never 100% better prior to 12/14/21, he was able to work and had not returned to the chiropractor. Dr. Rutz testified he assumed Petitioner did not seek treatment between June and December 14, 2021 because he was not symptomatic to the point he needed treatment.

With respect to the mechanism of injury, Dr. Rutz was unsure whether Petitioner fell to the ground, or simply bumped into the wall. He agreed Petitioner disclosed his work injury of 2019 and Petitioner denied any additional treatment or symptoms until a flare-up in November 2021. Dr. Rutz acknowledged this was not accurate based on Petitioner's treatment records. Dr. Rutz acknowledged Petitioner reported significant symptoms throughout the course of chiropractic treatment and had multiple flare-ups which would not be unexpected given the MRI findings. Dr. Rutz believed Petitioner's persistence of symptoms after his 12/14/21 incident differentiated that incident from his prior flare-ups.

Dr. Rutz testified he assumed Petitioner did not have any significant ongoing symptoms subsequent to 6/2/21 because that was the last time Petitioner treated with a chiropractor. He

acknowledged Petitioner reported ongoing constant and moderate to severe pain of 5/10 during his 6/2/21 evaluation.

Dr. Rutz acknowledged that the difference in findings on the 2019 and 2022 MRIs were extremely slight. He was unable to say to a reasonable degree of medical certainty that the slightly larger herniation seen on 2022 MRI was due to the 12/14/21 incident. He believed Dr. Bernardi's interpretation was reasonable, as there was only a slight difference in the studies. Dr. Rutz opined that the 12/14/21 incident aggravated Petitioner's pre-existing degenerative condition. (PX 6, p. 14)

Dr. Rutz acknowledged that Petitioner was referred for a functional capacity evaluation in October 2019 which are typically designed to evaluate the need for permanent work restrictions. Dr. Rutz confirmed his change from light to sedentary restrictions was only intended to prevent Petitioner from having to walk rounds as a security guard. He believed the restrictions provided in his notes prior to 6/7/21 remained appropriate.

Dr. Robert Bernardi testified by way of deposition on 10/14/22. (RX1) Dr. Bernardi is a board-certified neurosurgeon. He testified that the 2019 and 2022 MRIs revealed degenerative disc disease with a disc protrusion at L5-S1. Dr. Bernardi felt it was central and a little more prominent to the right than the left. He did not see any significant mass effect on the nerve roots. Dr. Bernardi acknowledged that symptoms of pain going down the back of the leg and calf are consistent with S1 radiculopathy with nerve root involvement, but the numbness and tingling along the top of the foot suggested L5 involvement and not SI radiculopathy. Dr. Bernardi testified, after review of all the medical records, that the 12/14/21 work accident did not aggravate Petitioner's lumbar spine condition. He opined that the L5-S1 fusion recommended by Dr. Rutz is not reasonable and necessary.

On cross-examination, Dr. Bernardi testified he could not identify the source of Petitioner's low back and left lower extremity symptoms. He admitted that had Petitioner's low back and left leg symptoms improved between April 2021 and 12/14/21 that the work accident could have aggravated or contributed to his symptoms. However, he opined that the natural course of chronic back pain is to experience multiple flare ups and even relatively trivial mechanism of injuries could lead to an onset or increase in symptoms.

Pre-accident social media photographs were entered into evidence. (PX14) On 5/22/21, Petitioner landscaped his house with his daughter. On 7/11/21, Petitioner visited the Florida Botanical Garden and Clearwater, Florida. Petitioner harvested vegetables from his garden on 7/17/21, went fishing on 8/1/21, and visited Fugitive Beach on 8/11/21. Petitioner landscaped, performed electric work, and hunted from September through November 2021. Post-accident Facebook photos show Petitioner attended a Cardinals game on 5/10/22. (RX2, p. 97) On 5/13/22, Petitioner hosted a bonfire. (RX 2, p. 98) On 5/14/22, Petitioner attended his nephew's ballgames. (RX2, p. 99) On 5/16/22, Petitioner posted that his pool was ready to be used for the summer. (RX2, p. 101) On 5/22/22, Petitioner went fishing with his daughter. (RX2, p. 100)

## CONCLUSIONS OF LAW

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

The Workers' Compensation Act is a humane law of a remedial nature that should be liberally construed to achieve its purpose. *Hagene v. Derek Polling Const.*, 902 N.E.2d 1269, 1273 (5th Dist. 2009). When a preexisting condition is present, a claimant must show that "a work-related accidental injury aggravated or accelerated the pre-existing [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 pre-existing condition." *St. Elizabeth's Hospital v. Workers' Compensation Comm'n*, 864 N.E.2d 266, 272-273 (5th Dist. 2007).

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. Industrial Comm'n*, 260 Ill.App.3d 92, 631 N.E.2d 724 (4th Dist. 1994); *International Harvester v. Industrial Comm'n*, 442 N.E.2d 908 (1982).

The question of whether the Petitioner's claimed injury is related to a degenerative process of a pre-existing condition or an aggravation of that pre-existing condition, is a factual determination to be made by the Workers' Compensation Commission. *Roberts v. Industrial Commission*, 93 Ill.2d 532, 67 Ill. Dec. 836, 445 N.E.2d 316 (1983).

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, 797 N.E.2d 665, 672 (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). 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).

It is undisputed Petitioner sustained accidental injuries that arose out of and in the course of his employment with Respondent on 12/14/21. All of Petitioner's medical records contain a consistent history of injury and an immediate onset of low back pain with radiculopathy in his left leg.

There is no dispute Petitioner suffered from an L5-S1 disc herniation in 2019. Both Dr. Rutz and Dr. Bernardi testified there was not a significant change in the herniation compared to

the post-accident MRI scan performed in 2022. The radiologist that interpreted the 2019 MRI did not feel the herniation impacted the nerve roots. However, the radiologist that interpreted the 2022 MRI believed Petitioner suffered nerve root compression on the left which is the side of Petitioner's radiculopathy. Petitioner underwent an epidural steroid injection at L5-S1 in 2019 that did not provide lasting relief, which resulted in Dr. Labore's diagnosis of sacroiliac joint pain. There is a gap in treatment between 10/28/19 and 6/25/20 when Petitioner presented to the chiropractor following a motor vehicle accident with a deer. The chiropractor's diagnosis was lumbar spine sprain, sacroiliitis, and pain in the right hip. These diagnoses never changed, and Petitioner received intermittent chiropractic treatment through 4/12/21, with a final visit on 6/2/21. There was no recommendation for a lumbar MRI or referral to a specialist.

There is no evidence Petitioner treated for low back or lower extremity symptoms from 6/3/21 through 12/14/21. Dr. Rutz and Dr. Bernardi reviewed Petitioner's pre-accident medical records. Dr. Rutz opined that based upon the absence of treatment for over six months prior to 12/14/21, along with the fact Petitioner was working unrestricted duty, the work accident aggravated the pre-existing L5-S1 condition resulting in the need for surgery. Dr. Rutz opined that Petitioner's symptoms were consistent with MRI findings of a L5-S1 disc herniation.

In March 2022, Dr. Bernardi reviewed the 2019 and 2022 MRI scans and opined that if Petitioner's history was accurate, the work accident caused a recurrent aggravation of his underlying lumbar condition. In May 2022, Dr. Bernardi reviewed additional medical records from Dr. Labore and Petitioner's primary care physician. He opined that in the absence of treatment from October 2019 through 12/14/21, Petitioner's work accident aggravated his underlying condition.

In October 2022, after reviewing chiropractic records 6/25/20 through 4/16/21, Dr. Bernardi opined that Petitioner had the exact same pathology in 2019 as he had following the work accident and therefore Petitioner's fall at work could not have contributed to his pathology. However, Dr. Bernardi was aware when he examined Petitioner in March 2022 that Petitioner's pre and post-accident pathology was the same yet opined Petitioner's work accident aggravated his condition. Although Dr. Bernardi found it "debatable" that Petitioner's symptoms improved prior to 12/14/21, Petitioner did not treat for ongoing low back symptoms for over six months prior to the accident and he performed a physically demanding job working 40 hours per week. The Arbitrator is not persuaded by Dr. Bernardi's opinion that Petitioner's current condition of ill-being is a result of the natural course of chronic back pain and that a trivial mechanism of injury could have caused his symptoms, particularly when there is no evidence of a mechanism of injury other than the undisputed work accident. Further, Dr. Bernardi opined that symptoms of pain going down the back of the leg and calf are consistent with S1 radiculopathy with nerve root involvement, yet he denied any mass effect on Petitioner's nerve root that was observed by the radiologist and Dr. Rutz. Dr. Bernardi testified he could not identify the source of Petitioner's low back and left lower extremity symptoms and admitted that had Petitioner's low back and left leg symptoms improved between April 2021 and 12/14/21 that the work accident could have aggravated or contributed to his symptoms.

The lack of treatment for over six months prior to Petitioner's work accident supports Petitioner's testimony that his prior low back symptoms improved, and he was not experiencing

significant symptoms or limitations prior to 12/14/21. The Arbitrator notes that Petitioner was hired by Respondent approximately two months prior to his work accident. His job duties included plumbing, electric, drywall, ceiling repairs, and painting. He described his job duties as physical which required heavy lifting and bending. Petitioner was able to perform his full job duties 40 hours per week.

Petitioner's social media posts in the months prior to the work accident reflect he was performing electric work on barns and silos, taking vacations, deer hunting, fishing, gardening, and landscaping. Respondent offered into evidence post-accident photographs from Petitioner's social media dated May 2022 that depict him sitting at a Cardinals baseball game and sitting at his nephew's baseball game. Other photographs dated May 2022 infer Petitioner was sitting around a bonfire, fishing, and showed his aboveground pool was ready for the season, although Petitioner is not depicted in the photos. The Arbitrator notes that none of the post-accident social medial posts or photographs depict Petitioner performing the physical activities he performed prior to 12/14/21. Petitioner reported to Dr. Rutz in April 2022 that his symptoms limited his activities, including being able to sit comfortably for less than an hour, reduced ability to walk long distances, and his pain interfered with his sleep. None of the social media posts depict activity that contradicted Petitioner's limitations expressed to Dr. Rutz at that time.

There is also an absence of any low back complaints or treatment with his primary care physician between June 2021 and 12/14/21 despite many visits to the doctor. The evidence supports that Petitioner consistently reported low back pain radiating to his left lower extremity since the work accident for which he was placed off work.

Based upon the evidence, the Arbitrator finds Petitioner's current condition of ill-being is causally connected to his work accident on 12/14/21.

**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 Arbitrator finds that the medical treatment rendered to Petitioner was reasonable and necessary to treat his work-related injuries based on the opinions of Dr. Rutz and Dr. Bernardi. Although Dr. Bernardi changed his causation opinion after reviewing Petitioner's chiropractic records from 6/25/20 through 4/16/21, he testified that all of Petitioner's medical treatment was reasonable and necessary through 1/10/22 when the lumbar MRI was performed.

Based on the Arbitrator's finding as to causal connection, Respondent shall pay the reasonable and necessary medical expenses outlined in Petitioner's Group Exhibit 11, pursuant to the Illinois medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act. Pursuant to the stipulation of the parties, Respondent shall receive credit for any and all medical bills paid through its group medical plan.

The evidence supports that Petitioner has not been cured or relieved from the effects of his work-related injuries. Dr. Rutz credibly testified that the objective findings on MRI and

physical examination correlate with Petitioner's subjective complaints and that he failed conservative measures. Dr. Bernardi testified he could not identify the source of Petitioner's low back and lower extremity symptoms as Petitioner did not have radiculopathy secondary to the L5-S1 small protrusion. He acknowledged that symptoms of pain going down the back of the leg and calf are consistent with S1 radiculopathy with nerve root involvement, but he did not appreciate nerve root involvement on the MRI as interpreted by the radiologist and Dr. Rutz.

The Arbitrator finds that Petitioner is entitled to receive the additional care recommended by Dr. Rutz as he has not reached maximum medical improvement. Therefore, Respondent shall authorize and pay for prospective medical treatment, including, but not limited to, an L5-S1 discectomy and fusion, until Petitioner reaches maximum medical improvement.

**Issue (L): What temporary benefits are in dispute? (TTD)**

Petitioner claims entitlement to temporary total disability benefits from 12/15/21 through 10/31/22, representing 45-6/7 weeks. Respondent disputes liability for TTD benefits based on Dr. Bernardi's causation opinion and alleges Petitioner refused light duty work.

Petitioner was placed off work on 12/15/21 by St. Mary's emergency room personnel. He was continued off work by his primary care physician and underwent a lumbar MRI on 1/10/22. On 1/20/22, NP Smith returned Petitioner to light duty work with restrictions of no pushing, pulling, gripping, or lifting with his bilateral arms, no lifting more than 10 pounds with his bilateral arms, and siting/standing as needed. Petitioner was examined by Dr. Bernardi on 3/1/22 who recommended work restrictions of no climbing ladders, avoiding overhead activities, avoiding unsupported lumbar flexion, and no lifting more than 20-25 pounds. There is no evidence Petitioner was offered a light duty position within the restrictions prescribed by NP Smith or Dr. Bernardi.

On 4/21/22, Petitioner was examined by Dr. Rutz who noted Petitioner had not worked since the accident. Dr. Rutz recommended an epidural steroid injection at L5-S1 and if his symptoms improved, he would place Petitioner back to work. Dr. Rutz returned Petitioner to light duty work on 5/17/22, with restrictions of no lifting over 20 pounds and sitting/standing as needed.

On 5/24/22, Respondent's HR Generalist Alta Welker authored a Transition Duty Letter to Petitioner. (RX5) The letter is backdated as it states, "As per our conversation of Wednesday, May 25, 2022 you will work as a Greeter assisting Security at the front desk, in a limited capacity that meets your physical restrictions. You will be provided assistance when the job functions are outside of the restrictions that have been provided to you by your physician. It will be your responsibility to inform your supervisor when the assistance is required."

Ms. Welker testified she met with Petitioner on 5/25/22 to review paperwork and provide computer training to Petitioner. She testified she had no further dealings with Petitioner after that date as she did not work weekends and Petitioner was to report to the Security Department supervisor. She admitted that Petitioner was being trained to walk rounds at the hospital which consisted of a 3-level facility, basement, and parking lot. She understood that rounds should be

made once per hour by full-time guards. Ms. Welker estimated it would take her 15 to 20 minutes to walk Respondent's entire campus at one time, and she does not have any medical limitations or restrictions.

Petitioner testified he attempted to perform the security rounds beginning on 5/25/22. He worked 4 to 5 hours that day before his pain increased, and he went home early. He returned to light duty work on 5/28/22 and his left leg gave out while making rounds causing him to fall and go to the emergency room. This incident was documented by Respondent in a Crossroads Daily Security Report that noted around 2:40 p.m. Petitioner and another employee were patrolling the Hospital when Petitioner had severe pain, his leg gave out, and he fell in the hallway by the server room. Petitioner presented to the emergency room that day and was placed off work until 5/31/22. On 6/2/22, PA Braswell placed Petitioner off work until he followed up with Dr. Rutz. On 6/7/22, Petitioner returned to Dr. Rutz and reported several falls at work while walking the grounds as a security guard. Dr. Rutz noted he was awaiting approval for surgery and placed Petitioner on *sedentary* duty. Petitioner did not return to work in any capacity after 5/28/22. Ms. Welker agreed that Petitioner was placed off work from his fall on 5/28/22 through 6/7/22.

Petitioner testified he did not feel the security guard position was within his work restrictions due to the amount of walking required. The Arbitrator finds that the security guard position was within Petitioner's light duty restrictions as he was allowed to sit/stand as needed. However, Dr. Rutz further restricted Petitioner's work activities on 6/7/22 to sedentary positions only. Dr. Rutz testified he changed Petitioner's restrictions from light duty to sedentary specifically to prevent Petitioner from walking rounds as a security guard. On 6/10/22, Petitioner called Dr. Rutz's office and advised that Respondent again offered him the security guard position that requires a lot of walking and sitting which aggravates his symptoms. He was advised to call his attorney for direction. Petitioner called Dr. Rutz's office again on 6/17/22 and advised he cannot perform the walking required of the security guard position as it was beyond his sedentary restrictions and walking aggravated his symptoms. On 6/21/22, Dr. Rutz examined Petitioner and told him to speak to Respondent and/or his attorney about working sedentary duty pending surgery approval.

Despite Petitioner's sedentary restrictions, Ms. Welker testified that the security guard position remained available to Petitioner since he was released to sedentary duty on 6/7/22 to the time of arbitration. Ms. Welker admitted she did not know Petitioner's specific restrictions and she requested clarification from worker's comp. There is no evidence Ms. Welker was ever informed what Petitioner's restrictions were, but she understood sedentary work to be limited sitting, standing, and walking. She received numerous texts from Petitioner wherein he expressed his inability to perform the security guard job as he could not be on his feet for three consecutive 12-hour shifts. (RX5) Petitioner was not offered sedentary work despite Ms. Welker's testimony that Petitioner was to inform Respondent if his job duties were beyond his restrictions.

There is no evidence Petitioner was offered work within his sedentary restrictions after 6/7/22. Based on the above evidence, the Arbitrator finds Petitioner is entitled to temporary total disability benefits for the period **12/15/21 through 5/24/22, 5/29/22 through 5/31/22, and 6/2/22 through 10/31/22,** representing 45-1/7 weeks. Pursuant to the stipulation of the parties, Respondent shall receive credit for TTD benefits paid in the amount of $13,069.88.

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

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|---|---|
| Affirm and Adopt (No Changes) No<br>Affirm with Changes Yes<br>No Reverse Reason<br><br>No Modify | Injured Workers' Benefit Fund (§4(d)) No<br>Rate Adjustment Fund (§8(g)) No<br>Second Injury Fund (§8(e)18) No<br>PTD/Fatal denied No |

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 18WC028495 |
| Case Name | Michael Watson v.<br>Illinois State Toll Highway Authority |
| Consolidated Cases | |
| Proceeding Type | Petition for Review |
| Decision Type | Commission Decision |
| Commission Decision Number | 23IWCC0535 |
| Number of Pages of Decision | 18 |
| Decision Issued By | Kathryn Doerries, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Patrick Shifley |
| Respondent Attorney | Robert Harrington |

DATE FILED: 12/15/2023

/s/Kathryn Doerries, Commissioner

Signature

23IWCC0535

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 Choose direction | ☐ None of the above |

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MICHAEL WATSON,

Petitioner,

vs. NO: 18 WC 028495

ILLINOIS STATE TOLL HIGHWAY AUTHORITY,

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, medical expenses, temporary disability and 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.

The Commission affirms and adopts the Arbitrator's Decision in its entirety except to correct a scrivener's error and to strike one word on page twelve. To correct the scrivener's error, the Commission changes the spelling of the Petitioner's first name on page one of the Form Decision from "Micheal" to " Michael." On page twelve, under issue (J), the Commission strikes the word, "full" from the second sentence in the second full paragraph. Therefore, under issue (J), the second sentence in the second full paragraph on page twelve now begins as follows, "[r]egarding the bills, the Arbitrator finds that the Respondent is responsible for payment of the submitted bills of…"

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision filed on October 28, 2022, is hereby modified for the reasons stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $677.33 per week for a period of 83 weeks, commencing August 14, 2018, through December 11, 2018, and December 15, 2018, through January 24, 2019, and February 22, 2019, through April 16, 2020, as provided in Section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner permanent partial disability benefits of $609.60 per week for 62.5 weeks, because the injuries sustained caused the 12.5% loss of use of the person as a whole, pursuant to Section 8(d)2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary medical services of $72,208.49, as provided in Sections 8(a) and 8.2 of Act, and as is set forth on page 12 under issue (J) of the Conclusions of Law in the Arbitrator's 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.

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.

**December 15, 2023**

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KAD/bsd
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/s/*Kathryn A. Doerries*
Kathryn A. Doerries

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

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

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 18WC028495 |
| Case Name | Michael Watson v. Illinois State Toll Highway Authority |
| Consolidated Cases | |
| Proceeding Type | |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 15 |
| Decision Issued By | Jeffrey Huebsch, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Patrick Shifley |
| Respondent Attorney | Robert Harrington |

DATE FILED: 10/28/2022

**THE INTEREST RATE FOR THE WEEK OF OCTOBER 25, 2022 4.39%**

/s/ Jeffrey Huebsch, Arbitrator
Signature

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

October 28, 2022

/s/ Michele Kowalski

Michele Kowalski, Secretary
Illinois Workers' Compensation Commission

M. Watson v. Ill. St. Toll, etc., 28 WC 028495

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**

**Micheal Watson** Case # **18WC028495**
Employee/Petitioner
v.
**Illinois State Toll Highway Authority**
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 **Jeffrey Huebsch**, Arbitrator of the Commission, in the city of **Chicago**, on **4/25/22**. 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 08/13/2018, 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 $**52,832.00**; the average weekly wage was **$1,016.00**.

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

Respondent shall be given a credit of $**4,861.99** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**4,861.99**.

Respondent is entitled to a credit under Section 8(j) of the Act, as is explained below.

**ORDER**

**Respondent shall pay reasonable and necessary medical services of $72,208.49, as provided in Sections 8(a) and 8.2 of Act, and as is set forth below.**

**Respondent shall pay Petitioner temporary total disability benefits of 677.33/week for 83 weeks, commencing August 14, 2018 through December 11, 2018, and December 15, 2018 through January 24, 2019, and February 22, 2019 through April 16, 2020 as provided in Section 8(b) of the Act.**

**Respondent shall pay Petitioner permanent partial disability benefits of $609.60/week for 62.5 weeks, because the injuries sustained caused the 12.5% loss of use of the person as a whole, pursuant to 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.

**OCTOBER 28, 2022**

Signature of Arbitrator

## STATEMENT OF FACTS

Petitioner, Michael Watson was employed by Respondent, Illinois Toll Highway Authority, as a Custodian III. He had worked for Respondent since 1995. His job duties required him to drive around to several tollway plazas and to do general janitorial duties, including mopping, buffing, and window cleaning.. He would be required to lift up to 80 lbs, assisted and unassisted.

Petitioner denied any chronic medical problems other than diabetes and high blood pressure. He admitted to low back pain going back to 2014. He specifically denied any shoulder problems prior to an incident in August of 2018.

The Parties stipulated that Petitioner sustained accidental injuries which arose out of and in the course of his employment by Respondent on August 13, 2018. Petitioner was performing his normal work duties, sweeping mopping and taking out the trash. He traveled to Plaza 36 to clean after there had been a picnic the prior day and he had a lot of cleaning to do. At Plaza 36, the site supervisor asked him to help move a 'huge' picnic table from one location to another. When setting the table down in its new location, Petitioner felt a very sharp pain in his right shoulder that radiated from his shoulder to the side of his neck and down into his elbow. Petitioner denied ever having experienced a pain like that in that location prior to August of 2018.

On cross-examination, Petitioner additionally described that he had grabbed the short end of the table with both arms, that he had lifted it maybe 2 feet off the ground, and that he had walked backwards while carrying the table. The supervisor helped him move the table. The table was moved about 12 feet.

Petitioner continued his work duties and experienced ongoing pain. He testified that he elected to see his doctor after the completion of his work day. Petitioner testified that he had seen Dr. Birhanu on the date of the injury. He confirmed this testimony on cross-examination and was certain he had treated with Dr. Birhanu on the date of the accident, and not Dr. Elias. Dr. Birhanu's records show no treatment on August 13, 2018. (PX 2)

On August 13, 2018, Petitioner was seen by Dr. James Elias, DC. Petitioner reported right shoulder pain after lifting a heavy wooden picnic table while at work. He reported sharp pain with arm elevation and extension as well as low back pain with forward flexion. He was diagnosed with a sprain in the lumbar spine, bursitis of the right shoulder, and pain the right shoulder. (PX 1, p 18) Petitioner received chiropractic care from Dr. Elias for his shoulder and low back through October 15, 2018. Thereafter, Dr. Elias' treatment focused on Petitioner's right shoulder. (PX 1)

On August 22, 2018, Petitioner was examined at Little Company of Mary Hospital for therapy to treat low back pain and pain in the right shoulder, on referral of Dr. Birhanu. He gave a history of lifting a picnic table at work when he felt a pull in his low back and right shoulder. (PX3 p 7) On exam, he was found to have reduced range of motion on the shoulder and in the low back. He reported interrupted sleep. X-rays of the shoulder showed no fracture or dislocation. X-rays of the lumbar spine showed degenerative face changes. (PX 3)

On August 24, 2018, the Petitioner was seen by Dr. James Elias. He was prescribed an MRI of the right shoulder. (PX 1 p 22)

On August 24, 2018, Petitioner underwent an MRI of the right shoulder at Merrionette Park Imaging The impressions were: supraspinatus tendinopathy, infraspinatus tendinopathy, and subscapularis tendinopathy. Equivocal thin partial interstitial tears were seen, delaminating tears of the tendinous insertion. There was a small amount of fluid which was possible tenosynovitis. Finally, there was a possible focal labral tear which could not be ruled out and further assessment with an MR arthrography was recommended. (PX 1 p 3)

On August 30, 2018, Petitioner was seen at University of Chicago for an outpatient consult with Dr. Conti Mica, and orthopedist. He reported a history of a lifting injury at work. Shoulder pain was noted when sleeping, but was said to be minimal with overhead movement. He was diagnosed with biceps tendinitis of the right upper extremity and bursitis of the right shoulder. Petitioner received a steroid injection. (PX1 p 16, PX 4 p 4)

Petitioner was seen for further shoulder care with Dr. Elias on August 27 through December 11, 2018. He was treated with electrical stimulation, hot packs, and ultrasound. (PX 1 pp 23 – 58)

On October 11, 2018, Petitioner was seen by Dr. James Elias. The results of the MRI were reviewed and were deemed to be a possible tear of the right shoulder labrum. He was noted as disabled from the date of the accident through October 18, 2018. (PX 1 p 6)

On October 25, 2018, Petitioner was seen at University of Chicago with a report of pain in his shoulder. Petitioner claimed that the injections helped for one week, but not further after that time. A surgical procedure was recommended for the right shoulder and scheduled for January 9. (PX 4 p 16) Petitioner was placed on a sedentary restriction pending surgery. (PX 4 p 21)

Petitioner was seen for a §12 examination by Dr. Lawrence Lieber, an orthopedist, on October 3, 2018. Respondent introduced the report of that examination as Respondent's Exhibit 2. Petitioner reported lifting a 200lb picnic table with his supervisor. Petitioner reported lifting the table from knee height up to waist height. At the time of the exam, Petitioner had low back pain and right shoulder pain and stiffness. On exam, Dr. Lieber found decreased range of motion and strength. On review of the MRI, he found tendinopathy about the supraspinatus, infraspinatus, and subscapularis without evidence of acute injury. (RX 2)

Dr. Lieber found that treatment for the injury on August 13, 2018, had been reasonable to date. As of the present date, Dr. Lieber concluded that Petitioner suffered from degenerative changes in the back and right shoulder. The subjective and objective symptoms correlated, but there was no objective present evidence of abnormality in Petitioner's back or shoulder, and he was deemed to be capable of returning to work. (RX 2)

Petitioner testified that the only treatments which helped him in the fall of 2018 were the chiropractic treatments and the pain medication he received.

Petitioner was paid $4,861.99 in TTD benefits (7-1/7 weeks). Respondent conceded TTD from 8/14/2018 through 10/3/2018. (ArbX 1)

Petitioner returned to work on December 12, 2018. His doctors continued the sedentary work restrictions, but Respondent applied Dr. Lieber's full duty realease. Petitioner testified he had worked for a couple of days and was doing okay. On the third day, while he was mopping a floor in a garage that he had felt the same pain in

his right shoulder radiating down to his elbow (he also said that it was in a different location). Petitioner testified that he was unable to complete his workday and went to see Dr. Birhanu. Dr. Birhanu's records contain no chart note around December 14, 2018.

On cross-examination Petitioner clarified that he had worked on the 12th and 13th of December before getting injured on the 14th. He was mopping the lunchroom of the plaza when injured.

On December 14, 2018, Dr. Birhuna placed Petitioner off work till he was able to have right shoulder surgery then scheduled for January 9, 2019. (PX 1 p 4)

On December 15, 2018, Dr. Elias saw Petitioner after his return to work full duty by the §12 examiner. He reported having worked a couple of days full duty and having sharp and severe pain in his right shoulder. Examination of the right shoulder showed reduced range of motion, pain, and weakness. (PX 1 p 58)

On December 17, 2018, Petitioner was off work and continued to report extreme pain in the right shoulder. (Px 1 p 63)

Petitioner continued treatment with Dr. Elias from December 17, 2018 through February 14, 2020. He had ongoing complaints of shoulder pain, and was treated with hot packs, cold packs, ultrasounds, and therapeutic activities. (PX 1 pp 64 – 131)

On December 27, 2018, Petitioner was seen at University of Chicago for a preoperative assessment and anesthesia consultation. He was deemed to be a high risk and his A1C was to be assessed. An addendum note shows that his A1C was 10.8% and he was to bring his A1C to below 8.0 and to bring his blood pressure under control before surgery could take place. (PX 4 p 32)

On January 3, 2019, Petitioner was seen at University of Chicago for follow up of right shoulder pain after his surgery was cancelled due to his A1C. He gave a history of returning to work on December 12, 2018, and then having pain while working and straining his shoulder while mopping. He denied other new trauma and described pain along the superior and lateral shoulder. (PX 4 p 84) He had an x-ray of the right shoulder. (PX 4 p 79) He received a biceps tendon sheath injection, and was placed at light duty with no repetitive work. (PX 4 pp 85, 86)

From January 25 through January 31, 2019, Petitioner had an unrelated condition of pituitary apoplexy which caused him to be hospitalized. He had continuing medical visits and medical problems related to this condition on February 2, 2019, and February 22, 2019. As of February 22, 2019, he had no pituitary apoplexy symptoms other than mild fatigue and was to follow up in 6 months. (PX 4 pp 96, 101, 103)

Petitioner worked to bring his A1C down in order to be cleared for surgery. He reported that he was able to bring it down because his fiancée was a health nut and she had helped him change his diet.

On August 5, 2019, Petitioner was seen by Dr. Altarshan, a board certified endocrinologist. His A1C was 6.8 and he was cleared for surgery on an endocrine basis. (PX 2 p 23)

On August 9, 2019, Dr. Birhanu completed a semi-annual disability medical report for SERS. Per the report, Petitioner was suffering from a right rotator cuff syndrome. He was noted to need surgery, to be in pain management, and to have a 10lb restriction until reevaluation after surgery. (PX 2 p 9)

On September 9, 2019, Petitioner was seen by Dr. Birhanu with a chief complaint of shoulder pain. (Px 2 p 18)

On September 19, 2019, Petitioner returned to University of Chicago's outpatient neurology clinic. He reported ongoing headaches of mild headaches without gait problems, balance problems, or weakness. He reported that he had returned to work and to perform his activities of daily living. (PX 4 p 104)

On October 11, 2019, Petitioner underwent an MRI of the right shoulder without contrast. The impression was right rotator cuff tendinosis with undersurface fraying, biceps tenosynovitis, and adhesive capsulitis. (PX 4 p 115)

On December 20, 2019, Petitioner was seen at University of Chicago. A history of his medical concerns was given, including that he had brought his blood sugars under control through diet and exercise with the help of his fiancée and family. (PX 4 p 117)

On January 9, 2020, Petitioner was evaluated at University of Chicago for a pre-surgical screening and was given pre-surgical instructions. (PX 4 p 125)

On February 17, 2020, Petitioner was seen for right shoulder pain at University of Chicago for right rotator cuff surgery. (PX 4 p 129) A right arthroscopic subacromial decompression was performed with lysis of adhesions. The post-operative diagnoses were right shoulder biceps tendonitis, bursitis, right rotator tendinitis, and right adhesive capsulitis. A pristine glenohumeral articular surface was noted, as was appropriate labrum without fraying. A partial tear of the supraspinatus was found, as was evidence of adhesive capsulitis. (PX 4 pp 134-135)

On February 19, 2020, Petitioner returned to Dr. Elias and was seen with treatment. He was treated with ice packs, hot packs, ultrasound, and therapeutic activities. Petitioner treated with Dr. Elias through March 20, 2020. (PX 1 p 132)

On March 4, 2020, Petitioner was seen at University of Chicago, for post-surgical follow-up. He was noted to be working hard in PT, and to have an increasing range of motion. (PX 4 p 141)

On April 14, 2020, Dr. Lieber authored a report based upon a review of records. Records of Elias Chiropractic, Dr. Conte Mica at University of Chicago, and Dr. Birhanu, all through 2019 were provided. The surgical report was not reviewed. Dr. Lieber restated his prior conclusion that there was no objective evidence of the August, 2018 work accident being the cause of the subjective symptoms. Dr. Lieber found that Petitioner had reached MMI prior to his exam in October of 2018. He deferred opinions regarding the December 14, 2018 alleged accident because he did not examine Petitioner. (RX 3)

On April 16, 2020, Petitioner called University of Chicago to inquire about transferring his scheduled 8 week follow up appointment to a zoom or telehealth visit. (PX 4 p 142)

On June 29, 2020, Petitioner was seen by Dr. Birhanu after a motor vehicle accident. His chief complaint was neck pain. He was referred to physical therapy and opthamology. (PX 2 p 7)

Petitioner attended a second §12 examination with Dr. Lieber on December 26, 2020. Respondent introduced the report from this examination as Respondent's Exhibit 4. Petitioner gave a history of his original August 13, 2018, injury, as well as a re-injury on December 14, 2018. Petitioner gave a history consistent with

the medical records described above, also including treatment at University of Chicago in the week prior to the exam including a cortisone injection. Dr. Lieber examined Petitioner, noting tenderness and reduced strength. The surgical report, as well as the surgical images, were reviewed. (Rx 4) Reviewing the surgical findings and images, Dr. Lieber found no causal relationship between the December 14, 2018 event and the conditions treated during surgery. Reasonable treatment for the December 14, 2018 injury was deemed to include an initial evaluation and MMI after two weeks. (RX 4)

Petitioner testified that during the period from the injury on August 13, 2018 through the surgery, he had not had a resolution of the pain he was experiencing. Petitioner claims to have ongoing pain and disability in his shoulder. He reports that up to the date of trial he is taking over-the-counter pain medication and has interrupted sleep due to pain in his shoulder. He reports that the majority of the pain is in his shoulder, but that sometimes it comes down his neck along the length of the humerus along the lateral side. There was no testimony regarding any ongoing back pain issues.

Petitioner authenticated a copy of Respondent's Exhibit 1, a job description for Custodian I from the Respondent. Petitioner had been a Custodian I when hired, but was a Custodian III at the time of his injury. Petitioner testified that the Custodian III differs from a Custodian I in that the IIIs are 'rovers', required to go to several different plazas to clean. Petitioner also stated that his Custodian III position was full time, in contrast to the exhibit which says part time.

On cross-examination Petitioner agreed that he had been in an automobile accident on June 5, 2018. He claimed to have been rear-ended in his personal vehicle, and to have received chiropractic care.

Petitioner received and was still receiving SERS disability benefits and Social Security Disability through the date of trial.

The Arbitrator observed Petitioner's affect and presentation during testimony and finds him to be a credible witness, who testified to the best of his personal recollection. Any inconsistencies in Petitioner's testimony are not ascribed to an attempt to deceive the finder of fact. The medical evidence shows consistent reporting regarding

Petitioner's history of accident and symptoms. The Arbitrator found no evidence of malingering or symptom magnification. The Petitioner's behavior noted in his medical records includes success with the difficult process of controlling his A1C.

## CONCLUSIONS OF LAW

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

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 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 evidence in the record of proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e)

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

Petitioner's current condition of ill-being (to wit: lumbar sprain, resolved as of October 15, 2018 and right shoulder sprain/biceps tendinitis/bursitis, status post arthroscopic surgery on February 17, 2020) is causally related to the work injury suffered on August 13, 2018.

Petitioner introduced medical records which demonstrate a clear and unbroken chain of complaints of injury to his right shoulder from August 13, 2018 through the date of trial. He also suffered a minor back sprain,

which was said to have resolved as of October 3, 2018 by Respondent's §12 examiner, Dr. Lieber, and for which he last had therapy by Dr. Elias on October 15, 2018. Petitioner's testimony that he had no right shoulder problems or treatment prior to the August 13, 2018 work accident is unrebutted. His testimony regarding continued complaints thereafter and the treating medical records persuade the Arbitrator that causation has been established.

Petitioner testified, and Dr. Lieber concurred, that he suffered a work injury on August 13, 2018, which required some amount of treatment. Petitioner now claims that his shoulder surgery related to that date of injury. The Arbitrator takes note that the §12 examination found Petitioner had reduced strength and range of motion on October 3, 2018, and that the February 17, 2020 surgical report found a partial thickness tear in the supraspinatus. As Petitioner has shown a condition of good health, an agreed acute event, and a change to a condition of ill-health, he has met the prima-facie requirements of the chain of events analysis.

In weighing the opinions of Dr. Lieber, the Arbitrator notes that Dr. Lieber was provided the surgical images, but was not asked to opine on the causal connection between the August 13, 2018 injury and the need for surgery after viewing those images. Considering only his October 3, 2018 report, the Arbitrator finds Dr. Lieber's opinions and findings inconsistent with the objective findings of the surgery.

Dr. Lieber's opinion that Petitioner's complaints were due solely to degenerative conditions is found not to be persuasive. The bottom line is Petitioner was able to work his regular job duties as a Custodian III before the work accident and was unable to do so thereafter. The Arbitrator is persuaded that Petitioner suffered a partial thickness tear of the rotator cuff and an aggravation of biceps tendinitis/bursitis of his 61 year old shoulder, yielding adhesive capsulitis as a result of his injury on August 13, 2018, which was treated surgically on February 17, 2020. "A claimant may be entitled to benefits under the Act even though he suffers from a preexisting condition of ill-being." Sisbro, Inc. v. Industrial Comm'n, 207 Ill. 2d 193, 205 (2003). "In preexisting condition cases, recovery will depend on the employee's ability to show that a work-related accidental injury aggravated or accelerated the preexisting disease such that the employee's current condition of ill-being can be said to have

been causally connected to the work-related injury and not simply the result of a normal degenerative process of the preexisting condition. 207 Ill. 2d 193, 204-205. "Accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it was a causative factor in the resulting condition of ill-being." 207 Ill.2d at 205. The injury of August 13, 2018 was a causative factor in Petitioner's right shoulder condition which led to the surgery of February 17, 2020.

**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,THE ARBITRATOR FINDS:**

The Arbitrator finds that the Petitioner has proven by the preponderance of the credible evidence that the medical services provided to him regarding his low back and right shoulder were reasonable and necessary to cure or relieve the effects of the work injury of August 13, 2018.

Petitioner's claimed bills were submitted as Petitioner's Exhibit 5. Regarding the bills, the Arbitrator finds that the Respondent is responsible for full payment of the submitted bills of Dr. James Elias (DOS: 8/13/2018 through March 20, 2020, $11,530.00, Little Company of Mary (DOS: 8/16/2018, $2,044.00, 8/22/2018, $547.00), and University of Chicago (with the exception of treatment for the unrelated pituitary apoplexy/brain issues) (DOS: 8/30/2018, $4,416.00; 10/25/2018, $542.00; 12/27/2018, $1,346.00; 1/3/2019, $4,949.00; 9/19/2019, $564.00; 9/12/2019, $1,231.00; 12/20/2019, $1,287.00; 10/11/2019, $5,535.00; 3/4/2020, $353.00; 12/23/2019, $6,218.00; 1/9/2020, $564.00; 2/17/2020, $31,082.49). To the extent that those bills have been paid by a group health plan under §8(j) of the Act, the Respondent is only required to hold the Petitioner harmless for said paid bills to the lesser amount of the medical fee schedule or the negotiated rate. The award is pursuant to §§8(a) and 8.2 of the Act and subject to the medical fee schedule. Respondent is entitled to a credit for all awarded bills that it has paid or compromised.

**WITH RESPECT TO ISSUE (L), WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY, TEMPORARY PARTIAL DISABILITY AND/OR MAINTENANCE, THE ARBITRATOR FINDS:**

Petitioner is entitled to TTD benefits from August 14, 2018 through December 11, 2018 (he returned to work on December 12, 2018). He was then restricted by Dr. Birhuna as of December 14, 2018 (Petitioner worked that day) and University of Chicago pending surgery from January 3, 2019 through surgery. However, his pituitary/brain condition intervened and took him out of the job market while he was in-patient beginning January 25, 2019, until he was released February 22, 2019. The Arbitrator therefore awards TTD from December 15, 2018 through January 24, 2019, and February 22, 2019 through April 16, 2020 (the last medical contact regarding his post-surgery recovery documented in the submitted medical records).

Accordingly, Respondent shall pay Petitioner TTD benefits of $677.33/week for 83 weeks commencing August 14, 2018 through December 11, 2018, December 15, 2018 through January 24, 2019, and February 22, 2019 through April 16, 2020. Respondent is entitled to a credit of $4,861.99 for TTD paid and any payments made by SERS and will hold Petitioner harmless for any claim for reimbursement for disability benefits paid.

**IN SUPPORT OF THE ARBITRATOR'S DECISION REGARDING (L) WHAT IS THE NATURE AND EXTENT OF THE INJURY?, THE ARBITRATOR FINDS:**

Because Petitioner's accident occurred after September 1, 2011, the Commission must base its decision on the five factors of Section 8.1(b) of the Act for guidance in determining the nature and extent of any permanent partial disability. The five factors are: (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.

Subsection (i) of §8.1(b) is not relevant, as no AMA rating was provided by either Party. Pursuant to Corn Belt Energy Corp. v. Illinois Workers' Compensation Comm'n, 2016 IL App (3d) 150311WC, no AMA rating is required. This factor is given no weight in determining PPD.

Subsection (ii) of §8.1(b), regarding the occupation of the injured employee, it is noted that Petitioner worked a heavy position requiring above the shoulder work and repeatedly lifting items up to 80lbs. He did not return to work as a Custodian III. This factor is given much weight in determining PPD.

Subsection (iii) of §8.1(b), regarding the age of the injured employee, is given only minimum weight in determining PPD. Petitioner was 61 years old and has a relatively short work life in his future for which he will have to work with the effects of his injuries.

Subsection (iv) of §8.1(b), regarding the employee's future earning capacity, is given no weight in determining PPD, as no evidence was introduced by either Party as to Petitioner's current earning capacity.

Subsection (v) of §8.1(b), regarding the evidence of disability corroborated by the medical records, is given significant weight in determining PPD. Petitioner was diagnosed with a rotator cuff injury, biceps tendinitis, and bursitis requiring surgical repair. He was also found to have reduced strength and tenderness in his shoulder during Dr. Lieber's final §12 exam 8 months after surgery. Petitioner voiced no current complaints regarding his low back.

After considering the above factors, and the entirety of the evidence adduced, the Arbitrator finds that as a result of the injuries sustained Petitioner suffered the 12.5% loss of use of the person as a whole, pursuant to Section 8(d)2 of the Act.

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 16WC029821 |
| Case Name | Luis Solis v.<br>Town of Cicero |
| Consolidated Cases | |
| Proceeding Type | Petition for Review |
| Decision Type | Commission Decision |
| Commission Decision Number | 23IWCC0536 |
| Number of Pages of Decision | 19 |
| Decision Issued By | Kathryn Doerries, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Neil Schelhammer |
| Respondent Attorney | Robert Luedke |

DATE FILED: 12/15/2023

/s/ Kathryn Doerries, Commissioner

Signature

23IWCC0536

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 Choose direction | ☐ None of the above |

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LUIS SOLIS,

Petitioner,

vs. NO: 16 WC 29821

TOWN OF CICERO,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by the parties herein, and notice given to all parties, the Commission, after considering the issues of causal connection, temporary total disability, and medical expenses, 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.

After careful review of the evidence, the Commission modifies the Decision of the Arbitrator to award the ATI bills for treatment rendered through July 14, 2017. The Commission modifies the temporary total disability (TTD) award to award benefits from August 24, 2016, through August 25, 2016, and from September 14, 2016, through August 14, 2017. In further support thereof, the Commission states the following.

The Act entitles a claimant to receive benefits "for all the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter incurred" so long as they are "reasonably required to cure or relieve from the effects of the accidental injury." *820 ILCS 305/8(a)* (West 2008). The Commission finds the bills for treatment rendered by ATI Physical Therapy through July 14, 2017, medically reasonable and necessary. Dr. Goldflies, Petitioner's treating physician, was sent and signed each week's ATI work conditioning progress reports. Specifically, Dr. Goldflies was sent the progress report for the week ending June 11, 2017, which had recommended continued work conditioning for two to four weeks. Dr. Goldflies signed

that report on June 13, 2017, and made no revision to the plan of care. (T. 566) Thus, the Commission finds the ATI Physical Therapy bills through July 14, 2017, to be reasonable and necessary to cure or relieve from the effects of the work-related injury.

The Commission is not persuaded by the Utilization Review (UR) non-certifying 41 physical therapy visits and 65 work conditioning visits submitted by Respondent. (RX 4, Dep RX 2, T. 735) Dr. Harvie, testifying on behalf of Respondent, acknowledged that he did not review the treating records of Dr. Santiago, Rapid Rehab, imaging, the accident report, or a job description. (T.687-689, 692-694, 702-703) In addition, Dr. Harvie testified the UR report was prepared by Claims Eval prior to his review and it was his determination whether to agree or disagree with the report after his review of the materials provided. (T.709-712) Dr. Harvie testified that he did not recall if he provided any additional information for the report or if he made any changes. (T.712-714) Based on this and the fact he did not review all of the treating medical records, the accident report, or the job description, the Commission finds the UR opinion is flawed and unreliable and is not persuaded by it.

The Commission modifies the Conclusions of Law regarding charges for reasonable and necessary medical services, second paragraph, as follows. The Commission modifies the sentence beginning, "The Act does not require him to do so" to add "in this case." at the end of that sentence. The Commission further adds, "Dr. Harvie's opinion is flawed. He did not review the records of Dr. Santiago, Rapid Rehab, imaging, the accident report, or a job description. Dr. Harvie testified that the UR report is prepared by Claims Eval before his review, and that after review of the materials provided, he decides whether to agree or disagree with the report. While he signed the report, he did not recall if he input any additional information. He acknowledged it was possible he did not change anything within the report received."

The Commission modifies the TTD award and awards benefits from August 24, 2016, through August 25, 2016, and from September 14, 2016, through August 14, 2017. The Commission finds that Petitioner's condition had not stabilized as of June 12, 2017, and he was not released from Dr. Goldflies' care until August 14, 2017. Therefore, the Commission awards TTD benefits to the date of discharge, August 14, 2017.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 15, 2022, is hereby, otherwise, affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $476.70 per week for a period of 49-6/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $429.03 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 Petitioner's person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay reasonable

and necessary medical services directly to the medical providers, pursuant to the medical fee schedule, of $185.11 to Dr. Mitchell Goldflies, $650.00 to Western Open MRI & Imaging, $2,797.00 to Lopez Family Chiropractic, $218.78 to Westlake Hospital, $374.00 to Westlake Emergency Providers, SC, $1,543.25 Rapid Rehab of Illinois, and $77,298.11 to ATI Physical Therapy, for medical expenses under §8(a) and 8.2 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.

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.

**December 15, 2023**

o-10/17/23
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 | 16WC029821 |
| Case Name | SOLIS, LUIS v. TOWN OF CICERO |
| Consolidated Cases | |
| Proceeding Type | |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 15 |
| Decision Issued By | Charles Watts, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Matthew Gannon |
| Respondent Attorney | Robert Luedke |

DATE FILED: 9/15/2022

**THE INTEREST RATE FOR THE WEEK OF SEPTEMBER 13, 2022 3.46%**

/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**

**Luis Solis**
Employee/Petitioner

v.

**Town of Cicero**
Employer/Respondent

Case # 16 WC 29821

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 Charles Watts, Arbitrator of the Commission, in the city of **Chicago**, 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. X Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. X Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. X What temporary benefits are in dispute?
TPD Maintenance **X** TTD
L. X What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

**FINDINGS**

On **August 23, 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 **$37,182.60**; the average weekly wage was **$715.05**.

On the date of accident, Petitioner was **25** years of age, ***single*** 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 $**TBD** under Section 8(j) of the Act.

**ORDER**

The Arbitrator finds that Petitioner's back condition is casually related to his August 23, 2016 accident.

Respondent shall pay reasonable and necessary medical services directly to the medical provider, pursuant to the medical fee schedule, of $185.11 to Dr. Mitchell Goldflies, $650.00 to Western Open MRI & Imaging, $2,797.00 to Lopez Family Chiropractic, $218.78 to Westlake Hospital, $374.00 to Westlake Emergency Providers, SC, and $1,543.25 to Rapid Rehab of Illinois, in Sections 8(a) and 8.2 of the Act. Respondent shall pay all reasonable and necessary medical services of ATI Physical Therapy up through June 12, 2017.

Petitioner is entitled to total temporary benefits for 39 3/7 weeks from the periods of August 24 and 25, 2016, and September 14, 2016 through June 12, 2017.

Respondent shall pay Petitioner permanent partial disability benefits of $ 429.03 /week for 47 1/2 weeks, because the injuries sustained resulted in a 5 % loss of the person as a whole due to the injuries to his back.

**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 15, 2022**

Signature of Arbitrator

**IN THE WORKERS' COMPENSATION COMMISSION OF THE STATE OF ILLINOIS**

**CHICAGO, ILLINOIS**

| | | |
|---|---|---|
| **Luis Solis,** | ) | |
| **Petitioner,** | ) | |
| | ) | **NO. 16 WC 29821** |
| **Town of Cicero,** | ) | |
| **Respondent,** | ) | |

***MEMORANDUM OF DECISION OF ARBITRATOR***

**FINDINGS OF FACT**

***August 23, 2016, Accident***

On August 23, 2016, Petitioner, Luis Solis, was a 25-year-old driver who suffered injuries to his lower back while working for Respondent, Town of Cicero. (TR 6). On that date, Petitioner was a driver and was licensed to operate a garbage truck for Respondent. (TR 6). Petitioner had been working for Respondent for approximately five years at the time of the incident. (TR 7). Prior to becoming a driver in 2016, Petitioner worked as a helper/loader for Respondent. (TR 7). Petitioner was a member of the International Union of Operating Engineers Local 150 at the time of the incident and had been a member during the duration of his employment with Respondent. (TR 8). Petitioner was working full-duty without any restrictions on August 23, 2016. (TR 9). Petitioner had no prior back issues. (TR 9). As a driver, Petitioner would follow an assigned route through alleys picking up excess garbage outside of garbage cans, such as excess bags, mattresses, couches, TVs, and cabinets. (TR 10). Petitioner would drive to the dump location at the end of the day to empty his truck. (TR 9).

On August 23, 2016, about an hour into his shift, Petitioner was on his assigned route to pick up residential garbage. (TR 10, 13). Petitioner was working with two other individuals on that day, one driver and one laborer. (TR 11). Petitioner was ordered by Respondent to pick up everything off the ground, such as debris, napkins, bottles, and anything of that nature. (TR 11). Petitioner was working with another driver and they took turns driving through the alleys. (TR 12).

Towards the end of their first set, Petitioner was picking up excess garbage which included a heavy bag of dirt. (TR 12, 13). Petitioner did not know that it was a heavy bag of dirt until he picked it up. (TR 13). The dirt was in a lawn and leaf bag. (TR 13). Petitioner immediately felt tightness in his lower back from picking up the bag. (TR 14). Petitioner felt a stinging pain in the same area of the lower back when it was his turn to drive the next set. (TR 14, 15). During his shift, the pain began to become more intense. (TR 15). About twenty minutes after picking up the bag of dirt, Petitioner notified his supervisor, Lucio Vargus, who had been following their truck. (TR 15). Petitioner notified Mr. Vargus that his back was in pain after picking up the bag of dirt. (TR 15). Petitioner went to the emergency room at Westlake Hospital at the direction of

Respondent. (TR 15, 16). After leaving the hospital, Petitioner returned to work where he filled out an incident report. (TR 18). On September 14, 2016, Respondent notified Petitioner that he could not return to work unless he was cleared of light duty restrictions. (TR 20).

***Petitioner's Medical Treatment***

Immediately following the incident, Petitioner presented to Respondent's selected treatment center, Westlake Hospital. (PEX 1). Petitioner presented to Westlake Hospital with a history, consistent with his testimony, of an injury at work that day when lifting heavy garbage bags. (PEX 1, pg. 10). He immediately experienced pain in his lower back after the incident. (PEX 1, pg. 10). An x-ray was performed on the lumbar spine and Petitioner was diagnosed with a lumbar strain. (PEX 1, pg. 13, 28). Petitioner was discharged with instructions for at-home treatment. (PEX 1, pg. 13). Following discharge, Petitioner returned to work to fill out an incident report. (TR 18).

As a result of the work injury, Petitioner missed the following two days of work, August 24 and August 25 of 2016. (TR 19). Petitioner returned to light duty work for Respondent on August 26, 2016. (TR 19). On September 9, 2016 Petitioner began a course of physical therapy at Rapid Rehab of Illinois. (PEX 2, pg. 17). At the time, Petitioner was experiencing lower back pain that required resting most of the day and resulted in light duty work restrictions, which included avoiding bending and prolonged standing. (PEX 2, pg. 17). Petitioner performed therapy three times a week, for three weeks at Rapid Rehab of Illinois until September 26, 2016. (PEX 2). Following his initial course of physical therapy, Petitioner noted that his lower back pain was still present. (PEX 2, pg. 2). On September 14, 2016, Petitioner was told by Respondent that he could not return to work unless he was cleared of light duty restrictions. (TR 20).

On September 23, 2016, Petitioner presented to Dr. Luis Santiago with lower back pain. (PEX 3, pg. 15). Petitioner was diagnosed with a lower back strain and was ordered to begin a course of physical therapy. (PEX 3, pg. 15). Petitioner was prescribed Ibuprofen for pain management. (PEX 3, pg. 15).

Petitioner followed up with Dr. Santiago on October 11, 2016, with worsening lower back pain. (PEX 3, pg. 16). Petitioner's physical therapy was discontinued because it was not being authorized. (PEX 3, pg. 16). Dr. Santiago ordered Petitioner to have an MRI of the lumbar spine. (PEX 3, pg. 16). Petitioner was ordered to continue Ibuprofen for pain management and to follow up for reevaluation after the MRI. (PEX 3, pg. 16).

Petitioner presented to Western Open MRI & Imaging for an MRI of the lumbar spine on October 20, 2016. (PEX 4, pg. 3). The MRI revealed a disc bulge at L5-S1. (PEX 4, pg. 3).

On October 22, 2016, Petitioner followed up with Dr. Santiago for analysis of MRI results. (PEX 3, pg. 17). Dr. Santiago referred Petitioner to Dr. Mitchell Goldflies to continue treatment for the lower back. (PEX 3, pg. 17).

Petitioner presented to Dr. Goldflies of Saint Anthony Hospital on October 26, 2016, with lower back pain. (PEX 6, pg. 23). Petitioner reported to Dr. Goldflies that he was attending physical therapy, but stopped going because Respondent denied further care. (PEX 6, pg. 23). Petitioner's pain began to radiate down the right leg. (PEX 6, pg. 23). On October 27, 2016 two x-rays were performed, one on the lumbar spine and one on the pelvis, and Dr. Goldflies diagnosed Petitioner with a lumbar strain. (PEX 6, pg. 23). Petitioner was ordered to remain off work until

November 7, 2016 and was ordered to follow up in two weeks for a reevaluation. (PEX 6, pg. 23). Additionally, a chiropractic referral was given. (PEX 6, pg. 23).

On October 28, 2016, Petitioner reported to Roberto Lopez Jr. of Lopez Family Chiropractic for lower back treatment. (PEX 7, pg. 3). Petitioner stated that his lower back pain has been worsening and presented difficulty with daily activities. (PEX 7, pg. 3). Petitioner was diagnosed with radiculopathy in the lumbar region and spinal instabilities in the lumbar region. (PEX 7, pg. 3). Petitioner was ordered to treat two times a week for six weeks, for twelve total treatments. (PEX 7, pg. 3).

Petitioner treated with Lopez Family Chiropractic until November 28, 2016. (PEX 7, pg. 11). Petitioner continued to report the same level of lower back pain and stiffness during treatment. (PEX 7, pg. 11). Over the course of treatment, Petitioner continued to feel lower back pain and stiffness that prevented full mobility. (PEX 7, pg. 11).

Petitioner followed up with Dr. Goldflies on November 7, 2016, complaining of lower back pain radiating down into his right leg. (PEX 6, pg. 21). An x-ray was performed on the lumbar spine, and Petitioner was diagnosed with a lumbar sprain. (PEX 6, pg. 21). Petitioner stated that lifting heavy objects makes the pain worse and was ordered to remain off work for four weeks. (PEX 6, pg. 12, 21). Petitioner was ordered to follow up in four weeks' time. (PEX 6, pg. 21).

On December 5, 2016, Petitioner presented to Dr. Goldflies for a follow up appointment due to continuous pain, especially from prolonged standing and walking. (PEX 6, pg. 19). Petitioner was given a referral for physical therapy and told to continue chiropractic treatment. (PEX 6, pg. 19). Petitioner was given light duty restrictions, consisting of avoiding bending and standing. (PEX 5, pg. 18). Petitioner was ordered to follow up in two weeks. (PEX 6, pg. 19).

On December 19, 2016, Petitioner presented for a follow up with Dr. Goldflies and reported stabbing, burning pain in his lower back. (PEX 6, pg. 17). Petitioner was ordered to continue physical therapy and return for a follow-up appointment in four weeks. (PEX 6, pg. 17). Petitioner was ordered to remain on the same light duty work restrictions until January 16, 2017. (PEX 6, pg. 17).

As instructed, on December 19, 2016, Petitioner presented to ATI Physical Therapy for an initial evaluation. (PEX 8, pg. 301). Petitioner treated for lower back pain and hip pain at ATI Physical Therapy from December 19, 2016 until March 31, 2017 consisting of 41 total visits. (PEX 8, pg. 4).

Petitioner followed up with Dr. Goldflies on January 16, 2017, with pain radiating down his left leg. (PEX 6, pg. 15). He described the pain as a sharp, shooting pain that started on the right side of the lower leg and radiated to the left side. (PEX. 6, pg. 15). Petitioner was ordered to remain off work until February 16, 2017. (PEX 5, pg. 28). Petitioner was ordered to follow up in four weeks. (PEX 6, pg. 15).

On February 13, 2017, Petitioner followed up with Dr. Goldflies with complaints of pain radiating from his back into both legs. (PEX 6, pg. 13). Petitioner was ordered to continue physical therapy. (PEX 6, pg. 13). Petitioner was also ordered to remain off work and told to follow up in four weeks. (PEX 6, pg. 13).

As instructed, on March 20, 2017, Petitioner followed up with Dr. Goldflies for his lower back. (PEX 6, pg. 10). Petitioner reported that pain radiated down into the right leg. (PEX 6, pg. 10). Petitioner was ordered to continue physical therapy and chiropractic treatment. (PEX 6, pg. 11). Petitioner was also ordered to use Motrin for pain management and remain off work for four weeks. (PEX 6, pg. 11). Dr. Goldflies ordered a reevaluation appointment for four weeks. (PEX 6, pg. 11).

On April 17, 2017, Petitioner followed up with Dr. Goldflies with continued pain radiating down the right leg. (PEX 6, pg. 8). Petitioner also complained of pain. (PEX 6, pg. 8). Petitioner was ordered to remain off work, continue physical therapy, and follow up with Dr. Goldflies four weeks later. (PEX 6, pg. 9).

Petitioner returned to Dr. Goldflies on May 15, 2017, with continuing pain symptoms. (PEX 6, pg. 7). Petitioner was ordered to continue physical therapy and return for reevaluation in four weeks. (PEX 6, pg. 7). On July 14, 2017, Petitioner was discharged from ATI physical therapy. (TR 43).

On August 7, 2017, Petitioner followed up with Dr. Goldflies for lower back pain. (PEX 6, pg. 76). Petitioner was released to return to work on August 14, 2017 and ordered to return to the clinic as needed. (PEX 6, pg. 76).).

***Testimony of Dr. Keith Harvie***

Dr. Harvie is licensed to practice medicine in the State of New Mexico. (REX 4, pp. 4-5) Dr. Harvie is certified in orthopedic surgery and as a medical-legal evaluator. *Id at 5.* Dr. Harvie has performed 20,000 orthopedic surgeries while in practice in New Mexico. *Id at 6-7.* Dr. Harvie reviewed medical records, work conditioning bills, and physical therapy bills for the petitioner. *Id at 8-9.* As a result of his review of these records he issued a report dated July 11, 2018. *Id at 9.* This report was entered into evidence as part of Dr. Harvie's testimony. (REX 4) Dr. Harvie reviewed the 41 physical therapy visits from December 19, 2016 to March 31, 2017 and the 65 work conditioning visits from April 3, 2017 to July 14, 2017. *Id.*

Dr. Harvie was asked to determine if the physical therapy bills and work conditioning bills were reasonable and necessary. *Id at 12.* Dr. Harvie evaluated the physical therapy and work conditioning bills pursuant to Official Disability Guidelines and the Texas Workforce Commission. *Id.* Official disability guidelines are based on research and the latest data from the literature. *Id at 13.* Official Disability Guidelines are evidence-based medicine. *Id.*

The Official Disability Guidelines for physical therapy for low back strains is 3 or less visits per week, or 10 physical therapy visits over 5 weeks, and self-directed home physical therapy. *Id at 14.* Petitioner was 26 years old when the chiropractic therapy started. *Id.* On December 5, 2016, Petitioner was advised to return to work. *Id.* As of December 5, 2016, there was no evidence of any persistent or significant objective deficits that would support any additional supervised skilled care after December 16, 2016. *Id at 14-15.*

There are Official Disability Guidelines for work conditioning. *Id at 15.* Official Disability Guidelines note that work conditioning is an additional series of intense physical therapy visits. *Id.* Work conditioning visits will typically be more intense than regular physical therapy visits and last 2 or 3 times as long. *Id.* Work conditioning participation does not preclude

concurrently being at work. *Id.* The Official Disability Guidelines timeline is 10 visits over 4 weeks or about 30 hours. *Id.*

Dr. Harvie testified that Petitioner underwent chiropractic treatment on October 28, 2016 and then completed 41 physical therapy visits from December 19, 2016 through March 31, 2017. *Id.* On March 31, 2017, Petitioner was discharged from therapy and transitioned to work conditioning to address functional strength. *Id at 15 and 16.* Petitioner requests an additional 65 visits of work conditioning from April 3, 2017 through July 14, 2017. *Id at 16.* Dr. Harvie testified there was limited evidence to support Petitioner's request for additional physical therapy visits beyond the normal course of physical therapy. *Id.* In this case, Petitioner had normal motion and functional strength in the lower extremities with limited documentation of a significant gap between Petitioner's function and job demands. *Id.* The medical necessity of the 65 work conditioning visits was not established. *Id.*

Dr. Harvie has been working with official disability guidelines for about 15 years. *Id.* Dr. Harvie has undergone additional training or certification regarding official disability guidelines. *Id at 16-17.*

Dr. Harvie testified that within a reasonable degree of medical and osteopathic and surgical certainty and pursuant to official disability guidelines the 41 requested physical therapy visits were not reasonable or necessary. *Id at 17.* The basis of Dr. Harvie's opinion was that as of December 5, 2016 the residual deficits were limited to pain with right-sided bending at the upper lumbar segments. *Id.* Dr. Harvie opined that transition to an independent home exercise program and at-home modality use was reasonable to manage the residual symptoms and deficits in the lumbar spine. *Id.* The official disability guidelines for physical therapy for low back is 3 visits per week or less, active self-directed home physical therapy, and 10 visits over 5 weeks. *Id at 17-18*. As of December 5, 2016, Petitioner gave a history of improvement with chiropractic treatment and was advised to return to work. *Id at 18.* As of December 5, 2016, there was no evidence of persistent and significant objective deficits that would support any additional supervised skilled care starting on December 16, 2016. *Id.*

Dr. Harvie testified that was in a reasonable degree of medical osteopathic and surgical certainty and pursuant to official disability guidelines the 65 requested work conditioning sessions were not reasonable or necessary. *Id.* The basis of Dr. Harvie's decision was that official disability guidelines note that work conditioning will typically be more intensive than regular physical therapy visits and 2 or 3 times as long. *Id.* The Official Disability Guidelines call for 10 visits over 4 weeks or about 30 hours. *Id.* Petitioner underwent chiropractic therapy on October 20, 2016. *Id.* He then completed 41 physical therapy visits from December 19, 2016 to March 31, 2017. *Id at 18-19.* Petitioner was discharged from therapy on March 31, 2017. *Id at 19.* There is limited evidence to support that the petitioner required an additional series of physical therapy visits beyond the normal course of physical therapy. *Id.* Petitioner had normal motion and functional strength in the lower extremities. *Id.* There was limited documentation of a significant gap between Petitioner's function of the job demands. *Id.*

Dr. Harvie's utilization review report of July 11, 2018 contains his opinion that the 41 visits of physical therapy and the 65 visits of work conditioning were all noncertified. (REX 1*at 1 and 4.*)

Dr. Harvie never met, examined, or treated Petitioner. (REX 2, pg. 9). Dr. Harvie signed a report related to Petitioner that was dated July 11, 2018. (REX 2, pg. 53). Dr. Harvie testified that he did not author the report he signed off on. (REX 2, pg. 48). Dr. Harvie did not generate any of the information contained in the report. (REX 2, pg. 48). Dr. Harvie testified that the report signed was generated by someone else prior to him reviewing any of Petitioner's medical records. (REX 2, pg. 48).

Further, Dr. Harvie was not provided Petitioner's medical records of Dr. Luis Santiago. (REX 2, pg. 23-24). Dr. Harvie was not provided Petitioner's medical records from Rapid Rehab of Illinois. (REX 2, pg. 24). Additionally, Dr. Harvie was not provided Petitioner's medical records of St. Anthony's Hospital. (REX 2, pg. 24-25).

In addition to not reviewing Petitioner's medical records from Dr. Santiago, Rapid Rehab of Illinois, or St. Anthony's Hospital, Dr. Harvie never reviewed Petitioner's radiological films. (REX 2, pg. 27). Dr. Harvie testified that he would have preferred to have all of those records before formulating an opinion on whether Petitioner's medical treatment was reasonable and necessary. (REX 2, pg. 38).

Dr. Harvie was also never provided the accident report for Petitioner's injury. (REX 2, pg. 30). Dr. Harvie testified that he was unaware of Petitioner's job duties and if it included laborious work. (REX 2, pg. 32). Additionally, Dr. Harvie was not provided with the lifting requirements for Petitioner's position with Respondent. (REX 2, pg. 32).

Dr. Harvie offered no opinion of causation. (REX 2, pg. 35).

***Petitioner's Current Condition***

Petitioner testified that he still struggles to get out of bed, spending a day with his family, or stay on his feet throughout the day. (TR 27). Petitioner has to sit down because his back will start bothering him during extended activities. (TR 27). Petitioner has to limit himself from lifting because he fears returning to the state of pain from the August 23, 2016 work accident. (TR 28).

Petitioner gets bothered by the pain while working. (T 28). His current job requires him to lift heavy bags of flour. (T 28, 29). Petitioner cannot pick up his daughter, and can no longer spend a day of leisure being on his feet all day. (T 28). Petitioner claims that if he does too much activity in one day, he is in pain by the end of the day. (T 29).

One important fact about Petitioner that he is a very obese man who became more and more obese in a compressed period of time such that he gained nearly 100 pounds in the five years up to the date of trial.

## CONCLUSIONS OF LAW

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

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 his employment and his 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). 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).

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 his testimony might be contradicted by the evidence, or how evident it might be that his story is a fabricated afterthought. U.S. Steel v. Industrial Commission, 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). 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).

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). In the case at hand, the Arbitrator observed Petitioner during the hearing and finds him to be a credible witness. Petitioner did not appear uneasy in his seat while testifying nor while observing the hearing. At all times, including cross examination, he remained calm. Petitioner's answers were forthright, and his tone of voice remained unreserved. Petitioner displayed normal eye contact and did not engage in any unusual fidgeting.

**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 the August 23, 2016 work injury.

Every natural consequence that flows from an injury that arose out of and in the course of one's employment is compensable under the Act absent the occurrence of an independent intervening accident that breaks the chain of causation between the work-related injury and an ensuing disability or injury. Dunteman v. Illinois Workers' Comp. Comm'n, 2016 IL App (4th) 150543WC, ¶ 42. A work-related injury "need not be the sole causative factor, nor even the primary causative factor, as long as it was a causative factor in the resulting condition of ill-being." Id. As long as there is a "but-for" relationship between the work-related injury and subsequent condition of ill-being, the employer remains liable. Id.

Here, the medical evidence is consistent with Petitioner's testimony. Petitioner was working in a full duty capacity without restrictions at the time of the August 23, 2016 incident. (TR 9). Petitioner had no prior issue with his back. (TR 9). Petitioner testified that he was lifting a bag of dirt to place into a garbage truck. (TR 13). Petitioner testified that he immediately felt a tightness and then a sharp pain in his back. (TR 14-15).

The medical evidence is mostly consistent with Petitioner's testimony. Petitioner immediately reported the incident to his supervisor, Lucio Vargus. (TR 15-16). Respondent sent Petitioner to the emergency room at Westlake Hospital immediately after the accident. (TR 17, PEX 1). The medical records of Westlake hospital have a consistent mechanism of injury. (PEX 1, pg. 10). Additionally, the records from Dr. Santiago tell of a work-related lower back injury. (PEX 3, pg. 16). Additionally, Dr. Goldflies records confirm Petitioner's injury occurred during work for Respondent. (PEX 6, pg. 11).

Proof of good health and change immediately following and continuing after an injury may establish that an impaired condition was due to the injury. Granite City Steel Co. v. Indus. Comm'n, 97 Ill.2d 402 (1983), Land and Lakes Co. v. Indus. Comm'n, 359 Ill.App.3d 582 (2nd Dist. 2005).

Petitioner testified that he presented to Westlake Hospital the day of the incident on August 23, 2016, at the direction of Respondent. (TR 17, PEX 1). Petitioner complained of lower back pain following an incident at work that day. (PEX 1, pg. 10). Throughout the medical records of Westlake Hospital, Dr. Santiago, Dr. Goldflies, Dr. Lopez, Rapid Rehab of Illinois, and ATI Physical Therapy, the described mechanism of injury was consistent with Petitioner's testimony. Respondent presented no evidence to claim Petitioner's injury or condition was manifested in some other manner.

Petitioner was involved in a motorcycle incident on November 15, 2015, but this accident is not relevant because it did not result in an injury to his back. (TR 53). Respondent presented no evidence to dispute Petitioner's testimony, or Petitioner's medical records. Petitioner was working in a full duty capacity on August 23, 2016 without any restrictions. (TR 9). This testimony was unrebutted by Respondent.

Petitioner had no prior issues with his lower back until the August 23, 2016 work injury, but continued to complain of pain after the incident and up to the present time. Additionally, there is no medical evidence that Petitioner suffered a previous injury or had any previous complaints regarding his lower back. Respondent has presented no evidence that Petitioner's lower back injury was caused by some other event other than the August 23, 2016, occurrence.

Therefore, based upon Petitioner's testimony, corroborating medical records, and Respondent's failure to present any evidence of some other intervening cause, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to his August 23, 2016 work injury.

**Has Respondent paid all appropriate charges for all reasonable and necessary medical services?**

At the beginning of trial, Respondent agreed that with the exception of the ATI bill Respondent would pay reasonable, necessary, and causally connected medical bills pursuant to the fee schedule. *T5*. Petitioner entered a physical therapy bill from ATI Physical Therapy in the amount of $77,298.11. Petitioner has not entirely met his burden of proving that this physical therapy bill is reasonable, necessary, or causally connected to the work accident.

It is the obligation of Petitioner to prove the reasonableness and necessity of treatment and not the Respondent's obligation to refute unsubstantiated alleged expenses. *Jennifer Stronz v. Alexian Brothers Medical Center,* 07 I.W.C.C. 0289. Respondent argues Petitioner produced no testimony or evidence supporting the reasonableness, necessity, and medical causal connection of the ATI physical therapy bill. This is simply not true. Petitioner was sent to ATI pursuant to his treating physicians. That Petitioner produced no counter Dr. Harvie like report containing an opinion that the ATI physical therapy bill was medically necessary simply does not matter. The Act does not require him to do so. That no medical professional testified in support of the ATI physical therapy bill likewise does not matter. There is a medical record of multiple prescriptions for Petitioner to go to ATI for physical therapy. Petitioner meets his burden of proving the reasonableness, necessity, and medical causal connection of the ATI physical therapy bill. Now the Arbitrator must decide between Dr. Harvie and Petitioner's treating medical professionals.

Respondent, instead of seeking a section 12 examination of Petitioner, allowed him to continue to be cared for by physical therapists pursuant to the direction of physicians for which Respondent is willing to pay. This produced an extraordinarily large ATI bill that Respondent understandably does not want to pay. Thus, they hired Dr. Harvie to play Monday morning quarterback and testify that little, if any, of that bill should have accrued. Then Respondent argues that Petitioner failed to justify the high bill through testimony of an expert. Petitioner argues that he attended sessions at ATI because his physicians instructed him to and that these care decisions were never questioned at the time they occurred.

The Arbitrator finds the petitioner has met his burden of proving that most of the $77,298.11 ATI Physical Therapy bill is reasonable, necessary, or causally connected to the petitioner's work accident up through June 12, 2017 which is exactly the length of the last order for physical therapy by Dr. Goldflies. Petitioner did not attend an appointment with Dr.

Goldflies in June to renew the physical therapy prescription and the next time he saw Dr. Goldflies was in August of 2017 at which time he was released at MMI. The Arbitrator finds the medical records of Dr. Goldflies more credible than the report and testimony of Dr. Harvie, who never examined Petitioner, did not generate his report, and did not review numerous medical records that were relevant.

Petitioner's claim for payment of the ATI physical therapy bill is granted in part. Respondent shall pay, pursuant to the fee schedule, the ATI physical therapy bill up through June 12, 2017.

Petitioner also presented outstanding medical bills from Dr. Mitchell Goldflies in the amount of $185.11; Western Open MRI & Imaging in the amount of $650.00; Lopez Family Chiropractic in the amount of $2,797.00; Westlake Hospital in the amount of $218.78; Westlake Emergency Providers, SC in the amount of $374.00; and Rapid Rehab of Illinois Ltd. in the amount of $1,543.25. The billed charges appear to be fair and reasonable for the treatment provided. Given the Arbitrator's findings of causal connection, the Arbitrator finds Respondent shall pay these charges pursuant to the medical fee schedule.

**Is Petitioner entitled to Temporary Total Disability Benefits?**

The Arbitrator finds Petitioner is entitled to TTD benefits from the time he missed immediately following the incident, on August 24 and August 25 of 2016, representing 2/7 weeks. Additionally, the Arbitrator further finds Petitioner is entitled to TTD benefits from the date Respondent no longer accommodated Petitioner's restrictions, September 14, 2016, until the time the physical therapy prescription of Dr. Goldflies would have ended – June 12, 2017, representing 39 and 1/7 weeks.

Petitioner presented to the emergency room at Westlake Hospital on August 23, 2016, immediately following his work injury with complaints of pain in his lower back. (PEX 1, pg. 10). Petitioner was diagnosed with a lumbar strain. (PEX 1, pg. 13, 28). However, a later MRI revealed a disc bulge at L5-S1. (PEX 4, pg. 3). Petitioner underwent extensive physical therapy for his injury, and wanted to avoid injections and any surgical interventions. Petitioner returned to work following Dr. Goldflies release.

Petitioner was placed on work restrictions which included no bending and prolonged standing on September 9, 2016. (PEX 2, pg. 17). On September 14, 2016, Respondent told Petitioner they could no longer accommodate his restrictions. (TR 20). Dr. Goldflies ordered Petitioner to remain off work beginning on October 26, 2016. (PEX 6, pg. 23).

Based on Petitioner's medical records and testimony, the Arbitrator finds that Petitioner is entitled to TTD from the time he missed work immediately following the accident, August 24 and 25, 2016. Additionally, the Arbitrator finds Petitioner is entitled to TTD benefits from the date Respondent could no longer accommodate Petitioner's restrictions, September 14, 2016, until June 12, 2017, the date that the last physical therapy order by Dr. Goldflies expired. The total is 39 and 3/7 weeks.

**What is the nature and extent of the injury?**

The records of treating physician Dr. Louis Santiago were entered into evidence. *Respondent's Exhibit #2.* Petitioner suffered a motorcycle accident on November 17, 2015. Dr. Santiago noted that his weight was 316 pounds. Petitioner was seen on September 23, 2016 and complained of low back pain. His weight at that time was 325 pounds. Dr. Santiago saw the petitioner on October 11, 2016. The petitioner was 5'10" tall and weighed 330 pounds. The petitioner complained of back pain and an MRI was prescribed. The petitioner was seen by Dr. Santiago on October 22, 2016. The petitioner had desiccated discs at the L5-S1 level. The records include the Westlake Hospital x-ray of September 1, 2016 of the low back. There were no fractures. The records include the MRI of the low back taken on October 20, 2016. The radiologist noted diffuse bulging at the L5-S1 level. There was no evidence of vertebral fracture or dislocation. There is desiccation at the L5-S1 level with mild bulging and a moderate size disc protrusion.

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.

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 the comments of treating physicians Dr. Santiago and Dr. Goldflies as a factor in the evaluation of Petitioner's permanent partial disability as required by §8.1b(b)(i). Dr. Santiago noted the petitioner could return to unrestricted employment on October 16, 2016. *Respondent's Exhibit #2.* The arbitrator notes that during cross-examination the petitioner testified that he saw Dr. Goldflies on December 5, 2016 and that Dr. Goldflies released the petitioner to return to work. *Petitioner's Exhibit 14 and T38-39.* Because of the opinions of Dr. Santiago and Dr. Goldflies, the Arbitrator gives greater 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 garbage collector 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. Petitioner has voluntarily moved on to other employment. Petitioner testified he works in his present employment without restriction. *T42-43.* The Arbitrator notes the petitioner testified he lifts flour in his present job. *T29.* Because of the petitioner's ability to return to his pre-accident employment, the Arbitrator therefore gives greater weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 25 years old at the time of the accident. Because of the petitioner's comparably young age, the Arbitrator therefore gives no weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes the petitioner was able to return to his pre-accident employment and has offered no evidence regarding his present wages. Petitioner voluntarily obtained a different job. Because petitioner makes no allegation of any impairment of earning capacity, 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 the work conditioning progress report of July 19,

2017 entered as *Respondent's Exhibit #3* finding Petitioner able to work at the heavy physical demand level. The physical therapist noted the petitioner could work at the heavy physical demand level, could lift and carry 80 pounds 100 feet, could lift 50 pounds over his head 10 times, and could lift 60 pounds 10 times from floor to chair. Dr. Santiago noted Petitioner could return to unrestricted employment on October 16, 2016. *Respondent's Exhibit #2.* Dr. Goldflies released Petitioner to return to work December 5, 2016. Petitioner testified that after July 16, 2017 he had no treatment for his low back as a result of this accident. *T40 and Petitioner's Exhibit 14.* Because of Petitioner's final capabilities after treatment, the Arbitrator gives greater weight to this factor.

The Arbitrator notes the petitioner's testimony on cross-examination that he did not require injections or surgery for his low back as a result of the August 23, 2016 incident. *T41.* Petitioner testified on cross-examination that he has never had a surgical recommendation from any of his treating physicians as a result of the August 23, 2016 accident. *Id.* Petitioner testified that at the time of arbitration Petitioner was not taking any prescription medication for his low back. *T42-43.* No physician has placed any permanent work restrictions on Petitioner as a result of the August 23, 2016 accident. *Id.* Petitioner has no future office visits planned as a result of the August 23, 2016 accident. *Id.*

Based on the above factors, and the record taken as a whole, the Arbitrator finds Petitioner sustained permanent partial disability to the extent of 5% loss of use of the person as a whole.

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 18WC035908 |
| Case Name | Todd Kieft v.<br>Bryan Kinser Enterprises, Inc.<br>& Dekalb Mechanical Inc. |
| Consolidated Cases | |
| Proceeding Type | Petition for Review under 19(b)<br>Remand Arbitration |
| Decision Type | Commission Decision |
| Commission Decision Number | 23IWCC0537 |
| Number of Pages of Decision | 26 |
| Decision Issued By | Kathryn Doerries, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Mitchell Peskin |
| Respondent Attorney | Andrew (AJ) Sheehan,<br>Mitzi Westerhoff |

DATE FILED: 12/15/2023

/s/Kathryn Doerries, 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 Choose reason | ☐ Second Injury Fund (§8(e)18) |
| | ☐ PTD/Fatal denied |
| ☐ Modify Choose direction | ☐ None of the above |

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TODD KIEFT,

Petitioner,

vs. NO: 18 WC 035908

BRYAN KINSER ENTERPRISES, INC. &
DeKALB MECHANICAL, INC.,

Respondents.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) and §8(a) having been filed by the Respondent Bryan Kinser Enterprises, Inc. ("Kinser") herein and notice given to all parties, the Commission, after considering the issue of whether Kinser was a loaning employer and Respondent DeKalb Mechanical, Inc. ("DeKalb") was a borrowing employer under §1(a)(4) of the Act, 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 to correct scrivener's errors, including one in the Arbitrator's Findings on page 2 and in the Conclusions of Law on pages 19, 20, and 21.

Under the Findings on page 2 of the Arbitrator's Decision, the Commission modifies the second Finding by identifying the Respondent-employer so that the sentence reads, "On this

date, an employee-employer relationship did exist between Petitioner and Respondent Bryan Kinser Enterprises, Inc."

Under Issue (O), on page 19 of the Arbitrator's Decision, the Commission strikes "Kinser's" in the last sentence and substitutes "DeKalb's" so the sentence now reads, "Petitioner also did not receive instructions from Respondent-DeKalb's employees."

Under Issue (O), on page 20 of the Arbitrator's Decision, the Commission strikes "Kinser" from the first sentence in the last paragraph and substitutes "DeKalb" so the sentence now reads, "In the present case, Petitioner had no knowledge and had no indication that Respondent-DeKalb was in control or in charge of his performance of his job duties."

Under Issue (O), in the last sentence of the second paragraph on page 21 of the Arbitrator's Decision, the Commission strikes "contact" and replaces it with "contract" and strikes "Kinser" and replaces it with "DeKalb" so that the sentence now reads, "As Petitioner did not sign the ticket and was not aware of the ticket or the terms of the ticket, the ticket cannot be deemed an express contract of employment between Petitioner and Respondent-DeKalb."

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision filed on November 9, 2022, is hereby modified for the reasons stated herein, and otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that there was not a borrowed-employee relationship between Petitioner and Respondent DeKalb Mechanical Inc. and Petitioner was an employee of Respondent Bryan Kinser Enterprises, Inc. under the Act when Petitioner sustained a work accident on November 13, 2018.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent Bryan Kinser Enterprises, Inc. shall pay reasonable and necessary medical services listed in Petitioner's Exhibit 9, as provided in Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent Bryan Kinser Enterprises, Inc. shall pay reasonable and necessary medical services related to the surgery recommended by Dr. Sampat of C5-6 anterior cervical discectomy and fusion, as provided in Sections 8(a) and 8.2 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 $19,500.00. 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 Circuit Court.

**December 15, 2023**

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KAD/bsd
42

/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 | 18WC035908 |
| Case Name | Todd Kieft v. Bryan Kinser Enterprises, Inc. & Dekalb Mechanical Inc. |
| Consolidated Cases | |
| Proceeding Type | 19(b)/8(a) Petition |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 22 |
| Decision Issued By | Elaine Llerena, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Mitchell Peskin |
| Respondent Attorney | Andrew (AJ) Sheehan,<br>Mitzi Westerhoff |

DATE FILED: 11/9/2022

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

/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)**

**Todd Kieft**
Employee/Petitioner

v.

**Bryan Kinser Enterprises, Inc. &**
**DeKalb Mechanical Inc.**
Employer/Respondent

Case # **18** WC **035908**

Consolidated cases: **No**

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 **March 18, 2022 and April 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 **Section 1(a)(4) Borrowing-Loaning Employers**

**FINDINGS**

On the date of accident, **November 13, 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 $**71,920.68**; the average weekly wage was $**1,383.09**.

On the date of accident, Petitioner was **47** years of age, ***married*** with **1** dependent children.

Respondent Bryan Kinser Enterprises, Inc. ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent Bryan Kinser Enterprises, Inc. shall be given a credit of $**125,531.13** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**125,531.13**.

Respondent is entitled to a credit of $**859.56** under Section 8(j) of the Act.

**ORDER**

There was not a borrowed-employee relationship between Petitioner and Respondent DeKalb Mechanical Inc. and Petitioner was an employee of Respondent Bryan Kinser Enterprises, Inc. under the Act when Petitioner sustained a work accident on November 13, 2018.

Respondent Bryan Kinser Enterprises, Inc. shall pay reasonable and necessary medical services listed in Petitioner's Exhibit 9, as provided in Sections 8(a) and 8.2 of the Act.

Respondent Bryan Kinser Enterprises, Inc. shall pay reasonable and necessary medical services related to the surgery recommended by Dr. Sampat of C5-6 anterior cervical discectomy and fusion, 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 9, 2022**

*Elaine Llerena*
Signature of Arbitrator

ICArbDec19(b)

**STATEMENT OF FACTS:**

**Accident**

Petitioner was working for the Respondent Bryan Kinser Enterprises, Inc. (hereinafter Respondent-Kinser) on November 13, 2018, at Maple Junior High in Northbrook, Illinois. (TX, Pg. 15). On this day, he was working as an oiler and was assisting the crane operator, Ted Fabry, in building a crane. (TX, Pgs. 15, 16, 17, 66). Mr. Fabry was an employee of Respondent-Kinser and was Petitioner's supervisor for that day. (TX, Pg. 17). Petitioner testified that he took direction from Mr. Fabry. (TX, Pgs. 21). He considered himself an employee of Respondent-Kinser. (TX, Pg. 67). Petitioner and Mr. Fabry were the only employees from Respondent-Kinser at the job site on that day. (TX, Pgs. 22).

Sometime between 8:30 a.m. to 9:30 a.m., Petitioner was on the drop deck of a trailer. (TX, Pg. 23). He was trying to jump back to the crane. (TX, Pg. 23). While doing this, his right foot had caught on a hanger on the trailer. (TX, Pg. 23). This pulled him back and caused him to miss landing on the crane. (TX, Pg. 24). He consequently hit his left shoulder into the deck of the crane and then slide down, falling approximately 4 to 5 feet. (TX, Pgs. 23, 25). Petitioner fell on frozen ground. (TX, Pg. 23). He first landed on his left buttocks and then his lower back had slammed to the ground. (TX, Pg. 23). Petitioner testified he is not sure if he hit his head, but his neck whipped and jerked as a result of the impact. (TX, Pgs. 23-24, 25).

Immediately following the accident, Petitioner testified he was in a bit of discomfort throughout his whole body. (TX, Pg. 26). He was not able to move his left arm and had to hold it across his chest. (TX, Pg. 26). Petitioner provided notice of the accident to Mr. Fabry. (TX, Pg. 27). Petitioner continued to work one-handed, but after an hour he started feeling more pain into his left shoulder. He stopped working and was driven to the hospital. (TX, Pgs. 27-31).

**Petitioner's testimony Concerning Bryan Kinser Enterprises, Inc.**

Petitioner testified he has been employed with the Respondent-Kinser for approximately 7 ½ years. (TX, Pg. 12). He obtained his job at Respondent-Kinser through his union. (TX, Pgs. 67-68). Petitioner would work 50% of the time as a crane operator and 50% of the time as an oiler. (TX, Pgs. 12-13, 14, 59). His job as a crane operator involved setting up a crane, and determining the weight of the materials needed to be lifted and where those materials needed to be placed. (TX, Pg. 13). As an operator, he would take the lead on the job and would communicate with the customer. (TX, Pg. 61). The customer would tell Petitioner where product had to be lifted and he would tell the customer the best location to set up the crane. (TX, Pg. 61). The customer advises Petitioner of the statistics (weight) of the product he would be lifting. (TX, Pg. 62, 63). The customer also shows Petitioner the areas that are available to set up his equipment. (TX, Pg. 62). If something is in the way of Petitioner's equipment, he would let the customer know and either ask that it be moved or find a different location. (TX, Pg. 62). The customer does not warn Petitioner of any hazards, rather Petitioner obtains the information about the product and then he looks for any potential hazards. (TX, Pg. 63).

Petitioner's job as an oiler involved working with the crane operator and setting up the crane. (TX, Pgs. 13-15, 59). He would have to climb up and down from a truck onto the crane. (TX, Pg. 14). He would also hoist and set up the rigging and counter-weights to the crane. (TX, Pg. 14). Petitioner testified that while working as an oiler, he does not have any communications with the customer. (TX, Pg. 63). As an oiler, Petitioner is under the supervision, control and direction of the crane operator. (TX, Pg. 68, 70, 74). It was Petitioner's understanding that while working as an oiler, the person who is the crane operator is his boss. (TX, Pgs. 74-75).

Prior to beginning a job, Petitioner is required to drive at a specific time to Respondent-Kinser's yard to load equipment onto a truck. (TX, Pgs. 69, 72). Petitioner was then required to drive from Respondent-Kinser's

yard to a job site. (Tx, Pg. 69). During this time, Petitioner was under the control and direction of Respondent-Kinser. (TX, Pgs. 69-70).

Petitioner testified he would average between 24 to 36 hours of work a week. (TX, Pg. 14). The number of hours he worked was dependent on the work available. (TX, Pg. 15). His work hours were set by Respondent-Kinser. (TX, Pgs. 21). His job at Respondent-Kinser would require him to work overtime. (TX, Pg. 60). Petitioner's paychecks were issued by Respondent-Kinser, minus withholdings for taxes, Social Security and insurance. (TX, Pg. 71). He had received a W-2 from Respondent-Kinser for work performed in 2018. (TX, Pg. 20). He did not work for any other employer in 2018. (TX, Pg. 20). Petitioner understood that Respondent-Kinser could fire him. (TX, Pg. 73).

Petitioner was being paid for the Maple School job and his previous jobs as an oiler or crane operator by Respondent-Kinser. (TX, Pg. 18). He believed at all times through November 13, 2018, that Respondent-Kinser was his employer. (TX, Pg. 18). The crane and the equipment that Petitioner was working on was owned and maintained by Respondent-Kinser. (TX, Pg. 66, 68). While performing his work, Petitioner did not use any other contractor's equipment. (TX, Pgs. 21).

**Petitioner's Testimony Concerning DeKalb Mechanical**

On November 13, 2018, there were other contractors at this job site; one of them being Respondent DeKalb Mechanical Inc. (hereinafter Respondent-DeKalb). (TX, Pg. 16). Respondent-DeKalb is an HVAC company. (TX, Pg. 16). Petitioner testified that he does not know anyone who works for Respondent-DeKalb. He was not aware of any written agreement between Respondent-Kinser and Respondent-DeKalb. (TX, Pgs. 17-18). He also was not aware of any agreement that anyone but Respondent-Kinser was his employer. (TX, Pg. 76). Petitioner never had any conversation with anyone at Respondent-Kinser that the work he was performing on November 13, 2018, was under the exclusive direction and control of Respondent-DeKalb. (TX, Pg. 20). He never took any direction from anyone with Respondent-DeKalb. (TX, Pg. 66). He did not receive a W-2 from Respondent-DeKalb nor did he ever receive any form of payment from Respondent-DeKalb for work performed in 2018. (TX, Pgs. 20-21). Petitioner worked different hours than the employees of Respondent-DeKalb. (TX, Pg. 72). Also, Petitioner does not have any training or certifications regarding HVAC units. (TX, Pg. 71).

Following Petitioner's accident, Mr. Fabry asked employees from Respondent-DeKalb for assistance in building the crane. (TX, Pgs. 28). Petitioner testified that he began giving two employees from Respondent-DeKalb directions on what to do over the next hour before going to the hospital. (TX, Pgs. 28-29). None of the employees of Respondent-DeKalb were telling Petitioner what to do. (TX, Pg. 75).

**The Rental Ticket**

There was a rental agreement or ticket used by Respondent-Kinser (Lessor) and Respondent DeKalb (Lessee) that was associated with the events of November 13, 2018, at the Maple School job. (TX, Pg. 92, RX5). It is a one-page document with a front and back page. (TX, Pg. 93). On the backside of the document, there is general information about the insurance parameters, requirements that the customer provide proof of insurance coverage, and legal obligations. (TX, Pg. 95, RX5). The ticket was signed by Gary Glidden as Lessee and there are two dates, by his signature; November 13, 2018, and November 15, 2018. (RX5) Teddy Fabry signed the ticket as Lessor with one date by his signature, November 13, 2018. *Id.* On the ticket, Teddy Fabry is listed as the operator and Petitioner and Dan F. are listed as the oiler. *Id.* The pertinent provisions on the back of the ticket in very small print were as follows:

> "It is expressly agreed by and between the parties here to that the Equipment and all persons operating, repairing, or maintaining and assembling/disassembling the Equipment are under the exclusive jurisdiction, supervision and control of the lessee under this lease." (RX5).

"It shall be the duty of the Lessee to give specific instructions and directions to all persons operating, repairing, and maintaining the leased Equipment." (RX5).
"Lessee specifically agrees that Lessor has absolutely no control over any person operating or assisting in operating, repairing or maintaining the leased equipment." (RX5).
"Lessor may provide an operator with the Equipment. Lessee may reject this operator, however, if the operator is not rejected, the Operator is under the Lessee's exclusive direction and control and is Lessee's agent, servant and employee." (RX5).
"Lessee specifically agrees that the Lessor has absolutely no control over any person operating or assisting in operating, repairing or maintaining the leased Equipment." (RX5).

**Testimony of Bryan Kinser**

Brian Kinser testified on behalf of the Respondent-Kinser. He is the owner of Respondent-Kinser. (TX, Pg. 73, 79). He oversees all aspects of the company including pricing, bidding on jobs, taking care of safety, and dealing with union and insurance. (TX, Pg. 80). As the owner, he also maintains payroll records, accident reports, and investigations relative to insurance issues. (TX, Pg. 80).

The nature of the business of Respondent-Kinser is a crane rental company. (TX, Pg. 103). The company owns cranes and scissor lifts and rents out this equipment to a variety of contractors. (TX, Pg. 81, 103). Respondent-Kinser also provides its own employees to operate and assist with the crane set up and take down. (TX, Pg.103). The crane operators are employees of Respondent-Kinser and operate the equipment that is rented out. (TX, Pg. 82).

Respondent-Kinser is not in the business of repairing HVAC units. (TX, Pg. 103). Mr. Kinser testified that his employees do not have any specific training on HVAC units including how to install these units. (TX, Pg. 104). Mr. Kinser also testified that he does not consider Respondent-Kinser to be a staffing agency. (TX, Pg. 104).

Before a job began, Mr. Kinser would either visit the site or use computer to look at overhead views of the jobsite. (TX, Pg. 107). From that information, he would take measurements to determine what size crane would be needed for the site. (TX, Pg. 107). He would also decide which employees were going to be provided with the crane. (TX, Pg. 109). Mr. Kinser would tell his employees the date and time to report to his yard site in West Chicago to pick up the necessary equipment. (TX, Pgs. 109; TX2. Pg. 11). The yard site is under the exclusive control and direction of Respondent-Kinser. (TX2. Pg. 11).

On a job site, Mr. Kinser testified that it is the customer that directs the crane. (TX, Pg. 84). Mr. Kinser testified that the crane operator on the job site will talk to someone on-site at which time they will be provided direction as to where the operator is going to be working. (TX, Pg. 85). He testified the customer helps establish what would be a safe location for the equipment to operate in. (TX, Pg. 85). The customer also identifies what product is going to be lifted, the information regarding the product, and the location of where the product is going to be placed. (TX, Pg. 85-86).

According to Mr. Kinser, the customer has the ability to fire the company if the job is not being performed correctly. (TX, Pg. 86). However, the customer does not have the ability to fire an individual Respondent-Kinser employee. (TX2. Pg. 8). The customer also does not have the ability to hire their own crane operator and oiler for job using Respondent-Kinser's equipment without permission from Mr. Kinser. (TX2. Pg. 8, 12, 13-14). Mr. Kinser admitted that this has never happened with Respondent-DeKalb and does not happen often with other customers because they usually do not have anybody skilled enough to run the cranes. (TX2, Pgs. 13-14).

Mr. Kinser identified RX5 as the daily rental contract or ticket. (TX, Pg. 92, RX5). This is the agreement that is provided to a customer when they need to rent equipment. (TX, Pg. 89, RX5). The times on the ticket are used by Mr. Kinser to calculate what the invoice will be. (TX, Pg. 111). The ticket identified the two employees of Respondent-Kinser, Petitioner and Teddy Fabry. (TX, Pg. 94, RX5).

Per Mr. Kinser, the ticket states that once his employees are on the job site, the relationship changes to a loaning of employees to the customer for the duration of the job. (TX, Pg. 90). Mr. Kinser was not aware if the provisions on the ticket were followed at the Maple School job site and he never had any discussions about the legal language and obligations that Respondent-DeKalb would have as set forth on the back of the ticket. (TX, Pg. 112; TX2. Pg. 9). Mr. Kinser also testified that the ticket was not provided to Respondent-DeKalb prior to November 13, 2018. (TX2, Pg. 8). He was unaware as to when it was first presented to Respondent-DeKalb. (TX2. Pg. 9).

Mr. Kinser never had an agreement with Respondent-DeKalb specifically indicating that his company would continue to provide workers compensation coverage. (TX, Pg. 96). However, he also admitted that he never had an agreement with Respondent-DeKalb to the contrary. (TX2. Pg. 6). Further, he never had any conversation with anyone from Respondent-DeKalb that their workers' compensation carrier would be responsible for any injuries sustained on the job site by any employees of Respondent-Kinser. (TX2. Pgs. 6-7).

The equipment rented for the Maple School job was a hydraulic crane and semi-truck and trailer. (TX, Pg. 94). Two people were needed to operate the equipment, an oiler and operator (TX, Pg. 94). Respondent-Kinser was responsible for the maintenance, repair and fueling of the crane and semi-truck being used for the Maple School job. (TX2. Pg. 10). Mr. Kinser assigned Mr. Fabry, an employee or Respondent-Kinser, to the crane operator for the Maple School job. (TX, Pgs. 107-107, 108-109). He testified that the crane operator was the one to have overseen Petitioner's work as an oiler on the date of the accident. (TX, Pg. 110). The crane operator is the one who would direct Petitioner to perform his job duties. (TX, Pg. 110). Mr. Fabry was the only person allowed to operate the crane and it was in his exclusive control. (TX, Pgs. 110-111). Mr. Kinser testified that after Petitioner was injured, he assigned a replacement employee of Respondent-Kinser, Dan F., to substitute in for Petitioner. (TX, Pgs. 106, 109-110).

**Testimony of Gary Glidden**

Gary Glidden testified on behalf of Respondent-DeKalb. He is a foreman sheet metal worker for Respondent-DeKalb. (TX2. Pg. 16-17). As a foreman, his responsibilities included manpower for work, ordering material and overseeing the installation of the material. (TX2, Pg. 35). Respondent-DeKalb works in the heating, ventilating and air conditioning industry. (TX2. Pg. 17). The company rents cranes from other companies in order to complete its jobs. (TX2. Pg. 17-18 19). When Respondent-DeKalb obtains a crane for a job, a crane operator and oiler are already assigned to the crane by the owner of the crane company. (TX2. Pg. 20, 21). The oiler assigned to the job is not an employee of Respondent-DeKalb. (TX2. Pg. 20).

Mr. Glidden testified that Respondent-DeKalb does not use its own cranes, their employees do not operate any cranes on a job site and it does not provide any training for its employees about how to operate cranes. (TX2. Pgs. 18, 29). He also testified that Respondent-DeKalb employees do not place counterweights, are not involved in rigging and hoisting, and are not trained to perform oiler duties. (TX2. Pg. 18).

Mr. Glidden testified that the crane company makes the ultimate determination as to which size crane is needed after taking measurements. (TX2. Pg. 23). The crane operator also makes the determination as to where the crane is to be placed and how the crane is going to be operated to lift the units. (TX2. Pgs. 23-24). He testified that the crane operator has the authority to override his suggestion as to where a crane is going to be placed. (TX2. Pg. 24). He would only stop the crane operator if the operator was doing something that was

unsafe, had damaged equipment or was putting the equipment in the wrong spot. (TX2, Pgs. 35-36). Mr. Glidden did not believe he had the authority to fire another company's crane operator and oiler from any job site. (TX2. Pg. 26).

In this case, Mr. Glidden testified that Respondent-Kinser took their own measurements at the job site and made the ultimate decision as to where the crane was going to be set up at the Maple School job site. (TX2. Pg. 22, 23). He further testified that Respondent-Kinser made the determination as to which oiler and operator would be assigned to the Maple School job site and that Respondent-Dekalb did not have any input into this decision. (TX2. Pgs. 24-25). None of the oilers or crane operators on the job site were on Respondent-DeKalb's payroll, and none were employees of Respondent-DeKalb. (TX2. Pgs. 25, 29). No one from Respondent-DeKalb provided any direction as to how the crane was to be assembled or disassembled, and Mr. Glidden had no specific knowledge as to the safe locations for cranes to be set up and operated in. (TX2, Pgs. 36-37). For this information, he relied on the employees of Respondent-Kinser. (TX2, Pg. 37). Respondent-DeKalb did not direct Petitioner how to perform his job duties at the Maple School job site, did not provide Petitioner any training on how to perform his job duties, and did not direct Petitioner or any of Respondent-Kinser's employees about how to set up or take down the crane. (TX2. Pgs. 26-27).

Mr. Glidden testified that the operator has final authority and control over the crane and its operations. (TX2. Pg. 27). It was Mr. Glidden's understanding that the crane operator was in charge of the crane on the date of the accident. (TX2. Pgs. 27-28). He testified that neither the crane operator or anyone with Respondent-Kinser ever gave Respondent-DeKalb's employees control of the crane. (TX2, Pg. 28). At all times the crane was in exclusive possession and control of Respondent-Kinser and its employees. (TX2, Pg. 28). When Respondent-DeKalb employees were helping set up the crane because Petitioner was injured, it was Petitioner who directing them what to do. (TX2, Pgs. 29-30). Ultimately, Respondent-DeKalb employees were following Mr. Fabry's direction. (TX2, Pg. 30).

Mr. Glidden identified RX5 which was the ticket he signed when the job was finished. (TX2, Pg. 31). He testified the ticket verifies the start and finish date and times of the job. (TX2, Pg. 31). The ticket was not presented to him until the last day of the job which was November 15, 2018. (TX2, Pg. 31). When it was presented, Mr. Glidden was not told about the terms and conditions on the reverse side, and was not asked to review or read the terms and conditions. (TX2, Pg. 33). He did not sign the ticket until the crane was broken down. (TX2, Pgs. 31-32). When he signed the document, it was already filled out. (TX2, Pgs. 32-33).

**Medical Treatment**

Petitioner was taken from the site to Lutheran General Hospital. The nurse's note indicated he fell about 4 feet from a crane onto his butt breaking his fall with his left shoulder. (PX1). He treated with Dr. Terry Chiganos who noted that Petitioner fell onto his left arm and dislocated his left shoulder. (PX1). He was complaining of pain running down the left arm, but had no focal cognitive or neurologic deficits. (PX1). He had no history of previous dislocations, and he reported no head/neck trauma. (PX1). He was diagnosed with a moderate anterior dislocation of the left humeral head. (PX1). His left shoulder was reduced via scapular manipulation and traction. (PX1). He was thereafter discharged and directed to follow up with an orthopedic surgeon. (PX1).

Petitioner testified that during the evening of November 13, 2018, he began to notice neck pain with tingling going into his left arm and little bit into his right arm. (TX, Pg. 33). On November 14, 2018, Petitioner began treatment at Advanced Physicians with Dr. Vasilike Sandas. (PX2). It was noted that he slipped off a trailer, struck a crane, fell 4 feet off the ground and braced his fall with his left upper extremity. (PX2). He was presenting with pain in the left shoulder, tingling in his left hand and left arm, and neck pain on the left. (PX2).

He was diagnosed with a closed left shoulder dislocation and neck pain, and prescribed MRI's of the left shoulder and neck. (PX2).

Both MRI's were competed on November 15, 2018. (PX2). The left shoulder MRI revealed a full-thickness tear of the distal anterior supraspinatus tendon insertion and a complete full-thickness tear of the distal subscapularis tendon. (PX2). The cervical MRI revealed at C5-6 a 4-5mm disc/osseous protrusion that predominated in the right posterolateral direction and mild to moderate left and severe right foraminal stenosis; at C4-5 a 2-3 mm disc bulge and mild right foraminal stenosis; and at C3-4 a 2mm disc/osseous bulge and mild to moderate bilateral foraminal stenosis. (PX2).

Dr. Sandas prescribed physical therapy for Petitioner's neck and left shoulder which Petitioner began at Advanced Physicians on November 16, 2018. (PX2; TX, Pg. 34). On November 29, 2018, his therapist, Christian Hollis noted that Petitioner reported experiencing more neck pain since the accident, tingling down the left upper extremity, and increased neck pain with looking down and turning the head. (PX2). Exam findings revealed positive cervical compression testing on the left and right. (PX2).

On referral from Dr. Sandas, Petitioner saw Dr. Nirva Shah for his left shoulder on November 19, 2018. After reviewing the MRI and completing his exam, Dr. Shah diagnosed Petitioner with a left shoulder massive rotator cuff tear, impingement, biceps tendinitis, a Bankart tear and a SLAP tear. (PX3). He recommended left shoulder surgery. (PX3).

On referral from Dr. Sandas, Petitioner began treatment with a neurosurgeon, Dr. Sean Salehi, on November 29, 2018. (PX2; PX3; TX, Pg. 35). Petitioner was complaining of pain and weakness in the left shoulder and pain radiating down the left arm and left shoulder. (PX4). He also reported neck pain but denied any right sided complaints. (PX4). Exam findings revealed decreased light touch in the left arm in a non-dermatomal distribution, mild cervical paraspinal muscle spasm, and no deep tendon reflexes at the right biceps. (PX4). Dr. Salehi diagnosed him with cervical disc displacement at C5-6 and cervical spondylosis without myelopathy. (PX4). He opined that Petitioner's neck pain was a result of his work accident and is secondary to a disc herniation at C5-6 and multilevel bulging discs. (PX4). Dr. Salehi believed Petitioner's left radicular complaints were due to his shoulder pathology. (PX4). He recommended physical therapy for the cervical spine. (PX4).

Petitioner also attended therapy on November 29, 2018, at which time it was noted that he had neck pain following his work injury. (PX2). He was reporting increased cervical pain symptoms with looking down and turning his head. (PX2).

Petitioner returned to Dr. Salehi on December 27, 2018. (PX4). He was continuing to have pain in the neck with intermittent shooting pain down the left arm to the fourth and fifth digits, and pain down into the right arm as well. (PX4). Exam findings again revealed absent deep tendon reflex at the right biceps. (PX4). Dr. Salehi recommended that Petitioner proceed with his planned left shoulder surgery and have an EMG study. (PX4).

On December 26, 2018, another one Petitioner's therapists at Advanced Physicians, Mark O'Neal, noted Petitioner was having pain radiating down both his arms. (PX2). Petitioner testified that this was accurate. (TX, Pg. 37). He testified that he started feeling a little bit of pain into the right arm within the second day after his accident. (TX. Pg. 37). He testified that the pain was not continuous and he would have it on and off. (TX, Pg. 38).

The EMG was performed on January 2, 2019, by Dr. Sandas. (PX2). Dr. Sandas noted Petitioner was having neck pain with bilateral upper extremity radiation since his November 13, 2018, accident. (PX2). The findings revealed pronounced denervation in the left deltoid musculature and evidence suggestive of right C6-7 radiculopathy with some chronicity on EMG exam with increased amplitude motor units in the right pronator teres. (PX2). Dr. Sandas noted the cervical paraspinal musculature exam was more difficult on the right as Petitioner could not relax his musculature. (PX2).

On February 5, 2019, Petitioner underwent surgery for his left shoulder with Dr. Shah. (PX3). Specifically, he underwent a left shoulder arthroscopic rotator cuff repair, biceps tenodesis, subacromial decompression and acromioplasty, distal clavicle excision, and extensive type 1 SLAP tear and labral debridement. (PX3). His post-operative diagnosis was complete rotator cuff tear, biceps tear and biceps dislocation, impingement, AC joint osteoarthritis, extensive type I SLAP tear and labral tear. (PX3). Following his surgery, Petitioner underwent a course of therapy for his left shoulder at Athletico from March 14, 2019, through June 14, 2019. (RX8). He attended 39 appointments. (RX8).

Petitioner returned to see Dr. Salehi on February 15, 2019. (PX4). Petitioner was reporting neck pain, pain in his left shoulder and tingling in his left hand. He was not having any radiating right arm pain or paresthesias. (PX4). Dr. Salehi diagnosed him with cervical spondylosis without myelopathy. He noted that Petitioner continues to have neck pain due to mild multilevel bulging discs which he was not recommending surgery for. (PX4). He also noted that Petitioner did not have any neural compression on the left side to explain his left arm symptoms. (PX4).

Petitioner attended a Section 12 examination with Dr. Guido Marra at the request of Respondent-Kinser. (RX6). Dr. Marra opined that Petitioner's current (left shoulder) complaints were causally related to the accident, his treatment has been reasonable and necessary, and an MR arthrogram would be appropriate to evaluate his rotator cuff repair given Petitioner's weakness and loss of strength at four months post-surgery. (RX6).

On June 12, 2019, Dr. Shah recommended a course of work conditioning. (PX3). Petitioner attended 11 sessions of work conditioning from June 24, 2019, through July 17. 2019. (PX8). On July 18, 2019, Dr. Shah noted that Petitioner was reporting a lot of pain in in the front, top, back and side of his left shoulder. (PX3; TX, Pg. 40). He concurred with Dr. Marra's recommendation for Petitioner to obtain an MR arthrogram and prescribed the same. (PX3).

The MR arthrogram was completed on August 12, 2019. (TX, Pg. 40). On August 15, 2019, Dr. Shah noted that the MR arthrogram showed portions of Petitioner rotator cuff did not heal. (PX3). Based on his exam findings and the MR arthrogram, Dr. Shah recommended a revision left shoulder surgery which was subsequently performed on October 29, 2019. (PX3; TX pg. 41). Specifically, Petitioner under a left shoulder arthroscopic complete synovectomy and extensive debridement of the glenohumeral joint, as well as the subacromial space; open rotator cuff repair; and an open biceps tenodesis. (PX3). Following surgery, Petitioner began another course of physical therapy at Athletico from December 2, 2019, through March 6. 2020. (PX8).

Dr. Shah referred Petitioner to Dr. Kyle MacGillis for left elbow pain radiating down to his left hand. (PX3; TX. Pg. 42). Petitioner saw Dr. MacGillis on February 27, 2020. (PX3). In addition to his left elbow complaints, it was noted that Petitioner was having a significant component of neck pain. (PX3). Petitioner testified that this was the same neck pain that he had reported to Dr. Sandas and Salehi and that it has never resolved since his accident. (TX, Pgs. 42-43). Petitioner testified that he did not have any further treatment for his neck up to that point because he thought the pain was stemming from his left shoulder. (TX, Pg. 43). Dr. MacGillis referred Petitioner to Dr. Chintan Sampat for evaluation of his cervical spine. (PX3; TX, Pg. 43).

Petitioner saw Dr. Sampat on April 27, 2020. (PX3). A history of the accident was provided. (PX3). Petitioner reported that he continued to have neck pain with tingling in the bilateral periscapular region and tingling in the left upper arm into the dorsal radial forearm, as well as over the ulnar forearm with numbness and tingling. (PX3, TX, Pg. 44). It was noted that he was having some right-sided periscapular pain. (PX3). Petitioner also reported that he had quite a bit of neck pain, especially when turning his head to the left. (PX3, TX, Pg. 44). Petitioner testified that the neck pain he reported at that time had become worse since he started having it after his accident. (TX, Pg. 44). Dr. Sampat wanted an updated MRI and EMG before making a diagnosis. (PX3).

Another cervical MRI was completed on May 6, 2020. It showed spondylotic changes, particularly at C5-6 with mild to moderate right foraminal stenosis. (PX3). On May 11, 2020, Petitioner saw Dr. Sampat and was reporting neck pain; tingling in the right dorsal radial forearm and into the hand; and tingling in the bilateral periscapular region and left radial forearm. (PX3). Petitioner testified that he had these right forearm symptoms often throughout his treatment, but that he started feeling and noticing it more after he had his second shoulder surgery. (TX, Pgs. 45-46). He believed that it was more noticeable because he was having more relief from his left shoulder symptoms after his second surgery. (TX, Pg. 45).

Dr. Sampat noted the May 2006 MRI showed right-sided paracentral disc protrusion at C5-6 with disc osteophyte complex resulting in stenosis. (PX3). He opined these findings corresponded with Petitioner's symptomatology. (PX3). He diagnosed Petitioner with C5-6 stenosis and recommended an EMG and a cervical epidural injection. (PX3).

At the request of Respondent-Kinser, Petitioner attended another Section 12 examination for his left shoulder on May 14, 2020, this time with Dr. Brian McCall. (RX7). Dr. McCall diagnosed him with rotator cuff dysfunction due to presumed failure of a prior subscapularis repair. (RX7). He opined that Petitioner's (left shoulder) condition was causally related to his accident. (RX7). He also indicated that a reverse total shoulder arthroplasty is a medically acceptable intervention for Petitioner, but suggested another MRI would be appropriate to assess the current status of the left shoulder. (RX7). In his report, Dr. McCall did note that Petitioner was having significant neck pain, pain which radiates into the posterior aspect of the left scapula and into his upper trapezius, and pain down the chest wall. Dr. McCall indicated that this was consistent with a cervical origin. (RX7).

On referral from Dr. Sampat, Petitioner saw Dr. Intesar Hussain on August 11, 2020. It was noted that Petitioner was having pain in his neck with some tingling in the right dorsal forearm and into the hand. (PX3). He was also having some tingling in the left periscapular region and left radial forearm. (PX3). Dr. Hussain diagnosed Petitioner with neck pain and right sided cervical radiculopathy secondary to a right-sided disc protrusion at C5-6 and a disc osteophyte complex with mild to moderate foraminal stenosis. (PX3). He recommended that Petitioner have a cervical epidural injection at C6-7 level. (PX3). This was subsequently performed on August 20, 2020. Petitioner testified after the injection his neck symptoms were relieved for a few days. (TX, Pg. 48).

On September 11, 2020, Dr. Sampat noted that Petitioner was still symptomatic with his neck pain radiating down into the right biceps, forearm and hand with associated numbness and tingling. (PX3). Based on his examination and Petitioner's failure to improve with conservative treatment, Dr. Sampat prescribed a C5-6 anterior cervical discectomy and fusion with the goal being to help decompress the neural elements and help Petitioner's radicular pain. (PX3).

On October 2, 2020, Dr. Shah performed a left open reverse total shoulder arthroplasty on Petitioner. (PX3). This involved removal of painful hardware deep to the bone, multiple bone anchors, sutures, and implantation of amniotic tissue membrane to reduce adhesions and scarring. (PX3). Following the surgery, Petitioner attended post-operative physical therapy at Parkview Orthopaedic Group from October 21, 2020, through April 5, 2021. (PX3).

At the request of Respondent-Kinser, Petitioner attended a Section 12 examination for his neck with Dr. Frank Phillips on December 1, 2020. Petitioner was reporting axial neck pain with radiating arm pain on the right side. (RX1, Resp. Ex #2; TX, Pg. 49). He described his neck and arm pain as severe and aggravated with extension of his neck. (RX1, Resp. Ex #2; TX, Pg. 50). Dr. Phillips had reviewed the November 15, 2019 cervical MRI and noted it showed a right sided disk-osteophyte complex at C5-6 with likely compression of the C6 nerve root. (RX1, Resp. Ex #2). He also reviewed the May 6, 2020 cervical MRI noting it showed a C5-6 right-sided disk osteophyte complex, compromising the takeoff C6 nerve root. (RX1, Resp. Ex #2). At the time he authored the report, he opined that Petitioner appeared to have sustained a cervical injury with likely C5-6 disk herniation and aggravation of an underlying degenerative condition at this level. (RX1, Resp. Ex #2. He also opined that the recommended fusion surgery would be reasonable given Petitioner's ongoing symptoms and lack of response to conservative treatment. (RX1, Resp. Ex #2). He indicated that the need for surgery and treatment to date was casually related to the accident but did indicate his opinions could change upon review of additional medical records. (RX1, Resp. Ex #2).

On March 12, 2021, Dr. Phillips wrote a second report at the request of Respondent-Kinser after being provided some additional records. (RX1, Resp. Ex #3). In his report, he stated that there was no evidence that Petitioner had any right arm symptoms in the period following his injury until at least 3 months after the accident. (RX1, Resp. Ex #3). Based upon this, he believed it was unlikely that Petitioner sustained any acute structural injury. (RX1, Resp. Ex #3). Instead, he now believed that Petitioner sustained a sprain/strain with an underlying degenerative condition. (RX1, Resp. Ex #3).

Petitioner had last seen Dr. Sampat on May 3, 2021. (PX3). Dr. Sampat's records indicate that he had reviewed the Section 12 report of Dr. Phillips and disagreed with his opinions on causation. (PX3). Petitioner was noted to have a positive Spurling's sign on the right, neck pain with flexion and extension maneuvers, 1/4 right-sided biceps, triceps and brachioradialis reflex compared to 2/4 on the left, and slightly diminished sensation on the upper right biceps and dorsal forearm on the right compared to the left. (PX3). Dr. Sampat was still of the opinion that Petitioner needed to have a C5-6 anterior cervical discectomy and fusion. (PX3). He also wanted an updated cervical MRI as the prior diagnostic was a year old. (PX3).

After the completion of physical therapy for his left shoulder, Petitioner saw Dr. Shah's physician assistant, Nathan Bell, on April 27, 2021. (PX3). He was prescribed light duty restrictions of lifting up to 15 pounds and given an order to have an FCE. (PX3, TX, pg. 51). The FCE was completed at Athletico on May 21, 2021. (PX8). Petitioner's performance was deemed consistent and he tested out at the medium physical demand level, demonstrating the ability to perform two hand lifts of 40 pounds to waist, 25 pounds to shoulder, and 15 pounds overhead. (PX8; TX, Pgs. 51-52). It was noted that Petitioner had limited strength and ability for prolonged forward reaching at shoulder height. (PX8).

Petitioner returned to Dr. Shah on May 27, 2021. (PX3). He had full passive range of motion, but his active range of motion was limited at extreme ranges secondary to pain. (PX3). He had excellent passive range of motion. (PX3). Dr. Shah deemed Petitioner to be at MMI, and prescribed permanent restrictions consistent with the recent FCE. (PX3).

Petitioner thereafter began light duty work for the Respondent on June 10, 2021. (TX, Pg. 52). On August 23, 2021, he returned to Shah. (PX3). It was noted that Petitioner started having increased pain in the left shoulder and other areas again. (PX3). This had developed a month prior when he began doing more active work such as utilizing a semitruck and performing oiling. (PX3). His pain was noted to be in the front, back and top of his left shoulder. (PX3). He reported that when he rolls over on to his left side, he has pain in his left shoulder. (PX3). He also reported pain in the neck and some shooting pain, numbness and tingling down his left arm. (PX3). Dr. Shah ordered a CT scan and EMG of left upper extremity. (PX3).

Petitioner had the EMG of his left upper extremity on September 13, 2021. (PX3). There was no evidence of left cervical radiculopathy or brachial plexus dysfunction. (PX3). He had the CT of the left upper extremity on September 15, 2021, which revealed a reverse type complete left shoulder arthroplasties in place without definite evidence of complications. (PX3). On September, 30, 2021, Dr. Shah opined Petitioner was at MMI for his left shoulder and could return to work within the restrictions of the FCE. (PX3). He believed Petitioner's current complaints were interventional pain issues and referred Petitioner to Dr. Mihail Beckerman for pain management. (PX3, TX, Pgs. 52-53). Petitioner saw Beckerman on November 10, 2021. (PX10). He was noted to have intermittent pain and tingling his left arm. Dr. Beckerman was unable to offer Petitioner any further treatment. (PX10).

**Petitioner's Prior Status**

Prior to November 13, 2018, Petitioner never treated for his left shoulder or his neck; never had an injury to his left shoulder or his neck; never had any pain complaints involving his left shoulder or his neck; never having any type of pain, tingling, or a pins and needles feeling going down either of his arm; and never had any difficulty performing his job for Respondent-Kinser. (TX, Pgs. 56-58). He also testified that since his November 13, 2018, he has not had any reinjuries to his left shoulder or his neck. (TX, Pg.58).

**Petitioner's Current Status**

Regarding his neck, Petitioner testified that it is very uncomfortable for him to sleep at night. (TX, PG. 53). He wakes up 5 to 6 times a night. (TX, Pg. 53). He has pain that runs down his right upper forearm in this hand. The pain is in both arms, but his right is worse. (TX, Pg. 53). For relief from the pain when he sleeps, he uses his leg or knee to put pressure onto his arm. (TX, Pgs. 53-54). Regarding his left shoulder, Petitioner testified it is very hard to hold or even hug his daughter. (TX, Pg. 54). Petitioner testified he takes Tylenol or ibuprofen for his neck and shoulder. (TX. Pgs. 54-55).

Petitioner has not undergone the surgery that Dr. Sampat recommended because it was not authorized by Respondent-Kinser. (TX. Pg. 55). Petitioner testified that Dr. Sampat had explained to him what was involved with the recommended surgery. (TX, Pg. 55). Petitioner would like to have the surgery so he can have live a normal life again and to be able to sleep without waking up 5 to 6 times a night. (TX, Pgs. 55-56).

Petitioner is presently working for Respondent-Kinser. (TX, Pg. 56). Petitioner testified that since his return to work, he is performing the role of the operator and oiler jobs for Respondent-Kinser. (TX, Pg. 65). However, he will ask contractors for help if he his operating the crane, particularly with assistance on carrying out his cribbing. (TX, Pg. 65).

**Testimony of Dr. Chintan Sampat**

Dr. Sampat testified on behalf of Petitioner. He is a board-certified orthopedic surgeon with subspecialty training in treating patients with spinal disorders. (PX6, Pgs. 5-6). Approximately 30 to 40 percent of his practices involves neck-related surgeries and he performs over 100 neck-related surgeries a year. (PX6, Pg. 6).

Dr. Sampat testified that the nerve roots that are potentially affected if someone has a disk herniation at the C5-6 level are C6 and sometimes C5. (PX6, Pgs. 11-12, 13). The symptoms from an affected nerve at C5-6 may include pain in the neck and/or pain, numbness or tingling that shoot into the base of the neck down the shoulder blade area. (PX6, Pgs. 12-13). The pain can sometimes shoot into the bicep and dorsal area, the radial part of the forearm, and the thumb and index finger. (PX6, Pgs. 12-13). A person with a C5-6 herniation with some nerve impingement, could experience no symptoms, have more neck pain, have more arm pain or a have a combination of those symptoms. (PX6, Pgs. 12-13). If someone has a C5-6 disc herniation with symptoms just emanating from the neck area, it is possible that they could develop radicular symptoms at a later point in time. (PX6, Pg. 13). Dr. Sampat testified that sometimes the symptoms start on one side and then go to the other side. (PX7, Pg. 86). The symptoms can become symptomatic and asymptomatic and can progress over time. (PX7, Pg. 86). The time frame of when this may happen varies. (PX6, Pg. 14). If there is pressure upon a nerve root by a disc herniation, then the nerve can get inflamed depending on the type of activities that a person performs and the frequency of those activities. (PX6, Pg. 13).

Dr. Sampat testified that although the initial ER records did not note Petitioner was having any right sided complaints, it can take time to develop and symptoms do not necessarily show right away. (PX7, Pgs. 79-80). He also testified that the pain in the left shoulder, the tingling in the left hand and left upper extremity, and the neck pain that was noted in the November 14, 2018 report from Advanced Physicians were complaints that could be seen in conjunction with bilateral foraminal stenosis. (PX7, Pg. 81). The foraminal stenosis on the left side can cause left sided symptoms. (PX7, Pg. 81). The mild to moderate left sided foraminal stenosis can cause pain in the neck, paresthesias in the left upper extremity, pain in the shoulder, and pain in the shoulder blade going down the upper extremity with numbness, tingling and sometimes weakness. (PX7, Pgs. 81-82).

Dr. Sampat testified that the right side became an issue for Petitioner when he saw Dr. Salehi in December. (PX6, Pg. 61). He noted that this is when Petitioner reported he was having pain shooting in the right upper arm. (PX6, Pg. 64). He also testified that there were physical findings noted by Dr. Salehi showing the right reflex was slightly diminished on physical exam. (PX6, Pg. 65). Specifically, it was noted during that exam that the biceps reflex was absent and per Dr. Sampat this finding corresponds to the C5-C6 level. (PX4; PX6, Pg. 65).

Dr. Sampat testified the November 15, 2018 cervical MRI showed multilevel cervical disk bulging which he believed could have become symptomatic after Petitioner's work injury. (PX6, Pg 23). It also showed right-sided foraminal stenosis at C4-5, mild to moderate left-sided stenosis, and severe right-sided stenosis. (PX7, Pg. 77). He testified with moderate foraminal stenosis at C5-6, a person could have no symptoms, have symptoms of pain shooting into the upper extremity in the C6 distribution, have neck pain or have a combination of both. (PX6, Pg. 24; PX7, Pg. 77). With foraminal stenosis at the C4-5 level a person could have pain in the back part of the neck going into the shoulder area. (PX6, Pg. 24). Based on these MRI findings, Dr. Sampat opined that Petitioner could have symptoms in either his left or right side or in both sides. (PX7, Pg. 77).

Dr. Sampat testified the EMG findings indicated that axillary nerve on the left has some dysfunction. (PX6, Pg. 34). The EMG also indicated the C6 and C7 nerves on the right side have dysfunction. (PX6, Pgs. 34-35). He testified he EMG findings were consistent with the 2018 cervical MRI and Petitioner's symptoms. (PX6, Pg. 35).

Dr. Sampat disagreed with Dr. Salehi's opinion that Petitioner's left radicular complaints were likely due to his shoulder pathology and there was no significant neural compression on the left. (PX6, Pg. 29, 37). It was Dr. Sampat's opinion that there was some neural compression that he noted and was also found by the radiologist. (PX6, Pg. 29, 37). He testified that the 2018 cervical MRI revealed bilateral foraminal stenosis on

the left and on the right at C5-6. (PX6, Pg. 30). Although the disk was more right-sided in nature, Dr. Sampat testified there was certainly some foraminal stenosis bilaterally. (PX6, Pg. 30). He opined it is possible that the symptoms Petitioner was experiencing on his left side were related to the foraminal stenosis aggravated by the fall. (PX6, Pgs. 30-31).

Regarding the proposed surgery, Dr. Sampat testified the goal is to "unpinch" the nerves. (PX6, Pg. 48). This would be done by going in from the front part of the neck, taking out the disk between the C5 and C6 bones and placing a cage inside to help restore the normal anatomy and "unpinch" the nerve. (PX6, Pg. 48). The surgery would also address the foraminal stenosis on the left and right sides, as well as the herniation on the right side. (PX7, Pg. 82). Dr. Sampat opined that this should help Petitioner's neck and arm pain. (PX6, Pgs. 48-49). The expected successful outcome from this surgery would be an 80 percent improvement in Petitioner's upper extremity pain. (PX6, Pgs. 48-49). Most patients would have improvement of neck pain but the surgery is designed to help the upper extremity symptoms. (PX6, Pg. 49).

Dr. Sampat opined the surgery is reasonable because Petitioner has neck pain shooting down his arm that corresponds with his EMG, MRI and physical exam. (PX6, Pg. 50). He also indicated that Petitioner has not responded to nonoperative treatment measures and has had persistent symptoms for long periods of time. (PX6, Pg. 50). Dr. Sampat testified that per multiple medical providers and his own history there was no evidence that Petitioner had any symptoms prior to his November 2018 accident. (PX6, Pg. 50). Dr. Sampat opined the cervical surgery he recommended was precipitated by Petitioner's November 13, 2018 accident. (PX6, Pg. 53).

Dr. Sampat also testified there was a causal relationship between Petitioner's fall and the onset of his symptoms at C5-6 (PX6, Pgs. 25, 52). His opinion was based on the fact that Petitioner did not have symptoms before his work injury and that Petitioner's fall was a competent cause of causing the onset of neck pain or pain shooting down his arm. (PX6, Pg. 29, 53). He agreed with Dr. Salehi that Petitioner's neck pain was secondary to the disk herniation at C5-6 and multilevel bulging discs. (PX6, Pg. 28).

Although Dr. Sampat could not determine if Petitioner had developed the disk herniation at the time of the accident, he believed it was more likely than not that the accident aggravated Petitioner's asymptomatic cervical condition. (PX6, Pg. 52, 58). He elaborated by testifying that if Petitioner had some asymptomatic bulging of the disk, then the fall was a competent cause because Petitioner's head suddenly moved left and right along with a fall that was hard enough to dislocate his shoulder. (PX6, Pg. 51). These events he opined could cause the nerve to become irritated. (PX6, Pg. 51).

Dr. Sampat testified that the symptoms into Petitioner's right arm which were first reported on December 27, 2018, correlated with his diagnosis of Petitioner's cervical condition. (PX6, Pg. 55). He testified that the symptoms can start in the neck and go down the path of the C6 nerve and this corresponded to Petitioner's symptomatology. (PX6, Pg. 55). When asked as to whether he had an explanation as to why Petitioner's radicular complaints did not develop concurrently at the time of the accident or shortly thereafter, he testified:

> *"It's impossible to know why he didn't have the complaints at the exact same time, but as you sort of have multiple injuries, you compensate and function differently, and so he had a severe left-sided injury that is being treated, and, clearly, probably had some dysfunction of his and how he uses his upper extremity, which can cause more flare-up of the symptoms, but, you know, he already had some symptoms of a C6 radiculopathy on the right side when he talked to Dr. Salehi about the pain shooting down the shoulder area on the right side and eventually started going down the rest of the upper extremity as he was using his neck and arms more."* (PX6, Pgs. 55-56).

**Testimony of Dr. Frank Phillips**

Dr. Frank Phillips testified on behalf of the Respondent. His practice involves managing patients with spinal disorders. (RX1, Pg. 4). He performs about 120 cervical surgeries a year. (RX1, Pg. 5). He performs about 10 to 15 independent medical examinations a month. (RX1, Pgs. 6, 20). The overwhelming majority of independent medical examinations that he performs are for the defense. (RX1, Pg. 20).

He examined Petitioner on December 1, 2020. (RX1, Pg. 6). This was the only time he saw Petitioner. (RX1, Pg. 18). He was paid by the Respondent or its agents in examining Petitioner and preparing the reports. For the first report and examination, the charge was around $1,000.00, but he could not recall the charge for the second report he wrote. (RX1, Pg. 19).

Dr. Phillips agreed that Petitioner had indicated he had no neck issues prior this November 13, 2018, accident. (RX1, Pg. 21). During his examination, Dr. Phillips testified Petitioner had reported neck symptoms at a 6 out 10 and that his neck pain was present since his injury. (RX1, Pg. 22). He also stated that Petitioner did not show any Waddell signs. (RX1, Pg. 22).

Dr. Phillips testified that the November 2018 MRI showed a bulging disc with bone spurs on the right side. (RX1, Pg. 10). According to Dr. Phillips, the bulging disc was narrowing the area and probably compressing the takeoff of the C6 nerve root on the right side. (RX1, Pg. 10, 24). There was just minimal disc bulging on the left without any significant narrowing or compression of the nerve. (RX1, Pg. 10, 24). Although Dr. Phillips testified Petitioner's exam was unremarkable and there no objective findings on exam that specifically would substantiate what was seen on the MRI, he noted that Petitioner's symptoms on the right side "sounded like radicular complaints." (RX1, Pg. 10).

Upon completion of his examination, he opined that Petitioner has an underlying C5-6 degenerative spondylosis and has aggravated symptoms related to his injury. (RX1, Pg. 28; Resp Ex #1). He believed the treatment (including the physical therapy and epidural) was reasonable and related to Petitioner's subjective complaints as a consequence of the injury in question. (RX1, Resp Ex #1). Dr. Phillips indicated consideration of the recommended fusion was reasonable. (RX1, Pg. 11, 26). He testified the surgery would only be to address Petitioner's right sided arm complaints. (RX1, Pg. 11). Per Dr. Phillips, if Petitioner underwent the fusion surgery, it is anticipated that he would have an excellent outcome. (RX1, Pgs. 27-28). He stated the recommended procedure is one of the most reliable surgeries. (RX1, Pg. 28).

Following his review of additional medical records, it was Dr. Phillips understanding that Petitioner did not present with neck pain until December 27, 2018. (RX1, Pg. 31). In reviewing Dr. Salehi's medical records, he testified "There's not a specific notation of neck pain that I've got in my summary of the November 29 of '19 visit." (RX1, Pg. 30). He also testified that he did not see in the records that Petitioner's neck pain progressively worsened since he first started experiencing the neck pain. (RX1, Pg. 31). He further indicated in his March 12, 2021 report that there was no evidence that Petitioner had right arm symptoms in the period following his injury in question out to at least 3 months subsequent to the injury. (RX1, Resp Ex #3).

Based on his review of additional records, Dr. Phillips changed his opinions on causation. (RX1, Resp Ex #3). He testified that the recommended surgery is not specifically related to any injury suffered as a result of the accident and that Petitioner likely sustained a sprain/strain of his underlying degenerative cervical condition. (RX1, Pgs. 16, 18, 28-29). Despite his change of opinions, Dr. Phillips did acknowledge that mechanism of Petitioner's injury could be a cause for the C5-6 disc herniation or an aggravation of an underlying C5-6 degenerative spondylosis condition. (RX1, Pg2. 25-26).

Dr. Phillips testified that the deep tendon bicep reflex is a reflex test that examines the function of the C5 and C6 nerve roots. (RX1, Pg. 34). He agreed that when the reflex response in performing this test is absent, this could be an indication that the nerve roots at C5 and C6 have been damaged or affected. (RX1, Pg. 35). He testified that if Petitioner had radicular pain in a C6 distribution in the right arm within a week or two of the injury, his opinion would change. (RX1, Pg. 33).

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

When a pre-existing 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 pre-existing 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). An 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,* 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, 849 (3rd Dist. 2000).

In the present case, the Arbitrator notes that there is ample evidence to support that Petitioner's cervical condition is causally related to his November 13, 2018 accident. First, there is diagnostic evidence showing pathology at the C5-6 level. Per the radiologist, the November 2018 MRI (which was taken within a two days of the accident) showed at C5-6 a 4-5mm disc/osseous protrusion that predominated in the right posterolateral direction. It also showed mild to moderate left and severe right foraminal stenosis. Dr. Sampat agreed with the radiologist's finding noting although the disk was more right sided in nature, there was foraminal stenosis bilaterally. While Dr. Phillip did not see any significant narrowing or compression of the nerve on the left, he did acknowledge that there was probably compression of the takeoff of the C6 nerve root on the right side. Consistent with pathology identified on the MRI, the January 2019 EMG revealed right C6 and C7 radiculopathy and nerve dysfunction.

Second, the symptoms Petitioner began to experience following his injury were consistent with the C5-6 pathology identified on the MRI's and EMG. Per Dr. Sampat, the symptoms affected by the nerve at C5-6 could include pain, numbness, or tingling from the base of the neck down to the shoulder blade; and sometimes into the bicep, the dorsal, and radial part of the arm. Dr. Sampat testified that these symptoms can vary and progress. The Petitioner's neck and arm symptoms reported by himself and noted throughout the medical records corresponded to pathology stemming from the C5-6 nerve root.

The Arbitrator notes that Petitioner was not experiencing any type of neck pain, or right or left arm complaints prior to his fall. He had also never treated for any such condition prior to his accident. Within one day of his accident Petitioner began to report neck pain. Per the records and Petitioner's testimony this neck pain has continued and progressed throughout his treatment. Although the first medical notation of right arm complaints did not appear until December 26, 2018, Dr. Sampat's testimony established that this can happen and the development of radicular symptoms can occur or worsen at a later point in time depending on the activities a person performs. Certainly, Petitioner's activities were somewhat limited given the nature and severity of his left shoulder injury. Further, Petitioner testified that his right arm pain started within the second day after his injury; but that it was not continuous and he would have the pain on and off.

Moreover, the Arbitrator notes that there was early evidence of cervical pathology. During Dr. Salehi's initial examination on November 28, 2019, it was noted that Petitioner was having cervical paraspinal muscle spasms and had absent deep tendon reflexes at the right biceps. The same absent reflex was again noted during his second visit with Dr. Salehi on December 27, 2018. Dr. Sampat testified this finding corresponds to the C5-6 level. Dr. Phillips concurred. He testified that the deep tendon bicep reflex test examines the function of the C5 and C6 nerve roots and agreed that an absent response is an indication that the nerve roots at C5 and C6 have been damaged or affected.

Third, Dr. Sampat's testimony established that there was a causal relationship between Petitioner's fall and the onset of his symptoms at C5-6. Although Dr. Sampat could not determine if Petitioner had developed the disk herniation at the time of the accident, he believed it was more likely than not that the accident aggravated Petitioner's asymptomatic cervical condition. He believed Petitioner's fall was a competent cause because Petitioner's head suddenly moved left and right, and then he had a fall that was hard enough to dislocate his left shoulder. This is consistent with Dr. Salehi's opinion that Petitioner's neck pain was a result of his work accident and secondary to a disc herniation at C5-6. Further, even Dr. Phillips acknowledged that Petitioner's mechanism of injury could be a cause of the C5-6 disc herniation or an aggravation of an underlying C5-6 degenerative spondylosis condition.

Dr. Phillips, after first opining that Petitioner sustained a cervical injury causing C5-6 disc herniation with aggravation of an underlying degenerative condition, changed his opinions after relying on medical records he reviewed. He was now of the opinion that the accident only caused a sprain/strain of the neck. The Arbitrator again notes that Petitioner was asymptomatic prior to his accident and has had ongoing neck pain since then that has not resolved. The Arbitrator also notes that Dr. Phillips may not have had the full picture concerning Petitioner' symptoms. Despite reviewing the medical records, Dr. Phillips did not seem to correctly understand when Petitioner first began presenting with neck pain. He testified it was not until December 27, 2018 that Petitioner presented with neck pain, despite Petitioner reporting the same to Dr. Sandas the day after his accident. Petitioner had also reported neck pain to Dr. Salehi on November 29, 2018 and to his therapist on the same day. The medical records also indicate that Petitioner's neck pain was progressively worsening, something Dr. Phillips was also unaware of based on his testimony. Finally, Dr. Phillips was under the incorrect impression that Petitioner did not develop right arm pain until three months after the accident when it actually was reported to his providers in about half that amount of time. Petitioner also testified he was having on and off right arm pain since his accident occurred.

Upon review of all of the evidence cited herein, including the credible testimony of Petitioner, the Arbitrator finds the testimony of Dr. Sampat more persuasive than the testimony of Dr. Phillips and concludes that Petitioner's present cervical condition of ill-being, is causally related to his November 13, 2018, work accident. As there is no dispute concerning Petitioner's left shoulder and in consideration of all the evidence including the opinions and records of Dr. Shah, Dr. Marra and Dr. McCall, the Arbitrator also finds that Petitioner's left shoulder condition of ill-being is also causally related to his November 13, 2018, work accident.

**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, THE ARBITRATOR FINDS AS FOLLOWS:**

Petitioner submitted into evidence as Petitioner's Exhibit 9 the following unpaid medical bills:

| | |
|---|---|
| Advanced Midwest Radiology | $204.00 |
| Prescription Partners | $2,327.66 |

| | | |
|---|---|---|
| Prescription Partners | | $2,050.28 |
| Palos Anesthesia Associates | | $3,770.00 |
| Advocate Lutheran General Hospital | | $3,653.00 |
| Parkview Orthopaedic Group | | $3,948.84 |
| Morris Hospital | | $2,910.00 |
| Morris Hospital | | $412.00 |
| | **Total** | **$19,275.78** |

Petitioner's testimony and the medical evidence established that the above-referenced bills correspond to treatment Petitioner had for his left shoulder and cervical conditions. All of the treatment and medications had been prescribed by his medical providers. There is no dispute concerning the treatment Petitioner underwent for his left shoulder. There is also no dispute about the treatment Petitioner had received for his cervical condition. Dr. Sampat had prescribed physical therapy and epidural injection for his neck. Dr. Hussain agreed with the cervical epidural recommendation and even Dr. Phillips testified that the treatment Petitioner had undergone was reasonable. The Arbitrator notes that no evidence was presented disputing the reasonableness of the above-listed charges.

Based upon the above and the Arbitrator's findings on causal connection, the Arbitrator finds that Petitioner is entitled to receive from Respondent-Kinser compensation for the above listed bills pursuant to paragraph (a) of Section 8 of the Illinois Workers' Compensation Act and in accordance with current fee schedule pursuant to Section 8.2 of the Act.

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

The Arbitrator notes that Petitioner underwent conservative treatment in the form of both therapy and an epidural injection for his cervical condition. Neither provided any significant or lasting relief of Petitioner's cervical symptoms. It has been over three and half years since Petitioner's accident, and he continues to have neck pain and pain in both arms, with the right arm being worse. The pain is bad enough in his right arm that when sleeping Petitioner uses his leg or knee to put pressure onto his arm for relief. The discomfort he experiences also causes him to wake up 5 to 6 times a night.

Dr. Sampat has proposed a C5-6 anterior cervical discectomy and fusion to address Petitioner's ongoing cervical symptoms. The evidence is clear that this procedure would be beneficial to Petitioner and help relieve his ongoing symptomology. Per Dr. Sampat, the surgery would address Petitioner's foraminal stenosis on the left and right sides as well the herniation on the right and ultimately help Petitioner's neck and arm pain. Dr. Sampat believes that outcome would be an 80 percent improvement in Petitioner's right upper extremity pain. Dr. Phillips agreed that the proposed surgery would help Petitioner's right arm complaints and he anticipates that Petitioner would have an excellent outcome from the surgery.

Further, the testimony of Dr. Sampat and Dr. Phillips show that they both believe that the proposed surgery is a reasonable treatment option for Petitioner. Dr. Phillips testified that it is one of the most reliable surgeries and that it would be a reasonable option to address Petitioner's right arm symptoms. Dr. Sampat testified that the surgery is reasonable because Petitioner has neck pain shooting down his arm that corresponds with his EMG, MRI and physical exam; has not responded to nonoperative treatment measures; and has had persistent symptoms for long periods of time.

Petitioner is aware of what is involved with the cervical surgery that Dr. Sampat has recommended. He would like to have the procedure so he can live a normal life again and so he can sleep through the night without waking up multiple times due to his pain and discomfort.

Based upon the foregoing, and having considered the totality of the credible evidence adduced at hearing, the Arbitrator finds that the proposed surgical procedure that Dr. Sampat recommended is a reasonable and necessary medical treatment option that is causally related to Petitioner's November 13, 2018, accident. Pursuant to Paragraph (a) of Section 8 of the Illinois Workers' Compensation Act, the Arbitrator orders the Respondent-Kinser to authorize and pay for this procedure and any other reasonable and necessary medical or prescription expenses related thereto.

**WITH RESPECT TO ISSUE (O), WHETHER RESPONDENT DEKALB WAS A BORROWING EMPLOYER UNDER SECTION 1(a)(4) OF THE ACT, THE ARBITRATOR FINDS AS FOLLOWS:**

An employee in the general employment of one employer may be loaned to another for the performance of special work and become the employee of the special or borrowing employer while performing such special work. A*.J. Johnson paving Co. v. Industrial Commission*, 82 Ill.2d 341, 346-347 (1980). The borrowed employee doctrine is also specifically incorporated into Section 1(a)(4) of the Act. *Reichling v. Touchette Regional Hospital, Inc*., 2015 IL App (5th) 140412 ¶ 26.

In considering whether a borrowed employee relationship exists, it must be determined whether the alleged borrowing employer had the right to direct and control the manner in which the employee performed the work; and whether there was an express or implied contract of hire between the employee and the alleged borrowing employer. *A.J. Johnson Paving Co*., 82 Ill.2d 341, 348.

In identifying the employer of a loaned employee, the dominant circumstance is the right to control the manner in which the work is done. *Raymond Concrete Pile Co. v. Industrial Commission*, 37 Ill.2d 512, 516 (1967), and *Suter v. Illinois Workers' Compensation Commission*, 2013 IL App (4th) 130049WC ¶ 13. There are several factors that are critical in determining whether the borrowing employer had the right to control and direct the manner of employee's work. These factors are whether:

1. The employee worked the same hours as the borrowing employer;
2. The employee received instructions from the borrowing employer's employees;
3. The loaning employer's supervisors were not at the worksite;
4. The borrowing employer told the employee when to start and stop working; and
5. The loaning employer relinquished its equipment to the borrower. *Morals v. Herrera*, 2016 IL App (1st) 153540 ¶ 24.

Courts have also considered whether the purported borrowing employer could dismiss the employee from service at its worksite, notwithstanding that the borrowing employer could not discharge the employee from her employment with the loaning employer. *Id*. Other factors include the manner of hiring, the mode of payment, the nature of the work, and the manner of direction and supervision of work. *Crespo v. Weber Stephen Products Co.*, 275 Ill.App.3d 638, 641 (1995).

The Arbitrator concludes that the evidence demonstrates Respondent-Kinser and not Respondent-DeKalb had the right to control and direct the manner of Petitioner's work. In examining the above-listed factors, Petitioner's work hours were set by Respondent-Kinser and were not the same hours as Respondent-DeKalb had for its employees. Petitioner also did not receive instructions from Respondent-Kinser's employees.

In fact, Petitioner did not have any communications with anyone from Respondent-DeKalb and only took direction from the crane operator, Mr. Fabry. Mr. Fabry was Petitioner's supervisor, was an employee of Respondent-Kinser, and was at the worksite during and after Petitioner's accident.

There was also no evidence that Respondent-DeKalb told any employees of Respondent-Kinser when to start and stop working. Petitioner's workday on November 13, 2018 actually began before he arrived at the Maple School site as he first traveled to Mr. Kinser's yard to pick up the necessary equipment for the job. Moreover, Respondent Kinser was the owner of the crane and equipment and at no time did any of its employees relinquish control of this equipment to any of Respondent-DeKalb's employees. If such a scenario were to happen, per the testimony of Mr. Kinser, he would need to provide approval. No such approval was given for the Maple school job.

Although Mr. Kinser testified the customer (Respondent-DeKalb) directs the crane and establishes the location that the crane is to be set up and operated, this was contrary to the testimony Gary Glidden. Mr. Glidden testified that the crane operator (a Respondent-Kinser employee) makes the determination as to where the crane is to be placed and how the crane is to be operated. Further, Mr. Glidden testified that Respondent-DeKalb did not direct Petitioner how to perform his job duties. He also testified that the crane operator has the authority to override any suggestions Mr. Glidden would make as to where the crane would be placed. Finally, Mr. Glidden's testimony established that Respondent-DeKalb did not have the ability to fire a Respondent-Kinser employee from a job site.

Consistent with Mr. Glidden's testimony, Petitioner testified that when working as an oiler, he is under the supervision, control and direction of the crane operator which in this case was Mr. Fabry. While the customer would tell Petitioner (if working as the crane operator) which product to lift, it was Petitioner that would determine the potential hazards and then chose the best location to set up the crane.

The only direction provided to Respondent-Kinser's employees was what item was to be lifted and where that item was to be placed. However, no employees of Respondent-DeKalb directed Petitioner or Mr. Fabry as to how to operate, maintain, assemble and/or disassemble the crane and the equipment Petitioner was working on. The evidence is clear that none of Respondent-DeKalb's employees had any knowledge or training concerning how to set up and operate cranes and how to perform oiler duties. Likewise, Petitioner had no knowledge or training in HVAC installation which was the business that Respondent-DeKalb was in. Petitioner also never received a W-2 from Respondent-DeKalb nor did he ever receive any form of payment from Respondent-DeKalb for work performed in 2018. Rather, he was hired by Respondent-Kinser through his union and was paid hourly by Respondent-Kinser.

Regarding the second prong, in order to demonstrate that a contract existed, the employee must have at least implicitly acquiesced in that relationship. *A.J. Johnson Paving Co*., 82 Ill.2d 341, 350. Additionally, implied consent is established where the employee knows that the borrowing employer is generally in charge of, and controls, his performance. *Crespo*, 275 Ill.App.3d 638, 641 (1995). Similarly, the employee's acceptance of direction shows his acquiescence to his relationship with the employer. *Id.*

In the present case, Petitioner had no knowledge and had no indication that Respondent-Kinser was in control or in charge of his performance of his job duties. At all times, when performing his work, Petitioner believed he was under the exclusive direction and control of Respondent-Kinser. There is also no evidence that Petitioner accepted any direction from Respondent-DeKalb or its employees. Accordingly, the Arbitrator finds there was no implied contract of hire between Petitioner and Respondent-DeKalb.

In examining whether there was an express contract of hire, the Arbitrator considers the ticket used between Respondent-Kinser and Respondent-DeKalb. While the language on the back of the ticket in effect stated that Respondent-DeKalb had exclusive control over the employees of Respondent-Kinser, in actuality this was not the case. The evidence as noted above clearly demonstrated that Petitioner was under the control of Respondent-Kinser. Further, even if the ticket had some binding effect, the evidence shows it was not presented and signed by Mr. Glidden until after the job had been completed. This was the testimony of Mr. Glidden and it was consistent with Mr. Kinser's testimony that that ticket was not provided to Respondent-DeKalb prior to November 13, 2018 and that he was unaware as to when the ticket was first presented to Respondent-DeKalb. The Arbitrator notes that neither Petitioner or Mr. Fabry were called by the Respondent to rebut Mr. Glidden's testimony. Accordingly, the provisions on the back of the ticket were not agreed upon at the time of the accident. Moreover, Petitioner was not aware of any written agreement between Respondent-Kinser and Respondent-DeKalb. Likewise, Mr. Glidden was not aware of any of the provisions on the back of the ticket, and he was not told or asked to ever review the terms prior to signing the ticket. He believed the ticket was simply used to provide information about the start an and stop times of the job.

Finally, the loaned employee concept depends on a contract of hire "between the employee and the special employer," not the details of the contract between the two employers. *A. J. Johnson Paving Co*., 82 Ill.2d 341, 348. As Petitioner did not sign the ticket and was not aware of the ticket or the terms of the ticket, the ticket cannot be deemed an express contact of employment between Petitioner and Respondent-Kinser.

The Arbitrator finds Petitioner and Mr. Glidden to be more credible than Mr. Kinser. Based upon the foregoing, and having considered the totality of the credible evidence adduced at hearing, the Arbitrator concludes that Respondent-DeKalb was not a borrowing employer under Section 1(a)(4) of the Act and that Respondent-Kinser was Petitioner's employer at the time of his November 13, 2018, accident.

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 11WC038403 |
| Case Name | Ruben Martinez v.<br>City of Chicago Fleet Management |
| Consolidated Cases | |
| Proceeding Type | Petition for Review |
| Decision Type | Commission Decision |
| Commission Decision Number | 23IWCC0538 |
| Number of Pages of Decision | 14 |
| Decision Issued By | Amylee Simonovich, Commissioner |

| | |
|---|---|
| Petitioner Attorney | William H. Martay |
| Respondent Attorney | Neil Hynes,<br>Stephanie Lipman |

DATE FILED: 12/18/2023

/s/Amylee Simonovich, Commissioner

Signature

23IWCC0538

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

Ruben Martinez,

Petitioner,

vs. NO: 11 WC 038403

City of Chicago Fleet Management,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of causation, medical expenses, reimbursement and hold harmless of medical bills, and permanent partial disability ("PPD"), 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 thereof.

The Commission modifies the first sentence of the first full paragraph on page 9 of the Arbitration Decision to read, "Based on the medical evidence provided and finding Petitioner's testimony not credible, the Arbitrator finds that Petitioner's back and head conditions were causally related to the September 6, 2011 work accident through May 22, 2012, that being the date on which Dr. Glantz found Petitioner was at maximum medical improvement."

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 May 3, 2022, is modified as stated herein, and otherwise affirmed and adopted.

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.

**December 18, 2023**

o: 10/17/2023 AHS/kjj

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

051

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

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

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 11WC038403 |
| Case Name | MARTINEZ, RUBEN v. CITY OF CHICAGO |
| Consolidated Cases | |
| Proceeding Type | |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 11 |
| Decision Issued By | Elaine Llerena, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | William Martay |
| Respondent Attorney | Lucy Huang |

DATE FILED: 5/3/2022

**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

**Ruben Martinez**
Employee/Petitioner

v.

**City of Chicago**
Employer/Respondent

Case # **11** WC **038403**

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 20, 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 6, 2011**, 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 $**42,002.48**; the average weekly wage was $**807.74**.

On the date of accident, Petitioner was **61** years of age, ***married*** with **0** dependent children.

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

Respondent shall be given a credit of $**21,685.40** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**21,685.40**.

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

**ORDER**

Respondent shall pay Petitioner permanent partial disability benefits of $484.46 per week for 45 weeks, because the injuries sustained caused the 9% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

Petitioner's request for reimbursement for out-of-pocket expenses ($610.40) and for a hold harmless for medical bill payments made by Petitioner's group insurance after May 22, 2012, 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.

*Elaine Llerena* **MAY 3, 2022**

Signature of Arbitrator

**STATEMENT OF FACTS**

It is stipulated to by the parties that on September 6, 2011, Petitioner sustained an injury arising out of and in the course of his employment with Respondent. Petitioner's job title was Garage Attendant for the Department of 2FM. On September 6, 2011, while fixing a truck motor, Petitioner slipped, fell backward, and injured his head, back, and neck.

Treatment records from Petitioner's primary care physicians ("PCP") from Advocate Health Care ("Advocate") show that Petitioner had received prior treatment to his back, lower extremities, upper extremities, and ears, as well as treatment for headaches, sleeping problems, and depression. The record also shows that Petitioner has other health issues such as depression, gout, diabetes, hyperlipidemia, and obesity. (RX4)

On March 24, 2005, Petitioner was seen at Advocate with complaints of ear pain. It was noted that Petitioner had a history of severe hyperlipidemia. At this visit, Petitioner was diagnosed with otitis media, tinea pedis, hyperlipidemia, and hematuria (RX4, pg. 583) On November 12, 2005, Petitioner presented at Advocate with complaints of lower back pain. Dr. Baez, Petitioner's primary physician, wrote, "This is a 55-year-old Hispanic male with a history of low back pain." (RX4, pg. 565) Petitioner was diagnosed with low back syndrome with spasm. *Id.* On December 8, 2005, Petitioner was seen at Advocate with complaints of left knee pain and difficulties with bending the walking. (RX4) On December 30, 2005, Petitioner was seen again with complaints of exacerbation of gouty arthritis of the left knee. Dr. Baez noted, "This is a 55-year-old Hispanic male with a history of gout. He has an exacerbation of gouty arthritis of the left knee." (RX4, pg. 552) On January 22, 2007, Petitioner was seen again with complaints of left knee pain. (RX4) On August 1, 2007, Petitioner reported that he had not been feeling well and he complained of left ear pain and right ear pain. Petitioner also reported of neck pain and joint pain. (RX4, pg. 530) On November 2, 2007, Petitioner again reported complaints of back pain (RX4, pg. 526) On March 26, 2008, treatment notes indicate that Petitioner raised his voice during his encounter with the office staff. It was noted, "Per wife, he had been like this since Prozac ran out. He also drinks ETOH heavily." (RX4, pg. 521) On March 16, 2010, Dr. Enrique Arana, Petitioner's PCP, wrote a letter to Petitioner's department. The doctor wrote, "This letter is a request for Mr. Ruben Martinez. This patient has been treated for major depression with Prozac 20 mg. However, this medication produces mild drowsiness during his afternoon shift working hours. He will be benefit from working the day shift." (RX4, pg. 593) On March 18, 2010, due to Petitioner's complaints of frontal headaches, x-rays were performed, which revealed normal findings. It was noted that if Petitioner's symptoms persisted, a CT scan should be considered. (RX4, pg. 591) On April 29, 2010, Petitioner reported earache and sore throat along with left elbow pain. It was noted "pain in left elbow, works using his left arm, constantly." (RX4, pg. 368) Petitioner was diagnosed with anxiety, otitis media, hyperlipidemia, diabetes mellitus, lateral epicondylitis of the left elbow, and chronic major depression. (RX4, pg. 370) Dr. Arana advised Petitioner to avoid repetitive use of the left arm. The doctor also noted, "Discuss with supervisor about change in his job duties." (RX4, pgs. 370, 479) On October 8, 2010, Petitioner was seen by Dr. Rosen, an ophthalmologist, at Advocate for diabetic retinopathy evaluation (RX4, pgs. 362-363) On October 11, 2010, Petitioner complained of earache and sore throat, and decreased hearing. Dr. Arana noted, "Left elbow pain, uses his arms for all types of duties now pain is worst. Diabetic check-up. Last Friday after work his wife did no[t] pick him up from work. [H]e left to a place to drink he did not arrive until Sunday. [H]e had been driving all 3 days he did not sleep. I ask several questions where he was, does not recall. I ask him if his wife was worried and report to police. [N]o answer, he appears besides sad confused. Has history of depression, his medication was changed in the pharmacy to a generic. [His] daughter left to Tampa to study he has become more depressed, has memory loss or attention." (RX4, pg.359) Petitioner reported that he felt depressed, angry and could not stay at home. Petitioner also reported, "His last episode of getting lost away for the whole weekend." (RX4, pg. 359) Petitioner was diagnosed with anxiety, otitis media, hematuria, hyperlipidemia, diabetes mellitus, lateral epicondylitis of the

left elbow, and chronic major depression (Rx. 4 p.361). Dr. Arana wrote, "I WILL REFER TO A PSYCHIATRIST AND NEUROLOGIST AND DISCUSS WITH WIFE. HE IS A HIGH RISK PATIENT." (RX4, pg. 361)

On February 10, 2011, Petitioner complained of left ear pain, and recurrent left shoulder and elbow pain. Petitioner also reported of feeling depressed at work (RX4, pg. 326) Petitioner was diagnosed with earache in the left ear, otitis media, hyperlipidemia, diabetes mellitus, and lateral epicondylitis of the left elbow. (RX4, pg. 328) Dr. Arana wrote a note for Petitioner to request for change of Petitioner's work duties due to his complaints of left arm pain. (RX4, pg. 328) Petitioner was also prescribed with Cipro ear drops. (RX4, pg. 328) On May 14, 2011, Petitioner reported recurrent gout flare-up in both hands. (RX4, pg. 312) On August 24, 211, Petitioner presented at Dr. Arana's office for a follow-up visit. Petitioner reported of arthralgias of the left elbow and ankles. (RX4, pg. 303) Petitioner also complained of headaches, which had occurred 2 weeks ago. (RX4, pg. 303) Physical examination of the ears showed "abnormalities." (RX4, pg. 305) Decreased in hearing was noted in both ears. (RX4, pg. 305) Petitioner was diagnosed with headache, hearing loss, and chronic tension-type headache. *Id.* Dr. Arana ordered an audiogram. *Id.*

On the date of the September 6, 2011, work accident, Petitioner sought treatment at Resurrection. (PX1) Petitioner was diagnosed with a right arm abrasion, chest wall contusion, concussion with loss of consciousness. *Id.*

On September 9, 2011, Petitioner sought treatment at MercyWorks. (PX2) Petitioner reported that while he was fixing a truck, he slipped and fell backward cutting his left forearm on a sharp metal and he also had laceration over the right posterior chest wall. On physical examination, he was not in acute distress. His neurological exam was within normal limits with no focalization. There was mild diffuse tenderness over the right upper back and tenderness around the laceration area which was in the mid-posterior chest wall and at the posterior axillary line. The laceration was longitudinal. It was about 4 to 5 cm long. There were three sutures in place with no sign of infection. On the left forearm, there was a linear abrasion about 4 to 5 cm with no sign of infection. All extremities had normal power and reflexes. Petitioner was diagnosed with right posterior wall laceration and contusion and left forearm abrasion. Petitioner was advised to continue taking the prescribed medications and was to return for follow-up.

On September 15, 2011, Petitioner attended a follow-up visit and was diagnosed with a right posterior chest wall contusion and laceration, left forearm abrasion, post traumatic headaches, and neck strain. *Id.* Neurological exam was within normal limits. CT scan of the head was ordered at that time.

On September 16, 2011, A CT scan of the head was performed, the results of which were negative for an acute intracranial process. *Id.*

The record shows that Petitioner mostly sought treatment for his back pain, neck pain, joint pain, headaches, hearing issues, ear pain and depression with his PCPs, Dr. Enrique Arana and Jorge Kurganoff from Advocate (PX4, PX9, RX4)

On December 1, 2011, Dr. Arana noted that Petitioner's wife would like to talk to the doctor about Petitioner's depression. Dr. Arana noted, "Wife extremely worried. The patient has not worked since job related injury. Headaches, swelling eyes and depression. Ruben had a discussion with their daughter 1 week ago, regarding family problem. Since argument the patient has severe suicidal ideation. Wife stated 1 week ago patient told her that he has a plan to die, that he has person already to do the job that is gonna look like robbery assault." (RX4, pg. 276) Dr. Arana further noted that Petitioner has major depression and that he should not be

driving. (RX, pg. 277) The doctor further noted that Petitioner is a high-risk patient and that he should be evaluated by a psychiatrist. *Id.*

Petitioner returned to see Dr. Arana on December 12, 2011. Petitioner reported that he had headaches and he felt dizzy. Dr. Arana noted Petitioner reported that he "fell at home several times." (RX4, pg. 271) Dr. Arana explained to Petitioner again that he needed to see a psychiatrist regarding his depression. (RX4, pg. 274)

Petitioner continued to attend follow-up visits at MercyWorks from September 19, 2011, to March 13, 2012. Petitioner's neurological examinations were generally within normal limits. (PX2) Due to Petitioner's complaints of headaches and dizziness, he was discharged from the clinic and referred to a neurologist for further evaluation *Id.*

In February 2012, Petitioner had started seeing Dr. Kurganoff at Advocate (PX4, PX9, RX4)

On May 22, 2012, Petitioner attended a Section 12 examination with Dr. Russell Glantz at Respondent's request. (RX2) Petitioner reported that following the work incident on September 6, 2011, Petitioner has started to experience headaches, lower back pain, ear pain, dizziness, and hearing loss. Petitioner also reported of memory problems. Petitioner stated that prior to the work injury, he did not have any of the alleged symptoms. Physical examination revealed that with respect to gait, Petitioner wanted to use a cane. However, when he walked with his cane, he had a narrow base. Walking with the cane, he had a peculiar motion of his right leg, not physiologic. Without the cane, he had obvious astasia-abasia. He had a bizarre clumsy gait but always had a narrow base and did not fall. Petitioner was alert and oriented. Cranial nerve examination revealed that the extra ocular motions were full without nystagmus. With up gaze and left lateral gaze, he developed pain. His visual fields were full. There was no facial asymmetry or tongue asymmetry, and facial sensation was normal. His pupils were 3-4 mm and equal. With a tuning fork vibrating near his right ear, he said he had almost 0 hearing out of the right side but normal on the left. The Weber lateralized to the left side.

Dr. Glantz noted in this physical examination that Petitioner's knee reflexes were 1-2 and essentially absent at the ankles. Upper extremity reflexes were 1-2 and symmetrical. With respect to the plantar responses, he had fairly brisk withdrawal bilaterally. Strength was normal throughout. Finger-nose testing was slow but ataxic. There was a functional component to his response. Heel-knee testes were normal. With light palpation over the neck and head, he had pain in every area that he was touched. The muscles of his neck were soft. He had a healed, fading right thoracic scar and similarly a healed, fading left arm scar. As far as sensation was concerned, he had reduced pin sensation from the toes to the mid legs and from the tips of the fingers to about 2 inches above the wrist. Touch sensation was reduced in the same zones in the lower and upper extremities. Gross proprioception was normal, but with very fine motions, he was slightly off bilaterally in the feet.

Dr. Glantz opined that Petitioner had persisting subjective symptomatology without any objective abnormality on his neurological examination. Petitioner's gait pattern reflected marked symptom magnification. The doctor noted, "My examination cannot objectify his subjective complaints of hearing loss out of the right ear. His complaint of memory dysfunction beginning five to six months ago (well after his injury) as well as his complaint of memory dysfunction is progressive, is not physiologic as would relate to his injury, and is not objective on my examination." Dr. Glantz further stated "From the neurological point of view, no further treatment is needed. He has been appropriately evaluated and treated at Mercy Works. Given his injury and fall, treatment relating to symptoms for a few weeks was reasonable and necessary. At this time, there is no objective abnormality requiring further and further treatment from the neurological point of view. "Dr. Glantz also stated, "His current symptoms are not caused by the accident which occurred in September of 2011. As stated above, give his injury, symptoms for a few weeks would have been consistent with that injury. There are no objective abnormalities at this time. He has marked symptom magnification of his gait pattern." Dr. Glantz

found that Petitioner had reached maximum medical improvement ("MMI") and that he could return to work full duty.

Dr. Kurganoff's treatment note dated June 5, 2012, revealed that the doctor noted that Petitioner exaggerated his symptoms. The doctor noted, "His gait walking through the parking lot was much better (I watched him through the window)" (RX4, pg. 228; RX5; PX9) Thereafter, Petitioner was found to be at MMI and released back to work full duty.

After Petitioner returned to work, he continued to attend follow-up visits with Dr. Kurganoff. (RX4) Dr. Kurganoff noted on August 2, 2013, that he suspected Petitioner's headaches were due to his ear infection. (RX4, pg. 139)

On November 13, 2013, Dr. Kurganoff noted that Petitioner's back pain had improved after receiving injections and that Petitioner "no longer uses a cane or back brace." (RX4, pg. 128)

On April 7, 2014, Petitioner reported to Dr. Kurganoff that he fell several times at home (RX4, pg. 108)

On February 25, 2016, Petitioner attended a Section 12 examination with Dr. Steven Horwitz at Respondent's request. At this visit, Petitioner reported that he had no hearing loss, tinnitus, and balance problems prior to the date of the incident. Petitioner also reported that he almost had no hearing in the right ear and very poor hearing in the left ear. (RX3, pg. 1) During the physical examination, Dr. Horwitz noted that Petitioner had issues with hearing. The right tympanic membrane was slightly thick but did move; the left tympanic membrane was normal. The Weber tunning fork lateralized to the left ear. The Rinne was airborne in the left ear and not heard at all in the right ear. Qualitatively, the left ear heard better than the right ear. The rest of the physical examination was normal. (RX3, pg. 2) Dr. Horwitz noted, "Mr. Martinez said he had no hearing loss and no balance problems prior to the accident. Without any pre-existing audiograms, I can neither confirm nor deny this. Thus, presently he has persistent (1) profound hearing loss in both ears. (2) tinnitus in the head or both ears, and (3) imbalance. Since the tinnitus is subjective in the vast majority of patients, meaning only they can hear it, I can neither confirm nor deny that he has it. However, with the extent of the hearing loss he has, tinnitus is certainly not unexpected. The imbalance is by history. At least in the office his gait was normal." (RX3, pg. 3) Dr. Horwitz also stated, "As discussed above, it is reasonable to assume that he did indeed incur a concussion and this the post-concussion syndrome. Disequilibrium and sometimes hearing loss resulting from the post-concussion syndrome can resolve or certainly stabilize within 12-14 months of the head trauma. (1) Thus, the initial right ear hearing loss documented on the February 2012 audiogram in relation to the left ear might have been caused by the accident. The profound progression of his hearing loss in both ears starting in 2013 (close to 2 years after the accident) is completely incompatible with the accident. This is highly suggestive of an auto-immune inner ear hearing loss, idiopathic sensorineural hearing loss of adulthood, or psychogenic hearing loss. (2) The imbalance component did seem to improve with vestibular physical therapy in 2012 but he has not had any of that therapy since. Furthermore, he apparently regressed when he stopped that. As mentioned above, usually imbalance from post-concussion syndrome improves at least stabilizes after 12-14 months, but his imbalance seems to have progressed (by history). (3) His tinnitus cannot be documented but he says it has gotten worse, which would be consistent with the markedly worsened hearing." *Id.* Dr. Horwitz further stated, "To confirm the extent of hearing loss, an auditory brainstem evoked response (ABR) test for thresholds should be considered, if the hearing loss is in dispute, as this test is complete objective. If the profound hearing loss is confirmed, he should probably undergo additional testing for auto-immune disease, but this would be outside of Workman's Compensation." *Id.* Dr. Horwitz also opined that Petitioner could turn to work full duty. *Id.*

Regarding Petitioner's lumbar spine**,** Petitioner initially sought treatment with his PCPs at Advocate. Due to his complaints of ongoing back pain, he was referred to Dr. Maunak Rana for pain management (PX4, PX6)

On July 16, 2012, an MRI of the lumbar spine was performed, which revealed disc bulging at levels L3-4, L4-5, and L5-S1 and multiple level degenerative disc disease with moderate spinal stenosis. (PX4)

On August 21, 2012, Petitioner attended the initial evaluation with Dr. Rana. (PX4, PX6) Petitioner reported that after the work accident, he had experienced headaches, hearing loss, bilateral joints pain of the knees, wrists, shoulders, and ankles. *Id.* Physical exam of the upper and lower extremities showed normal range of motion and normal strength. Physical examination of the lumbar spine showed reduced range of motion and tenderness. Straight-leg-raising test was negative bilaterally. The neurological examination was essentially normal with loss of hearing noted in the right ear. Petitioner was diagnosed with lumbar radiculopathy, degenerative disc disease of the lumbar spine, spinal stenosis and possible arthritis. Dr. Rana administered an epidural steroid injection ("ESI"). *Id.*

Petitioner underwent follow-up visits with Dr. Rana. *Id.* Overall, physical examinations of the upper and lower extremities were within normal limits. Physical examination of the lumbar spine generally showed tenderness, normal range of motion, normal strength, normal sensation, and normal reflexes. *Id.*

Petitioner underwent the second ESI on September 18, 2012. *Id.* On October 23, 2012, Petitioner underwent the third ESI. *Id.* On December 27, 2012, Petitioner underwent a facet joint steroid injection. *Id.* On February 11, 2013, Petitioner underwent a left medial branch block. *Id.* Petitioner underwent 5 additional ESIs on September 14, 2015, January 19, 2016, February 29, 2016, April 4, 2016, and May 3, 2016. *Id.*

Regarding Petitioner's complaints of ear pain and hearing loss, Petitioner was seen by his PCPs initially. Petitioner was referred to Dr. T. K. Venkatesan at Chicago EMT for further evaluation. (PX5)

On March 8, 2012, Petitioner underwent a hearing test. *Id.* Petitioner was found to have an asymmetrical right sensorineural hearing loss. Videonystagmography showed right peripheral weakness. *Id.*

Petitioner attended follow-up visits with Dr. Venkatesan on March 6, 2013, and December 11, 2013. (PX5) At the last office visit on January 29, 2014, Dr. Venkatesan noted that Petitioner's MRI of the brain showed normal findings. *Id.*

Petitioner continued to attend follow-up visits with his PCPs at Advocate for his back pain, headaches, and his other non-work-related conditions from 2014 to 2020.

Petitioner testified he started working as a Garage Attendant for Respondent in 2004. (Tr. 9) Petitioner testified that before the September 6, 2011, work incident, he did not receive any medical care for his back, legs, head and shoulder, and hearing loss. (Tr. 10-11) Petitioner also testified that on the day of the work incident, he fell and injured his head, arms, back, neck. (Tr. 11) Petitioner also stated that he suffered hearing loss after the work accident. *Id.* Petitioner testified that he went back to work as a Garage Attendant and ultimately retired in February 2018. (Tr. 14) Petitioner also testified that since the September 6, 2011, work accident, he has not had any new injuries to his head, back, legs, arms, and ears. (Tr. 17) Petitioner reported that he is still seeing the treating doctors every three months for medications. *Id.*

Petitioner stated that he still has headaches, back pain, bilateral arm pain, neck pain, and hearing loss (Tr. 19). Petitioner testified that he has difficulties with sleeping and walking due to the back pain. (Tr. 19) On cross-examination, Petitioner testified that his current weight is 5'9 and his weight is 230 pounds. (Tr. 20) Petitioner also testified that he returned to his job as a Garage Attendant in 2012 and he resumed earning the

same wages. (Tr. 21) Petitioner testified that he does not have an autoimmune inner ear disease and that his hearing loss occurred on the same day of the work accident. (Tr. 23)

Petitioner reported that he did not have any prior injuries to his head, back, neck, arms, legs, and ears. (Tr. 23-24) Petitioner also testified that he was diagnosed with depression after the work accident. (Tr. 25) Petitioner also testified that prior to the work accident, he did not have headaches, neurological issues, or balancing problems. *Id.* He testified that he was diagnosed with gout after the work accident. *Id.* Petitioner also testified that he was diagnosed with diabetes approximately 15 years ago. (Tr. 25-26)

When Petitioner was asked whether he was diagnosed with otitis media which is an ear infection in 2005, Petitioner testified that he did not remember and did not agree with the medical records from his PCP regarding references to a prior ear infection. (Tr. 26) When Petitioner was asked whether he had complained of knee pain and difficulties with walking and bending in 2005 and whether Petitioner was diagnosed with gout in 2005, Petitioner answered, "I don't remember very well, but it could be." (Tr. 27) Petitioner also testified that he did not remember and did not know whether he had reported issues with his ear to his treating doctor in 2007. *Id.* Petitioner also testified that he did not remember whether he had complained about his depression and sleeping issues in 2008. (Tr. 29-30) Petitioner did not remember that he had turned in a request to work the dayshift only in 2010 due to the side effects from his medications for depression. (Tr. 30-31) Petitioner also stated that he did not agree with the medical records referencing such a request. (Tr. 31) Petitioner did not remember reporting to his doctor complaints of headaches in 2010. (Tr. 32)

Petitioner further testified he does not remember reporting hearing loss to his PCP in 2010. *Id.* He also stated that he did not agree with the medical records referencing his complaints of hearing loss in 2010. *Id.* Petitioner testified that he did not remember reporting am earache and hearing loss to his PCP in February 2011. (Tr. 32-33) Petitioner also did not remember reporting to his PCP headaches and visual changes on August 24, 2011. (Tr. 33-34) Petitioner acknowledged that due to his complaints of hearing loss on August 24, 2011, his PCP ordered an audiogram. (Tr. 34)

Petitioner testified that he has not had any injuries to the back, head, ears, arms, and legs since the work accident. (Tr. 34-35) Petitioner also stated that he still sees his doctor every three months for his headaches, back pain, neck pain, and arm pain. (Tr.36) Petitioner also reported that he takes medications for his headaches and back pain on daily basis. (Tr. 37)

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

When determining the issues at hand, the Court must carefully weigh all the evidence presented. This includes the credibility and testimony of the petitioner, who was the only witness in the case at hand. In this case, Petitioner's testimony is questionable.

Petitioner's testimony was riddled with statements that directly contradict one another as well the accounts that he, personally, gave to his PCP. The Arbitrator notes that Petitioner's testimony contradicts the statements of his PCP. Additionally, the Arbitrator notes that Petitioner was argumentative and evasive when answering questions. The aforementioned cannot be ignored when weighing the medical evidence submitted which contradicts 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. Although Petitioner testified that he did not have any issues with his back, arms, and legs, and did not have headaches, ear pain, or hearing loss prior to

the work accident, the treatment records clearly show otherwise. Furthermore, the Arbitrator notes that Petitioner had complained of ear pain in 2005, and he continued to complain of ear pain as recently as February 2011 and of headaches as recently as August 2011. The Arbitrator also notes that while Petitioner testified that he did not reinjure his back, head, arms, legs and neck after the work accident, the medical records indicate that Petitioner reported additional falls at home after the work accident.

Based on the medical evidence provided and finding Petitioner's testimony not credible, the Arbitrator finds that Petitioner's back and head conditions are causally related to the September 6, 2011, work accident and that he reached MMI for these conditions on May 22, 2012, the date of Dr. Glantz's IME report. The Arbitrator finds that Petitioner's current conditions of ill-being (back, headaches, hearing loss, depression, and joint pain with both upper and lower extremities, and sleeping issues) are not causally related to the September 6, 2011, work accident.

**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, THE ARBITRATOR FINDS AS FOLLOWS:**

Petitioner is requesting reimbursement for Petitioner's out-of-pocket expenses in the amount of $610.40. (PX10) Furthermore, Petitioner is asking for Respondent to hold Petitioner harmless for the medical bills that were paid by the group health insurance in the amount of $10,392.92. (PX12) Respondent argues that all bills have been paid and Respondent is not liable for bills that have been paid by Petitioner and Petitioner's group insurance because the bills are for treatment of Petitioner's non-work-related conditions.

Pursuant the IME dated May 22, 2012, completed by Dr. Glantz, Petitioner was found to be at MMI and able to return to work full duty. In addition, the record shows that after returning to work, Petitioner generally sought further treatment for his non-work-related conditions. As such, the Arbitrator finds Respondent is not liable for bills that have been paid by Petitioner and Petitioner's group insurance because the bills are for treatment of Petitioner's non-work-related conditions. As such, Petitioner's request for reimbursement for payments that have been made by Petitioner and Petitioner's group insurance is denied.

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

Pursuant to Section 8.1b of the Act, the following criteria and factors must be weighed in determining the level of permanent partial disability for accidental injuries occurring on or after September 1, 2011:

(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.

(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.

With regard to subsection (i) of Section 8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator gives this factor no weight.

With regard to subsection (ii) of Section 8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a Garage Attendant 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 gives this factor great weight.

With regard to subsection (iii) of Section 8.1b(b), the Arbitrator notes that Petitioner was 61 years old at the time of the accident. The Arbitrator gives this factor some weight.

With regard to subsection (iv) of Section 8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that Petitioner did not suffer any loss of earnings because of the accident. Further, Petitioner returned to work in his prior capacity following the accident. The Arbitrator gives this factor great weight.

With regard to subsection (v) of Section 8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes Petitioner's complaints of headaches and back pain generally appear to be disproportionate to the objective medical findings. Additionally, Petitioner, despite his lack of recollection, has a substantial ongoing history of back, lower extremities, upper extremities, and ear problems, as well as a history of treatment for headaches, sleeping problems, and depression. The medical records also show that Petitioner's treatment and medication use has been generally effective in alleviating his symptoms. Petitioner was able to return to work full duty and worked in the same job that he worked prior to this incident until his retirement. The Arbitrator further notes that the treatment that he has received has been essentially routine and conservative in nature. Petitioner had no surgical intervention, and none has been recommended. The record shows that Petitioner made a complete recovery and returned to his usual and customary position with no restriction. The Arbitrator further notes that while Petitioner testified that he still experiences back pain and headaches, and he has to take medication daily, the medical evidence does not provide an apparent reason for the extent of the Petitioner's alleged ongoing difficulties with activities of daily living. Additionally, as noted above, Petitioner's testimony was inconsistent with the medical records. Therefore, the Arbitrator finds that the nature and extent of Petitioner's injuries are not as severe as he has alleged. The Arbitrator gives this factor substantial weight.

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 9% loss of use of the person as a whole pursuant to Section 8(d)(2) of the Act.

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

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|---|---|
| Case Number | 22WC021647 |
| Case Name | Chloe Varsek v.<br>State of Illinois - IYC Warrenville |
| Consolidated Cases | |
| Proceeding Type | Petition for Review |
| Decision Type | Commission Decision |
| Commission Decision Number | 23IWCC0539 |
| Number of Pages of Decision | 13 |
| Decision Issued By | Kathryn Doerries, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Thomas C Rich |
| Respondent Attorney | Thomas Owen |

DATE FILED: 12/19/2023

/s/ Kathryn Doerries, Commissioner

Signature

23IWCC0539

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 | ☐ None of the above |

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CHLOE VARSEK,

Petitioner,

vs. NO: 22 WC 21647

STATE OF ILLINOIS/IYC WARRENVILLE,

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 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 modifies the Order section in the Arbitrator's decision to strike "30 weeks" and replaces it with "25 weeks" to correspond to the number of weeks for a 5% loss of Petitioner's person as a whole.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 17, 2023, is, hereby otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $666.67 per week for a period of 5-5/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $600.00 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 Petitioner's person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the reasonable and necessary medical services, if unpaid, pursuant to the fee schedule as outlined in Petitioner's group exhibits, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given 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 credit, as provided in Section 8(j) of the Act.

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)*.

**December 19, 2023**

o-12/12/23
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 | 22WC021647 |
| Case Name | Chloe Varsek v. State of IL/IYC Warrenville |
| Consolidated Cases | |
| Proceeding Type | |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 10 |
| Decision Issued By | Michael Glaub, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Thomas C Rich |
| Respondent Attorney | Will Dimas |

DATE FILED: 5/17/2023

**THE INTEREST RATE FOR THE WEEK OF MAY 16, 2023 4.98%**

/s/ Michael Glaub, Arbitrator

Signature

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

May 17, 2023

/s/ Michele Kowalski

Michele Kowalski, Secretary
Illinois Workers' Compensation Commission

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**

**CHLOE VARSEK**
Employee/Petitioner

v.

**STATE OF IL / IYC WARRENVILLE**
Employer/Respondent

Case # **22** WC **21647**

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 **WHEATON, ILLINOIS**, on **04/06/2023**. 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 **04/04/2022**, 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 $**52,000.00**; the average weekly wage was $**1,000.00**.

On the date of accident, Petitioner was **27** 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 $**4,916.07**.

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

**ORDER**

Respondent shall pay Petitioner additional temporary total disability benefits of $666.67/week for 5 5/7 weeks from 07/01/2022 through 08/09/2022, as provided in Section 8(b) of the Act.

Respondent shall pay the reasonable and necessary medical services, if unpaid, pursuant to the Illinois Medical Fee Schedule as outlined in Petitioner's group exhibit, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall 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 compensation that has accrued from 7/5/2022 through 4/24/2023, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall pay Petitioner permanent partial disability benefits of $600.00/week for 30 weeks, because the injuries sustained caused the 5% loss of the person as a whole in relation to Petitioner's left shoulder, 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.

**Michael Glaub** **MAY 17, 2023**
Signature of Arbitrator

## FINDINGS OF FACT

This matter came before an Arbitrator appointed by the Commission pursuant to Petitioner's Motion for a hearing on all issues. The issues in dispute were causation, liability for medical bills and temporary total disability benefits for the dates of 7/1/2022 to 8/9/2022. (T. 4-6, 9, 10) The TTD dispute was related to Respondent offering light duty accommodations during that time period verses Petitioner being kept off work. (T. 9) Petitioner stipulated that she was offered light duty work during this time period, however, indicated that her physician had kept her off work entirely during that time. (T. 9-11) Respondent objected to bills in Petitioner's exhibits 1 and 2 on the basis that it was not responsible for payment of same. (T. 21, 22) Respondent also objected to Petitioner's exhibit 3 on the basis that the CMS notes had not been redacted for Social Security numbers or privacy. (T. 21, 22)

Petitioner's exhibit 3, the records of Dr. Aijaz, consists of 16 pages of records, which included CMS forms that Dr. Aijaz completed for Petitioner to provide to Respondent. (PX3) These records, including the certification pages, were accompanied by a records certification page, which was completed by Dr. Aijaz on 9/6/2022. (PX3, p. 17)

Petitioner is employed by Respondent as a Juvenile Justice Specialist and has been so for nearly five years. (T. 11, 12) The parties stipulated that on 4/4/2022, Petitioner sustained accidental injuries when, while intervening in a physical altercation between three youths, she injured her left shoulder. (T. 12)

The day following the accident, Petitioner saw her primary care physician, Dr. Maimoona Aijaz, who noted that Petitioner injured her left shoulder while trying to stop an altercation between inmates. (T. 13; PX3, p. 1) She noted left shoulder tendinitis, and recommended Advil, rest, heat, physical therapy and an x-ray. (PX3, p. 1) She kept Petitioner off work until 5/5/2022. (PX3, p. 3)

Petitioner attended physical therapy at ATI Physical Therapy in Shorewood, Illinois. (PX4) At her initial therapy visit, her therapist noted that Petitioner had a constant ache with occasional sharp pain, decreased range of motion, decreased strength, impairments with posture, and that her deficits limited her ability to perform numerous aspects of daily living. (PX4, p. 1) Objective findings included positive Hawkins-Kennedy, Speed, Empty Can, and Lift Off testing and tenderness to palpation. *Id.* She was treated with numerous therapeutic modalities. *Id.*

At subsequent visits, Petitioner reported continued soreness. (PX4, pp. 21, 22) At her 4/27/2022 visit, she reported that she slid one of her son's bins across the floor, which caused increased pain. (PX4, p. 23) She continued to progress in therapy over subsequent visits. (PX4, 25, 26)

On 5/3/2022, Petitioner returned to Dr. Aijaz, who noted that Petitioner had left shoulder impingement syndrome while stopping a fight at work. (PX3, p. 5) Dr. Aijaz indicated that Petitioner was off until 6/6/2022, and recommended four more weeks of therapy. (PX3, pp. 5, 7)

Petitioner returned to therapy at ATI and reported that her shoulder was still sore. (PX4, p. 27, 29) At her progress evaluation on 5/18/2022, her therapist noted that she still had a constant ache at the top of her left shoulder with occasional sharp pain with movements, and that she still had difficulty with numerous activities of daily living. (PX4, p. 4) At subsequent therapy sessions, she reported pain, stiffness, and achiness in her left shoulder. (PX4, pp. 31, 33, 36)

On 6/1/2022, Dr. Aijaz took Petitioner off work until 7/10/2022. (PX3, p. 8) On 6/16/2022, Petitioner saw Dr. Aijaz, who recommended that she finish physical therapy and that she see an orthopedic physician. (PX3, pp. 10, 12) It was also noted that Petitioner tested positive for COVID-19. (PX3, p. 11) Dr. Aijaz again noted that Petitioner would not be able to return to work until 7/11/2022. (PX3, p. 12)

At her therapy progress evaluation on 6/16/2022, Petitioner's pain levels during rest had improved, however, her pain during activities remained the same. (PX4, p. 10) Her primary symptom was pain the posterior shoulder during abduction and when carrying heavy objects for a long period. *Id.*

Her 6/28/2022 therapy note indicates that she picked up her son and heard a pop in her shoulder, which caused soreness. (PX4, p. 44)

At her 7/1/2022 progress evaluation, Petitioner's pain level during activity was a 4/10 and had decreased from a 6/10 at her prior progress evaluation. (PX4, p 12) She reported that she had improved approximately 60%, but still had symptoms and difficulties with activities. *Id.*

On 7/5/2022, Petitioner followed up with Dr. Aijaz, who recommended an x-ray of Petitioner's left shoulder and kept her Petitioner off work until 8/11/2022, noting a left shoulder impingement syndrome. (PX3, pp. 13, 16)

Petitioner underwent the left shoulder x-ray that same day. (PX5) The history was noted as "Pain and limited range of motion since April 4, 2022 not improving with physical therapy." *Id.* The x-ray was negative for fracture and dislocation and was otherwise unremarkable. *Id.*

A discharge summary from ATI Physical Therapy dated 7/20/2022 stated, "Due to authorization / insurance limitations, patient has been discharged from Physical Therapy." (PX4, p. 18)

At trial, Petitioner testified that although she missed some sessions of physical therapy, she rescheduled them. (T. 18) She candidly testified that she had experienced some instances of popping in her arm when she lifted her son. (T. 18) She testified that she had an incident at work

in December 2022 wherein she was punched in the jaw, but that it was "only one day," that she went to get it looked at, and that she was "cleared." (T. 18-20)

Petitioner testified without rebuttal that prior to the 4/4/2022 accident, she had never injured, received treatment for, or made any workers' compensation claims with regard to her left shoulder. (T. 12, 13) She testified that following the incident, she experienced soreness and the inability to lift her shoulder above shoulder-height or raise her arm above her head. (T. 13)

Petitioner testified that she was continued off work until 8/11/2022, as her physician did not approve her to return to light duty. (T. 14) She testified that while she was off work and going through physical therapy, she tested positive for COVID, however, she was already off work due to her shoulder condition at that time. (T. 19, 20)

She testified that she still experiences soreness in her left shoulder and takes medication depending on how heavy her daily workload is. (T. 15, 16) She has loss of strength and limited range of motion in her left shoulder. (T. 16)

She is a single mother of a three-year-old child, and testified that she is unable to hold her child for a long time and must compensate with her other arm. (T. 17, 18) She testified that she cannot multitask because she can only use one arm at a time. (T. 17, 18)

She provides security and safety to youths at her job, which involves physically intervening if they are at risk to themselves or others. (T. 16) She testified that she has had to physically restrain youths since she returned to work, that this is a frequent occurrence, and that she is not able to restrain them for as long and must compensate with her other arm. (T. 16, 17)

## 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).

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 workers' compensation claimant's injury. *Shafer v. Illinois Workers' Comp. Comm'n*, 2011 IL App (4th) 100505WC, 976 N.E.2d 1 (2011).

Illinois law holds that "[e]very natural consequence that flows from an injury that arose out of and in the course of the claimant's employment unless caused by an independent intervening accident that breaks the chain of causation between a work-related injury and an ensuing disability or injury" is compensable. *Vogel v. Indus. Comm'n*, 354 Ill. App. 3d 780, 786, 821 N.E.2d 807, 812 (2d Dist. 2005); *Nat'l Freight Indus. v. Illinois Workers' Comp. Comm'n*, 993 N.E.2d 473, 481, 373 Ill.Dec. 167, 175 (5th Dist. 2013). Courts have consistently held that 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; as the Court in Lasley Const. Co., aptly stated: "The fact that other incidents, whether work related or not, may have aggravated claimant's condition is irrelevant." *Lasley Const. Co., Inc. v. Indus. Comm'n*, 274 Ill.App.3d 890, 893, 655 N.E.2d 5, 8, 211 Ill.Dec. 345, 348 (5th Dist. 1995). See also *Vogel v. Industrial Comm'n*, 354 Ill. App. 3d 780, 786, 821 N.E.2d 807, 812, 290 Ill.Dec. 495, 500 (2d Dist. 2005).

Respondent disputes causal relation for Petitioner's left shoulder. (AX1) The Arbitrator notes that Respondent did not have Petitioner examined under Section 12. Petitioner's treating physician, Dr. Aijaz, stated several times in her records that Petitioner's left shoulder condition was a result of her work injury. (PX3, pp. 1, 5) Further, Petitioner testified without rebuttal that she had not ever injured or received treatment for her left shoulder prior to her 4/4/2022 accident. (T. 12, 13) She sought treatment with her primary care physician promptly the day after her accident, and positive objective findings to her left shoulder were documented in her physical therapy records. (PX3, p. 1; PX4, p. 1)

Petitioner's physical therapy notes indicate that Petitioner heard a pop in her shoulder while lifting her son, and that this resulted in soreness. (PX4, p. 44) Respondent questioned her and Petitioner candidly testified to this occurrence at trial. (T. 18) The evidence shows that at her therapy evaluation subsequent to occurrence, she reported that her pain level had decreased to a 4/10 from a 6/10, as it was at her prior therapy progress evaluation on 6/16/2022. (PX4, pp. 44, 12) This demonstrates that this incident likely resulted in a temporary aggravation, but not an intervening accident that was severe enough to break the chain of causation. (PX4, pp. 44, 12)

Respondent also questioned Petitioner regarding an incident in December 2022 when she was punched in the jaw at work, and Petitioner testified that she went to get it looked at and was cleared. (T. 18, 20) The Arbitrator notes that this incident did not involve Petitioner's shoulder, but rather, her jaw, and Respondent did not produce any evidence that this incident affected her shoulder. Therefore, the Arbitrator finds that the chain of causation remained intact following this incident.

Pursuant to the above facts, testimony and evidence as a whole, the Arbitrator finds that Petitioner has met her burden of proof regarding causal connection, and that her accident of 4/4/2022 is causally related to her current condition of ill-being.

**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?**

Respondent objected to bills in Petitioner's exhibits 1 and 2 on the basis that it was not responsible for payment of same. (T. 21, 22)

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, 229 Ill.Dec. 77 (Ill. 2000). This includes treatment required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 758 N.E.2d 18 (1st Dist. 2001).

Petitioner engaged in conservative treatment with her primary care provider and with physical therapy. (PX3; PX4) The medical evidence and Petitioner's testimony indicate that her condition improved due to her treatment. (PX4, p. 12) The Arbitrator finds that Petitioner's treatment was reasonable and necessary in order to relieve her symptoms.

Therefore, pursuant to the above findings on causal connection, the Arbitrator finds that Respondent is liable for payment of the medical bills pursuant to the Illinois Medical Fee Schedule as outlined in Petitioner's exhibit 1 if unpaid.

**Issue (K): What temporary benefits are in dispute? (TTD)**

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, 81 Ill.Dec. 896 (1984).

"[A] claimant is temporarily and 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 [the] injury will permit." *Shafer v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100505WC, ¶ 45, 364 Ill.Dec. 1, 976 N.E.2d 1. "It is a well-settled principle that when a claimant seeks TTD benefits, the dispositive inquiry is whether the claimant's condition has stabilized, i.e., whether the claimant has reached maximum medical improvement. *Interstate Scaffolding, Inc. v.*

*Illinois Workers' Compensation Comm'n*, 236 Ill.2d 132, 142, 337 Ill.Dec. 707, 923 N.E.2d 266, 271 (2010).

Respondent disputes liability for temporary total disability benefits from 7/1/2022 to 8/9/2022 on the basis that it had light duty available and offered same to Petitioner. (T. 9-11) Petitioner does not dispute the fact that light duty was offered to her, however, she testified that she did not return to work during that time because her physician had her off due to her shoulder injury. (T. 9-11, 14) She testified that she tested positive for COVID while she was going through physical therapy, but was already off work for her shoulder condition at that time. (T. 19, 20) The medical evidence shows that Dr. Aijaz had kept Petitioner off work due to her shoulder injury from 4/5/2022 until 8/11/2022. (PX3, pp. 3, 5, 7, 8, 10, 12, 13, 16)

Therefore, pursuant to the above findings on causal connection and the medical evidence demonstrating that Petitioner was off work due to her shoulder injury, the Arbitrator finds that Respondent is liable for payment of temporary total disability benefits for the disputed period of 7/1/2022 through 8/9/2022.

**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. Therefore, the Arbitrator uses the remaining factors to evaluate Petitioner's permanent partial disability.

(ii) **Occupation**: Petitioner continues to serve as a Juvenile Justice Specialist for Respondent. (T. 11, 12) She testified that she has had to physically restrain youths since she returned to work following her accident, that she does so frequently, and that her injury has resulted in the reduction of time she is able to keep the youths restrained. (T. 16, 17) The Arbitrator notes that due to the nature of her job and location of her injury, future re-injury of her left shoulder is likely to occur. The Arbitrator finds that this factor weighs in favor of increased permanence.

(iii) **Age**: Petitioner was 27 years of age at the time of her injury. (AX1) She is a younger individual and must live and work with her disability for an extended period of time. Pursuant to *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). The Arbitrator finds that this factor weighs in favor of increased permanence.

(iv) **Earning Capacity**: There was no evidence introduced any of reduced earning capacity. The Arbitrator finds that this factor weighs in favor of decreased permanence.

(v) **Disability**: As a result of her accident, Petitioner suffered injury to her left shoulder, which she treated conservatively with physical therapy. (PX4) Petitioner testified that she still experiences soreness, loss of strength and limited range of motion in her left shoulder. (T. 15, 16) She cannot restrain youths at her job as long as she used to due to her injury. (T. 16, 17) She is unable to hold her three-year-old son as long as she used to, and frequently compensates with her right arm. (T. 17, 18) She takes medication for her condition based on how heavy her workload for the day is. (T. 15, 16) The Arbitrator fins that this factor weighs in favor of increased permanence.

The Arbitrator did find the petitioner's testimony to be credible.

Based upon the foregoing evidence and factors, the Arbitrator finds that Petitioner sustained serious and permanent injuries that resulted in the 5% loss of Petitioner's body as a whole in relation to her left shoulder injury.

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 19WC026134 |
| Case Name | Corey Tompkins v.<br>GTX Express |
| Consolidated Cases | |
| Proceeding Type | Petition for Review under 19(b)<br>Remand Arbitration |
| Decision Type | Commission Decision |
| Commission Decision Number | 23IWCC0540 |
| Number of Pages of Decision | 12 |
| Decision Issued By | Kathryn Doerries, Commissioner,<br>Amylee Simonovich, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Kari Peterson |
| Respondent Attorney | Michelle Symank |

DATE FILED: 12/19/2023

/s/Kathryn Doerries, Commissioner

Signature

DISSENT: /s/Amylee Simonovich, Commissioner

Signature

23IWCC0540

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

COREY TOMPKINS,

Petitioner,

vs. NO: 19 WC 26134

GTX EXPRESS,

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 causal connection, medical expenses, and prospective medical, 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 modifies the Order section of the Arbitrator's Decision to award the medical bills of Dr. Nogalski and Dr. Solman pursuant to the stipulation of the parties. The Commission notes that on the Request for Hearing form, Respondent agreed to liability for unpaid medical bills of Dr. Nogalski, for service date August 9, 2021, and Dr. Solman, for service dates October 9, 2019, through December 11, 2020 (Arb X 1-T.66, T.5). Thus, the Commission modifies the Order section of the Arbitrator's Decision to add, "Respondent shall pay reasonable and necessary medical services directly to the medical provider, pursuant to the medical fee schedule, of $312.00 to Dr. Nogalski, and $2,369.56 to Dr. Solman, pursuant to Sections 8(a) and 8.2 of the Act."

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 23, 2022, is hereby, otherwise, affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,338.52 additional TTD benefits, based on the stipulation.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary medical services of $2,681.56 as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be entitled to credit for any amounts paid to the providers and Respondent shall hold Petitioner harmless for all claims for which Respondent is claiming credit.

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 $4,100.00. 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.

**December 19, 2023**

o-11/7/23
KAD/jsf

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

/s/*Maria E. Portela*
Maria 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 his burden of proving his current condition of ill-being is causally related to the accident of August 22, 2019.

The parties in this case stipulated that Petitioner sustained a compensable accident on August 22, 2019. Petitioner argues that this was an agreement as to the mechanism of injury to both knees. In fact, Respondent stipulated to liability for medical treatment through December 11, 2020, including services to both left and right knees. The issue presented at trial was not whether Petitioner injured his left knee in the accident, but whether the accidental injury caused the need for left knee surgery.

This is further evinced by Dr. Farley's testimony. While Dr. Farley made note of the

differences in the histories provided, he did not rely on this in forming his denial. Dr. Farley testified that the findings on the CT of the left knee were degenerative in nature. T. 326. He opined that the findings of the CT excluded the possibility of a meniscus injury from the August 22, 2019 work injury "very clearly." T. 326-327.

Dr. Nogalski testified that the accident at work on October 22, 2019 caused, contributed to, or aggravated Petitioner's left knee complaints and symptoms. T. 93. He explained that there was a fall, with either a strain or twist to the knee. T. 102. There was no other notable trauma or reason for symptoms. *Id.* There was no evidence regarding treatment for left knee pain prior to the August 22, 2019 accident. T. 93.

Dr. Nogalski read the CT of the left knee to show: "a central tear or irregularity in the lateral meniscus, which was likely consistent with a radial tear. There was surrounding joint space narrowing in the lateral tibial plateau, a small osteophyte or bone spur marginally in both tibial and femoral condyles. There was [sic] also some irregularities in the medial compartment." T. 90-91. He explained that CT arthrograms are not as reliable for diagnosis of meniscal abnormalities as an MRI. T. 105.

The radiologist concurred that the CT of the left knee showed fraying of the inner margin of the lateral meniscus. T. 282. Thus, it was only Dr. Farley who saw no meniscus abnormality.

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 | 19WC026134 |
| Case Name | TOMPKINS, COREY v. GTX EXPRESS |
| Consolidated Cases | |
| Proceeding Type | 19(b) Petition |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 8 |
| Decision Issued By | William Gallagher, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Kari Peterson |
| Respondent Attorney | Michelle Symank |

DATE FILED: 5/23/2022

**THE INTEREST RATE FOR THE WEEK OF MAY 17, 2022 1.49%**

/s/William Gallagher, Arbitrator

Signature

+
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)**

Corey Tompkins
Employee/Petitioner

Case # 19 WC 26134

v.

Consolidated cases: n/a

GTX Express
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 Collinsville, 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. ☒ 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 22, 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 not causally related to the accident.

In the year preceding the injury, Petitioner earned $19,777.50; the average weekly wage was $755.73.

On the date of accident, Petitioner was 42 years of age, single with 1 dependent child(ren).

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

Respondent shall be given a credit of $1,037.15 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $1,037.15. The parties stipulated to underpayment of TTD benefits of $1,338.52.

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

**ORDER**

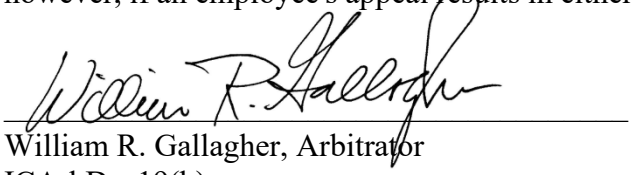
Based upon the Stipulation, Respondent shall pay Petitioner additional TTD benefits of $1,338.52.

Based upon the Arbitrator's Conclusions of Law attached hereto, Petitioner's claim for prospective medical treatment 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.



**MAY 23, 2022**

William R. Gallagher, Arbitrator
ICArbDec19(b)

Findings of Fact

On August 28, 2019, 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 August 22, 2019. According to the Application, Petitioner was "stepping down from truck, slipped off stairs, while raining & twisted right knee as it was still on step & left knee as it came down to ground" which caused an injury to his "right & left leg" (Respondent's Exhibit 1). On March 29, 2022, Petitioner filed an Amended Application which alleged Petitioner was "stepping down from truck, stepped off stairs, while raining" and sustained an injury to his "right and left leg" (Petitioner's Exhibit 1).

This case was tried in a 19(b) proceeding and Petitioner sought an order for prospective medical treatment, specifically, left knee surgery, as recommended by Dr. Michael Nogalski, an orthopedic surgeon. Respondent stipulated Petitioner sustained a work-related accident on August 22, 2019, but disputed liability on the basis of causal relationship. Petitioner and Respondent stipulated Petitioner was owed $1,338.52 for an underpayment of temporary total disability benefits (Arbitrator's Exhibit 1).

Petitioner worked for Respondent as a delivery driver. On August 22, 2019, Petitioner was in the process of picking up a load. There was not a loading dock at the facility where Petitioner was picking up the load, so it was delivered to his truck with a forklift. The forklift placed the load on the edge of the truck and Petitioner used a pallet jack to move the load inside the truck.

Petitioner testified the truck was a 26 foot box truck and the door at the back of the truck would open/close similar to a garage door. However, to open/close the door, Petitioner had to walk up a ladder attached to the truck, walked across the edge, unlock the door and then push the door up. Petitioner identified two photographs of a truck similar to the one he drove at the time of the accident. In a photograph of the rear end of the truck, Petitioner identified with an "L" a metal ladder on each side of the truck (Petitioner's Exhibit 10-2).

Petitioner testified he was standing on the rear ledge of the truck bed facing toward the vehicle so he could lock the door. Petitioner turned to his right and proceeded to walk to the right side of the ledge, he then had to pivot so he could descend the ladder. Petitioner grabbed a handle on the right side of the truck and stepped onto the top rung of the ladder with his left foot. Petitioner's hand slipped off the handle and he fell. As he did so, Petitioner testified he twisted to the right to avoid striking his head on the building the truck was parked beside and landed with his hands and right knee striking the pavement. Petitioner's left foot was still in the rung of the ladder and he twisted sideways. Petitioner stated it was raining at the time of the accident.

The accident was reported to Respondent and Petitioner was directed to go to Concentra Urgent Care where Petitioner was initially evaluated on August 23, 2019, by Dr. Gustavo Galeano. Petitioner testified he advised Dr. Galeano he had complaints in both knees; however, according to Dr. Galeano's record of that date, Petitioner informed him that while he was closing the door to his truck, he slipped and hit his right knee. X-rays of the right knee were obtained which were negative for fracture and Dr. Galeano diagnosed Petitioner with a contusion of the right knee. He imposed light duty work restrictions (Petitioner's Exhibit 5).

On August 26, 2019, Petitioner was seen by Dr. Galeano. At that time, Petitioner advised his right knee symptoms were unchanged. Dr. Galeano's diagnosis remained the same, a right knee contusion. He ordered physical therapy (Petitioner's Exhibit 5).

On September 4, 2019, Petitioner was evaluated by Christopher Cook, a Physical Therapist associated with Concentra. At that time, Petitioner complained of bilateral knee pain and informed PT Cook that he fell off the back of a truck when his right foot got stuck and his left knee struck the ground as he fell (Petitioner's Exhibit 5).

Petitioner was periodically seen by Dr. Galeano in September, 2019, and he continued to opine Petitioner had sustained a right knee contusion. When Dr. Galeano evaluated Petitioner on September 26, 2019, Petitioner informed him he had bilateral knee pain. This was the first time Petitioner informed Dr. Galeano that he had left knee pain. Dr. Galeano opined Petitioner had a contusion of both the left and right knees. Dr. Galeano ordered a CT scan of Petitioner's right knee (Petitioner's Exhibit 5).

The CT scan of Petitioner's right knee was performed on September 26, 2019. According to the radiologist, there was a small amount of effusion, but no fracture or evidence of acute injury (Petitioner's Exhibit 6).

On September 26, 2019, Dr. Galeano reviewed the CT scan results with Petitioner. He authorized Petitioner to return to regular work duty effective September 27, 2019 (Petitioner's Exhibit 5).

Dr. Galeano last saw Petitioner on October 11, 2019. At that time, Petitioner advised his knee symptoms were improving. Dr. Galeano's examination of both knees was normal and Petitioner had a full range of motion. He authorized Petitioner to return to work without restrictions (Petitioner's Exhibit 5).

On October 9, 2019, Petitioner was evaluated by Dr. Corey Solman, an orthopedic surgeon. At that time, Petitioner informed Dr. Solman he injured his knee on August 22, 2019, when he fell off the back of a truck, his right foot got twisted and his left knee struck the ground. Petitioner advised he had experienced right knee swelling which was now improved, but he continued to experience left knee swelling. Dr. Solman opined Petitioner had sustained a possible left meniscal tear and had chondromalacia. He recommended Petitioner undergo an MRI of both of his knees, but this could not be performed because Petitioner had bullet fragments in his back. Dr. Solman opined Petitioner should undergo a CT arthrogram of both knees (Petitioner's Exhibit 7).

Petitioner was again seen by Dr. Solman on December 13, 2019. At that time, Petitioner brought a CT scan which Dr. Solman noted was of Petitioner's left knee. Dr. Solman later noted that the CT scan was actually of Petitioner's right knee. He read the CT scan as revealing a depression of the articular surface at the lateral tibial spine which he diagnosed as a tibial plateau fracture. He administered an injection into Petitioner's left knee (Petitioner's Exhibit 7).

Dr. Solman subsequently saw Petitioner on September 25, 2020. Petitioner continued to complain of pain/swelling in the left knee. Dr. Solman reaffirmed his diagnosis of a tibial plateau fracture

which was based on the CT scan of Petitioner's right knee. Dr. Solman recommended Petitioner have an MRI of the left knee; however, as previously noted, Petitioner could not undergo that study because of the bullet fragments in his back (Petitioner's Exhibit 7).

At the direction of his attorney, Petitioner was examined by Dr. Michael Nogalski, an orthopedic surgeon, on June 2, 2021. When seen by Dr. Nogalski, Petitioner informed him he sustained an injury to both of his knees on August 22, 2019. Petitioner advised he was on the back of a truck and he started to descend steps while pulling the strap connected to the door. When he did so, his right leg slipped on the wet step and became caught which caused him to twist his right knee as he fell. Petitioner said his left knee was caught up higher than this and became "jammed up". Petitioner believed he may have twisted his left knee, but did not recall if his left knee struck the ground. Dr. Nogalski diagnosed Petitioner with left knee pain/effusion and recommended additional imaging of the left knee (Petitioner's Exhibit 4; Deposition Exhibit 2).

Dr. Nogalski again saw Petitioner on August 9, 2021, and reviewed a CT arthrogram of Petitioner's left knee which was performed on August 5, 2020. Dr. Nogalski opined the diagnostic studys revealed a tear of the left medial meniscus and recommended further treatment, including arthroscopic surgery (Petitioner's Exhibit 4; Deposition Exhibit 3).

At the direction of Respondent, Petitioner was examined by Dr. Timothy Farley, an orthopedic surgeon, on August 17, 2021. In connection with his examination of Petitioner, Dr. Farley reviewed medical records provided to him by Respondent. When Petitioner was seen by Dr. Farley, he informed him he had injured both of his knees on August 22, 2019. Petitioner advised that on that date he was stepping down off the back of a truck trailer, stepped on the first step with his right foot while holding onto the railing. Petitioner's hand then slipped off the railing, and his left foot got stuck between the steps and he felt a twisting sensation in his left knee. Petitioner said he fell and his right knee struck the ground. Dr. Farley noted the mechanism of injury described to him by Petitioner was different than the mechanism described to Dr. Solman (Respondent's Exhibit 2; Deposition Exhibit B).

Dr. Farley examined Petitioner and reviewed diagnostic studies which included the CT scan of August 5, 2021 [apparently referring to August 5, 2020], and opined that it did not reveal any meniscal tears but did reveal chondromalacia. He opined Petitioner had degenerative changes in the left knee which were present prior to the accident and unrelated to same (Respondent's Exhibit 2; Deposition Exhibit B).

Dr. Nogalski was deposed on January 17, 2022, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Nogalski's testimony was consistent with his medical report and he reaffirmed the opinions contained therein. In regard to the history of the accident of August 22, 2019, provided to him by Petitioner, Dr. Nogalski testified Petitioner informed him he fell off the back of a truck, his right foot got stuck and his left knee hit the ground when he fell. He testified Petitioner had a torn left medial meniscus, required arthroscopic surgery and the condition was related to the accident (Petitioner's Exhibit 4; pp 14-19).
On cross-examination, Dr. Nogalski was questioned about the various histories Petitioner gave to the treating medical providers. He agreed that the history provided to Dr. Galeano on August 23,

2019, was different than the history provided to PT Cook on September 4, 2019, and the history provided to Dr. Solman on October 9, 2019 (Petitioner's Exhibit 4; pp 24-27).

Dr. Farley was deposed on February 8, 2022. On direct examination, Dr. Farley's testimony was consistent with his medical reports and he reaffirmed the opinions contained therein. In regard to the history of the accident of August 22, 2019, Dr. Farley testified Petitioner informed him that he was coming out of the back of a truck, holding on to the railing, when he stepped down on the first step with his right foot, slipped and lost his hold with his hand and his left knee got between the steps and he may have twisted it. Petitioner then fell to the ground on his right knee. Dr. Farley made specific note of the differences between the histories Petitioner provided to him and Dr. Galeano and Dr. Solman (Respondent's Exhibit 2; pp 8-11).

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 not causally related to the accident of August 22, 2019.

In support of this conclusion the Arbitrator notes following:

There was no dispute Petitioner sustained a work-related accident on August 22, 2019; however, there are multiple histories as to how the accident occurred, in particular, how Petitioner allegedly sustained an injury to his left knee.

In the initial Application that was filed, Petitioner alleged that while stepping down from a truck, he slipped off the step, twisted his right knee while still on the step and fell striking his left knee on the ground.

At trial, Petitioner testified he was in the process of stepping on to the top rung of the ladder on the truck with his left foot, his hand slipped off the handle and Petitioner fell with his right knee striking the pavement and his left foot still in the rung of the ladder.

When seen by Dr. Galeano on August 23, 2019, Petitioner informed him that he slipped and fell striking his right knee while closing the door to his truck. There was no reference to Petitioner having sustained an injury to his left knee.

When Petitioner was evaluated by PT Cook on September 4, 2019, Petitioner informed him he fell off the back of a truck, his right foot got stuck and his left knee struck the ground as he fell. This was the first time in the medical that Petitioner made any reference to having sustained an injury to his left knee.

When Petitioner was evaluated by Dr. Solman on October 9, 2019, he advised him he fell off the back of a truck, his right foot got twisted and his left knee struck the ground.
When Petitioner's Section 12 examiner, Dr. Nogalski, examined him on June 2, 2021, Petitioner informed him he was descending the steps while pulling on the strap connected to the door, his

right leg slipped on the wet step which became caught causing him to twist his right knee as he fell. Petitioner stated his left knee was caught up higher than his right and became "jammed up," and believed he may have twisted it but did not know if his left knee struck the ground.

When seen by Respondent's Section 12 examiner, Dr. Farley, Petitioner informed him he was stepping down the back of a truck trailer, stepped on the first step of his right leg while holding onto the railing, his hand slipped off the railing and his left foot got stuck between the steps and he fell experiencing a twisting sensation in his left knee. Petitioner informed Dr. Farley that it was his right knee that struck the ground.

The Arbitrator notes there are multiple inconsistent histories provided by Petitioner to the treating medical providers, the Section 12 examiners of both Petitioner and Respondent, as well as Petitioner's testimony at trial.

The Arbitrator finds Petitioner's testimony not to be credible.

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 not entitled to prospective medical treatment.

William R. Gallagher, Arbitrator

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 17WC017900 |
| Case Name | Sally Becherer v.<br>State of Illinois - Illinois Department of Healthcare and Family Services |
| Consolidated Cases | 18WC014641;<br>21WC006630;<br>21WC006631; |
| Proceeding Type | Petition for Review |
| Decision Type | Commission Decision |
| Commission Decision Number | 23IWCC0541 |
| Number of Pages of Decision | 21 |
| Decision Issued By | Marc Parker, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Martin Haxel |
| Respondent Attorney | Kayla Koyne |

DATE FILED: 12/19/2023

/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

Sally Becherer,

Petitioner,

vs. No. 17 WC 017900

Illinois Department of Healthcare &
Family Services and DoIT,

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, benefit rates, medical expenses, permanent disability, and whether the correct body parts were addressed in the correct decisions, 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 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.

**December 19, 2023**

MP/mcp
o-12/07/23
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 | 17WC017900 |
| Case Name | BECHERER, SALLY v. ILLINOIS DEPARTMENT OF HEALTHCARE AND FAMILY SERVICES |
| Consolidated Cases | |
| Proceeding Type | |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 18 |
| Decision Issued By | Dennis OBrien, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Martin Haxel |
| Respondent Attorney | Kayla Koyne |

DATE FILED: 9/6/2022

**THE INTEREST RATE FOR THE WEEK OF AUGUST 30, 2022 3.23%**

/s/ Dennis OBrien, Arbitrator
Signature

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

September 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**

**SALLY BECHERER**
Employee/Petitioner

v.

**ILLINOIS DEPARTMENT OF HEALTHCARE AND FAMILY SERVICES**
Employer/Respondent

Case # **17** WC **017900**

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 **July 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 _____

**FINDINGS**

On **September 6, 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.

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

In the year preceding the injury, Petitioner earned $**99,504.28**; the average weekly wage was $**1,913.54**.

On the date of accident, Petitioner was **55** years of age, ***married*** with **no** dependent children.

Petitioner ***has*** received 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**.

**ORDER**

**Petitioner suffered an accident on September 6, 2016, which arose out of and in the course of her employment by Respondent.**

**Petitioner's medical conditions, right carpal tunnel and right cubital tunnel syndromes, are causally related to the accident of September 6, 2016.**

**The following bills introduced into evidence in Petitioner Exhibit 7 are related to Petitioner's right carpal tunnel and right cubital tunnel injuries, are reasonable, were necessitated to treat or cure Petitioner's injuries suffered in this accident, and are to be paid pursuant to the Medical Fee Schedule:**

- Page 1, the three dates of service not crossed out are causally related.
- Page 2, all of the dates of service dated 11-1-2016 and 11/08/2016 are causally related except for the immunizations administered on 11-01-2016. These bills, with the noted exceptions, are for petitioner's pre- surgical workup.
- Page 3, 4, and 5, the dates of service not crossed out are causally related to the injury.

**Respondent shall reimburse Petitioner for her out-of-pocket payments of $70.00.**

**Pursuant to the stipulation of the parties, Respondent is entitled to a Section 8 (j) credit for all group health insurance payments made towards the medical bills awarded in this decision.**

**Petitioner was not temporarily totally disabled as a result of the accident for the period claimed by Petitioner.**

**Petitioner sustained permanent partial disability to the extent of 10% loss of use of the right hand pursuant to §8(e) of the Act as a result of this repetitive trauma injury, 19 weeks of permanent partial disability at a weekly rate of $775.18, and 10% loss of use of the right arm pursuant to §8(e) of the Act as a result of this injury, 25.3 weeks of permanent partial disability at a weekly rate of $775.18.**

**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 6, 2022**

Signature of Arbitrator

**FINDINGS OF FACT:**

**TESTIMONY AT ARBITRATION**

**Petitioner**

Petitioner testified that she was employed as a Public Service Administrator, Option 1, having been employed by Respondent over 24 years as of the date of arbitration. She said that for the 10 to 15 years prior to the date of arbitration she performed her work using a keyboard and mouse, viewing work on two monitors, with her computer tower being behind one of the towers. She said that since 2011 she has been doing web services work. She has been working in a building on Churchill Road since 2015 at a desk in a cubical. Her keyboard is on top of the desk with the mouse next to it. She noted that she is right hand dominant.

Petitioner identified Petitioner Exhibit 8 as a document created at Petitioner counsel's request. She said it lists projects she worked on from 2015 through 2020. She said it did not list everything she did, but highlighted the projects she worked on. She said she would do her work using the keyboard and mouse unless she was in a meeting or a training. Some of those trainings also involved the use of keyboards and computer setup, while meetings would have her taking notes. She noted that meetings were infrequent, possibly two or three a year. She testified that in a typical day she would be keyboarding or using a mouse for approximately six hours, and had done so since 1999.

Petitioner said she had an EMG performed by Dr. Fortin in 2005 which was positive for mild right carpal tunnel syndrome. She said at that time she was an administrative assistant and was asked to do a large project in the file room, searching for misplaced files and then helping physically moving the file room, supervising 12 or 14 members of the staff physically moving files to reduce the number of filing cabinets. After that was complete non-administrative staff came in and moved the filing cabinets to the new file room. She said this project was huge and took nearly three months to complete. She said she had problems with her right hand, saw Dr. Fortin and was tested, and after the project was completed the symptoms subsided, and she saw no further doctors after the project ended, until 2016.

Petitioner said that in 2016 her right elbow began aching and her right hand became numb. She said in the year prior to that she did more keyboarding than she had ever previously performed while working for the State as there was a huge migration project from a software program called Dreamweaver to a new program, Sharepoint, the equivalent of replacing the whole website. She said she contributed to migrating the policy notices, doing over 300 of those, and she was asked to do that for one year's data, for instance 2011, and when done with that year she would be asked to do another year's data.

Petitioner said she eventually sought medical treatment in 2016, apparently first seeing her primary care physician, Dr. Richards, or his Physician Assistant (PA), Ms. Whitler, on September 6, 2016. She said she originally picked August 5, 2016 as her accident date as when she told the adjuster at Tristar that there was no date, that it had just come on gradually, she was told there had to be an accident date or they could not file a claim, she said August 5. She said she was referred to Dr. Becker for an EMG test, and then to Dr. Ma, a hand surgeon, seeing him on October 11, 2016. She said she told Dr. Ma that she believed her keyboarding at work

contributed to her symptoms. After a number of tests were performed to clear her for surgery, Dr. Ma performed right carpal and cubital tunnel surgeries on November 28, 2016. Petitioner said she was off work for a period of time following those surgeries.

Petitioner testified that there was then a period of time when she was not under medical treatment, but she returned and saw PA Naughton, who was physician assistant to both Dr. Ma and Dr. Greatting, on October 11, 2017, as she was having problems with her right wrist "hanging up." She received the first of two cortisone shots on that date. She then saw Dr. Ma, and he advised her he did not think she needed surgery and instead gave her another injection. She said the injections only gave her temporary relief.

On November 15, 2018, Petitioner sought treatment with Dr. Greatting due to symptoms in her left hand and elbow, carpal and cubital tunnel symptoms, as well as problems she was having grasping things with her right hand, causing her to drop things. She said she saw Dr. Becker for a second time for EMG testing of the left hand and arm before Dr. Greatting eventually performed left carpal and cubital tunnel syndrome surgeries. She said Dr. Greatting initially tried to care for her right long and ring finger problems with injections, but that did not help. Dr. Greatting eventually performed surgery on those fingers in 2019.

Petitioner said she saw Dr. Greatting in regard to two trigger fingers in her left hand on March 3, 2020. She said her supervisor at that time was Ann Marie Anderson, and she advised Ms. Anderson about her left trigger fingers prior to March of 2020 as well as after she saw Dr. Greatting on March 3, 2020, she made Ms. Anderson aware of every time she went to the doctor while Ms. Anderson was her supervisor, and why she was going to the doctor. Dr. Greatting performed surgery in 2020 on her left long and ring fingers.

Petitioner said that she began working at home when the pandemic began, and continued doing so as of the date of arbitration. She said her computer use was about the same working at home as it was working in the office, she still spent most of her day on the computer. She said she is performing the same job that she had before and was able to do that job. Petitioner said she has gotten work evaluations since her return to work and has been deemed exceptional.

Petitioner said these surgeries alleviated the severe symptoms she was experiencing, but she still had grasping problems on occasion, weakness in both her hands, including in gripping, achiness in her right elbow and daily pain in her left elbow. She said she occasionally takes Tylenol and had a steroid gel that she put on her hands and elbows. She testified that she had to sleep with her left arm extended due to her elbow as otherwise it would throb and feel like it had lost circulation, and with a pillow on her fingers to keep her hand open. She said she wears compression sleeves with the fingers cut out on both hands, they allow her to work on her keyboard without intense throbbing. At the end of the day she takes them off and applies the gel. She said she would occasionally apply the gel at lunch as well.

On cross examination Petitioner said she was not being seen by any physician for injuries to her hands and elbows. She could not remember the date of the last time she saw a doctor for her hands and elbows. She said she did not use tobacco, was not diabetic or pre-diabetic, but was diagnosed with hypertension in 2018 or 2019. She said she took a diuretic for that condition.

Petitioner said Nurse Practitioner (NP) Naughton had prescribed a wrist brace for her, but she found it too cumbersome, so she bought the compression sleeves as she needed something for her left hand.

Petitioner testified that the job duty form she filled out at the request of her attorney was prepared a year to a year-and-a-half prior to arbitration, and it does not contain all of her duties, but it contains her significant duties. She said she also had three breaks during the day, attended meetings, and helped with IRS and Social Security audits. She said her work duties had changed since her first date of accident, that while it was still on the keyboard and the mouse, she no longer did web work, she does audit work, with spreadsheets and databases.

Petitioner said she may have first experienced symptoms in her left hand and elbow in perhaps 2017, and in the right wrist and elbow in the summer of 2016. She said that she would get symptoms while working with her arms held as they were at her desk while working, in the elbows. She said she never asked her employer for any accommodations such as a standing desk or a gel wrist pad.

Petitioner said she did not do many activities outside of work, such as gardening, she was a bit of a homebody.

Petitioner said she earned more as of the date of arbitration than she did on the date of the first accident.

Petitioner was asked about her current complaints and said she wore sleeves now, used gel cream, and had difficulty grabbing things when her hand was numb. She said the surgeries improved her condition, but she was not cured. She said she did follow up with Dr. Greatting after her last surgery and told him of her complaints, but she could not remember the date she did so.

She said the keyboarding she currently did involved typing and mouse work and sometimes she would be doing data entry.

On redirect examination Petitioner said she did her keyboarding with both hands.

**Melissa Batty**

Ms. Batty was called as a witness by Petitioner. She testified that she works for the State of Illinois in the Division of Child Support Enforcement. She had been employed by the State for 32 years and had worked with Petitioner on a daily basis at Healthcare & Family Services starting in 2015 and for about a year and-a-half. They shared a work station, with a table splitting their work stations. She said she observed Petitioner as she worked through the day. Ms. Batty said she performed her work on the computer, using a keyboard, as did Petitioner. She said Petitioner would be keyboarding all day long, just as she would.

On cross examination Ms. Batty said she and Petitioner did not have the same job titles.

**MEDICAL EVIDENCE**

Petitioner was seen by NP Witmer on September 6, 2016 with complaints of right fourth and fifth finger numbness since August 5, with the whole hand being tingly and weak. She said she also had right elbow pain for the same amount of time, with occasional shock-like sensations on the ulnar side of the elbow radiating to the ulnar wrist and hand. She said the felt her symptoms were work related as she is on her computer all of the time, for years, but the computer usage had increased a year earlier. She said she used a mouse with her right, dominant, hand. She had suffered no recent injuries, exercises or activities which would explain the symptoms. Physical examination revealed a negative Tinel's sign at both wrists and elbows, no thenar atrophy, decreased right grip strength, normal sensation of the right hand. NP Witmer strongly suspected cubital tunnel entrapment, and advised Petitioner to wear a splint at night. An EMG test was ordered. (PX 3 p.1,3)

Petitioner saw Dr. Becker on September 19, 2016 for EMG testing of her right hand. She advised Dr. Becker that the numbness and tingling in the 4th and 5th digits of her right hand started in August. Petitioner said she did not have symptoms on the left. On physical examination Dr. Becker noted atrophy of the ulnar innervated intrinsic hand muscles. After performing the electrodiagnostic testing in the right arm Dr. Becker felt the findings were consistent with severe ulnar mononeuropathy at the right elbow and mild carpal tunnel at the right wrist. No testing was performed on the left side. (PX 5 p.1)

Dr. Ma first saw Petitioner on October 11, 2016. Petitioner was complaining of numbness and tingling in the right hand. She advised Dr. Ma that she had worked for the State for 17 years, typing and using a mouse constantly, all day. She said numbness and tingling in the right had developed at the end of July, 2016. She also complained of right elbow pain which was constant and throbbing. She stated that her symptoms definitely were aggravated with repeat motion at work, typing and using the mouse. She noted recent EMG/NCV suggesting carpal and cubital tunnel. On physical examination Petitioner had a positive Tinel at both the carpal and cubital tunnels, decreased sensation in both median and ulnar nerve distributions, positive Durkan and Phalen tests, and significant weakness in the intrinsic muscle of the right hand. He noted Dr. Becker's test results suggesting severe right cubital tunnel and mild right carpal tunnel syndromes. He suggested Petitioner have surgery on both the carpal and cubital tunnels, and Petitioner agreed. (PX 4 p.1,3)

Dr. Ma performed the right carpal and right cubital tunnel surgeries on November 28, 2016. During the carpal tunnel surgery he noted that the median nerve was swollen. During the cubital tunnel surgery, Dr. Ma noted the ulnar nerve was subluxated with elbow flexion of 90 degrees leading to the decision to anteriorly transpose the ulnar nerve anteriorly. (PX 4 p.4,5)

Petitioner was seen post-operatively by Dr. Ma on December 13, 2016. Petitioner reported the numbness and tingling n the right hand was improved significantly. Physical examination revealed the incisions were healing well. Petitioner was advised to continue a home exercise program, with range of motion and stretching. She was to avoid lifting, pushing or grasping. (PX 4 p.12)

Petitioner saw Dr. Ma again on January 24, 2017, saying she was extremely pleased with her recovery. Dr. Ma found her median and ulnar nerve distributions to be improving. He felt she was recovering well. In a Brigham Hand Symptom Severity Scale form on that date, Petitioner said she did not have hand or wrist pain when seen, did not wake up on a typical night due to hand or wrist pain in past two weeks, had mild pain during the day, once or twice a day, for less than 10 minutes, did not have numbness, tingling, or weakness in her hand, or at night, and had no difficulty with grasping small objects, or doing several other hand activities.. She was released on a prn basis at this time. (PX 4 p.14,16,20,21)

On October 11, 2017 Petitioner saw NP Naughton with complaints about her right index and middle fingers as well as the dorsum of the hand and her wrist. She was denying any specific injury. She noted pain was sharp when she was gripping. Her pain was 5/10 at rest and 7/10 when gripping and doing computer-based activities. It was noted her work was primarily computer based. On exam she had tenderness over the second dorsal compartment of the wrist, pain with resisted extension of the index and middle fingers, some pain with resisted wrist extension, and less pain with resisted wrist flexion. She had full range of motion and muscle strength of the right wrist. Intersection syndrome was discussed with Petitioner and an injection into the second

dorsal compartment of the right wrist was performed for that condition. Petitioner was provided with a splint while up and active. (PX 4 p.24)

NP Naughton saw Petitioner on November 8, 2017 for follow up of the right second dorsal compartment injection. Petitioner said the injection gave her some relief, but her pain was not entirely resolved, she continued to have discomfort in the right index and middle fingers as well as the dorsum of the hand and the wrist extending into the distal forearm. She rated her pain as 3/10. Physical examination showed tenderness to palpation over the second dorsal compartment of the right wrist, pain with resisted wrist extension and resisted extension of the index and middle fingers of the MCP joint. The right wrist had full range of motion and muscle strength. It was agreed to continue conservative treatment, which included her starting use of Voltaren gel. (PX 4 p.28)

On January 10, 2018 Petitioner saw NP Naughton, and advised her the Voltaren gel did not give much relief. Her symptoms were basically unchanged, as was her physical examination. A second injection into the right second dorsal compartment was performed during this visit. It was noted that if she had not had significant improvement at her next visit they would discuss surgical options. (PX 4 p.32)

Petitioner was seen again by NP Naughton on February 8, 2018. Despite her injection a month earlier, her pain had returned. The pain was primarily along the dorsum of the hand and in the second dorsal compartment. Her physical examination findings remained about the same. Debridement and release of the second dorsal compartment of the right wrist for intersection syndrome by Dr. Ma was discussed, and Petitioner elected to have that surgery. (PX 4 p.36)

Petitioner saw Dr. Ma on February 13, 2018. Dr. Ma noted her recent complaints and physical examination findings as well as injections. X-rays of the right hand were done on February 13, 2018 and were interpreted as only showing mild degenerative changes. His physical examination on this date found significant tenderness to palpation to the right thumb CMC joint, a positive grinds test, and mild swelling around the CMC joint of the right hand. Dr. Ma felt Petitioner's pain was due to multiple issues, which included arthritis in the right wrist and finger arthritis. He felt nonsurgical treatment would help her, they reviewed those options and Petitioner opted for an injection of the right CMC joint, which was performed. Dr. Ma felt Petitioner could be helped by occupational therapy, but Petitioner said it had not been obtained in the past due to money issues. (PX 4 p.23,40)

Petitioner was seen by NP Naughton on November 15, 2018. On the Orthopedic Surgeon Intake form filled out and signed by Petitioner on that date she noted she was to be seen for right hand middle finger trigger finger, left hand tingling, numbness, and pain in the arm and wrist. She noted she had been experiencing these symptoms for three months, they came on gradually, and the activities of daily living where it bothered her were driving and work/typing. She noted she had seen Dr. Greatting previously for left trigger thumb, and had seen Dr. Ma for right trigger thumb. When asked if this problem interfered with her work she wrote that she had to rest the left hand. Her pain drawing that day showed aching in the right hand and aching, numbness and tins and needles sensation in the left hand. Petitioner told NP Naughton of the left hand pain coming on over the past three months and of the symptoms being exacerbated by driving and typing. She said it had been progressively getting worse in the last six weeks. An x-ray of the left hand on this date only showed mild degenerative changes in the first carpometacarpal joint. On exam Tinel's, Phalen's and compression tests were all positive

over the carpal tunnel on the left. The right hand had a small nodule in the area of the A1 pulley adjacent to the right middle finger which was tender to palpation, with catching and clicking of the flexor tendon as it passed through the A1 pulley system of that right middle finger. It was decided to inject the right middle finger that day, which was performed, and to send her to Dr. Becker for electrodiagnostic testing. (PX 6 p.1-4,10)

Dr. Becker saw Petitioner for a second time on November 20, 2018. On this occasion Petitioner was complaining of numbness and tingling in the left hand which woke her at night and which had begun 1 and-a-half months earlier. EMG testing was interpreted as showing a mild left carpal tunnel syndrome and a mild ulnar mononeuropathy at the left elbow. (PX 5 p.1)

NP Naughton again saw Petitioner on December 13, 2018. Petitioner said her right middle finger complaints had resolved following the injection, with no clicking, catching, or discomfort. She said her left hand complaints were bothering her considerably, and, again, were aggravated by driving and typing. Her previous exam findings remained the same. other than the resolution of right middle finger tenderness and the absence of catching or clicking of the flexor tendon at the A1 pulley system. They discussed Dr. Becker's findings and Petitioner stated she would like to undergo left carpal and cubital tunnel releases by Dr. Greatting. (PX 6 p.11)

Petitioner was seen by Dr. Greatting on January 28, 2019 for a pre-op physical. Her exam findings were generally unchanged.. (PX 6 p.22)

On February 5, 2019, Dr. Greatting performed a release of the left cubital tunnel, a release of the left carpal tunnel, and injections of the right middle and ring fingers' flexor tendon sheaths. The ulnar nerve was found to be compressed and narrowed and decompression was accomplished. The median nerve was found to be compressed and narrowed under the middle third of the transverse carpal ligament, and decompression was accomplished. (PX 6 p.32,33)

Dr. Greatting saw Petitioner on March 19, 2019 and Petitioner advised him that her numbness was resolved and her sutures removed. She was advised to call and return for follow up in four to six weeks if she was having any significant problems or concerns. (PX 6 p.37)

Petitioner was next seen on August 8, 2019 as she was again having triggering of the right middle and ring fingers. She said her fingers would lock completely to the palm and she would have to use her other hand to manually unlock them. She wanted injections as she was going to be going on vacation. Her physical examination was similar to what it had been prior to her injections, with tenderness over the A1 pulley system and catching and clicking of the flexor tendons as they passed through the A1 pulley system of those fingers. Surgery to correct the trigger fingers was discussed, and Petitioner said she would like the surgeries. (PX 6 p.40)

Dr. Greatting saw Petitioner on August 14, 2019, and injected her right trigger fingers. Due to left arm numbness and tingling, Petitioner was again referred to Dr. Becker for electrodiagnostic testing. Dr. Greatting saw her again on August 28, 2019 with continuing right middle and ring finger triggering and surgery was discussed and scheduled. (PX 6 p.44,45,52)

Surgeries for the release of the right long and ring fingers were performed on September 4, 2019, by Dr. Greatting. Petitioner was seen post-operatively by Dr. Greatting on September 18, 2019, and she was already

getting good motion in the fingers. Her sutures were removed and she was told to return if she had any significant problems or concerns. (PX 6 p.56,57,59)

Petitioner returned to see NP Naughton on March 3, 2020, this time with catching and clicking of her left middle and ring fingers, which she said was a new problem for her. She said it had been worsening over the last several weeks. There was palpable catching and clicking of the flexor tendons of the left middle and ring fingers. Petitioner said she wanted surgical releases by Dr. Greatting. Petitioner received injections of the fingers on this date. (PX 6 p.63)

Petitioner saw Dr. Greatting on May 7, 2020, and after being examined, surgery was scheduled. Dr. Greatting performed the pre-op physical the next day, May 8, 2020. Dr. Greatting performed releases of the left long finger trigger finger and the left ring finger trigger finger on May 19, 2020. (PX 6 p.71,77,87,88)

NP Naughton saw Petitioner on June 4, 2020 and Petitioner said she was doing well, no longer having any mechanical symptoms or pain. She denied numbness or tingling in the left hand. Sutures were removed. Petitioner was told to contact Dr. Greatting's office if she had any concerns. This appears to be Petitioner's last visit with any physician for her right hand, wrist or elbow and her left hand, wrist, or elbow. (PX 6 p.90)

**CAUSATION REPORT OF DR. MARK GREATTING**

Petitioner's attorney wrote Dr. Greatting on March 26, 2021 with copies of Petitioner's pertinent medical records. He described Petitioner's work for Respondent as:

> "While her job duties were many and varied, the common denominator was that she spent 90% of her time at work using her computer, both keyboard and mouse. * * * He (sic) told me that she would rest her forearms on the top of the edge of the desk, elbows bent with her hands on top of the desk to use the mouse and keyboard." (PX 1 p.1)

Dr. Greatting was then asked a series of questions which he was asked to answer within a reasonable degree of medical certainty. In answer to those questions Dr. Greatting wrote a letter to Petitioner's attorney on June 17, 2021, in which he stated:

- He treated Petitioner for left carpal tunnel syndrome, left cubital tunnel syndrome, right middle trigger finger, right ring trigger finger, left middle trigger finger and left ring trigger finger.
- He performed the left cubital and carpal tunnel surgeries, right middle and ring trigger finger releases, and left middle and ring trigger finger releases summarized above.
- He opined that Petitioner's work did not cause any of those conditions.
- He opined that the work activities described in Petitioner attorney's letter over a period of many years could have aggravated or accelerated the symptoms related to these conditions and required her to have surgical treatment. He believed the treatment she received for these conditions was reasonable and necessary. He had no specific information about any time Petitioner may have been off work for these conditions.

- Petitioner also was treated for left trigger thumb and recurrent left wrist volar and dorsal carpal ganglions, but he did not believe those conditions were in any way related to Petitioner's work activities. (PX 1 p.4)

**CAUSATION REPORT OF DR. JIANJUN MA**

The parties stipulated that a letter was sent to Dr. Ma by Petitioner's attorney with a job description, but that letter was not available for subpoena purposes at the time of arbitration. The attorneys stipulated that the letter sent to Dr. Ma was the same as the letter sent to Dr. Greatting. For the contents of that letter, please see the summary of Dr. Greatting's causation report, above.

Dr. Ma, in answer to the questions posed to him in Petitioner counsel's letter wrote a letter to Petitioner's attorney on October 4, 2021, in which he stated:

- He treated Petitioner's right hand and wrist conditions she complained of, numbness and tingling in the right hand.
- He performed right carpal tunnel release and ulnar nerve anterior transposition on November 28, 2016.
- She was released from his care on November 11, 2016.
- He opined that Petitioner's work activities of keyboarding, use of mouse and positioning of her arms and hands would not have caused Petitioner's right carpal tunnel syndrome, right cubital tunnel syndrome or extensor intersection of the right wrist, but those work activities could have aggravated the symptoms related to those diagnoses. He said all of the treatment Petitioner received from NP Naughton and himself were reasonable and were necessary to treat those conditions.
- He said Petitioner was authorized to be off work "for a period of time" after her November 2016 surgery, followed by a return to work with "certain restrictions." (PX 2 p.1)

**IME REPORT OF DR. ANTHONY E. SUDEKUM**

Dr. Sudekum performed an IME of Petitioner on October 4, 2018. He reviewed medical records dating back to 1994, many of which were not introduced into evidence at arbitration. Many of the pre-accident dates records are for complaints on other parts of her body other than fingers, hands, and elbows, and for hand and wrist complaints (ganglion cysts, headache, anemia, stresses with a co-worker affecting her health, etc.) which are not claimed as work related injuries. Some are related to the areas of the body that are the subject matter of Petitioner's current claims, but are double hearsay (the report itself being hearsay) which was not specifically objected to at arbitration, but in addition are obviously incomplete in their summarization in this report. The report does appear to indicate a review of all medical treatment and testing performed from September 6, 2016 through February 13, 2018, but not thereafter. (RX 3 p.1 – 12,16,17 of 39)

Dr. Sudekum received a history of Petitioner's complaints from her during his examination. He then performed a physical examination which revealed well-healed incisions on her right medial elbow and right proximal palm as well as well-healed incisions on the left wrist from non-related ganglion cyst excisions. He found Tinel's and Phalen's signs to be negative bilaterally at the wrist and elbows, full range of motion of

bilateral elbows, wrists and fingers, normal sensation throughout both upper extremities, full strength of the right shoulder, upper arm, elbow, forearm and wrist and grip and pinch strength which was considered in the low normal range. He found a palpable nodule on Petitioner's right middle finger flexor tendon at the MP flexor crease, without pain on palpation and with no triggering. He noted a slight muscular change in the right forearm which he felt could be mild muscular atrophy from her ulnar nerve release/transposition. (RX 3 p.12,14)

Dr. Sudekum had a section of his report entitled, "Job analysis." This section set out what positions Petitioner had worked for the State of Illinois by year, division, and duties. It appears this information was from Petitioner as at one point in the four paragraph descriptions of four different jobs Dr. Sudekum wrote, "She states that her duties included …" The description of the work would appear to be more detailed than the description given by Petitioner at arbitration, though the description of the work both at arbitration and in Dr. Sudekum's report appears to be almost entirely computer work, with the exception of meetings. (RX 3 p.17 of 39)

Dr. Sudekum also included in his report what purports to be a document for Public Service Administrators in general, that being a class of employees, describing work done by people who have vastly different job duties than those described by Petitioner at arbitration or to Dr. Sudekum during this examination. This description obviously is not derived from a copy of the position description introduced into evidence as Respondent's Exhibit #4. (RX 3 p.18-20 of 39)

Dr. Sudekum did include in his report the contents of a typed document Petitioner brought with her to her appointment describing what she did in all of her positions from 1999 through 2016. This was quite detailed and generally was consistent with her arbitration testimony, though the description given to Dr. Sudekum in writing was more detailed than her arbitration testimony. This description is also consistent with Petitioner spending the vast majority of her time working at her computer. Petitioner also advised Dr. Sudekum that on average 90 percent of her work day was spent sitting at her work station doing keyboarding, paperwork and phone work, with the remaining 10 percent being attendance at meetings. (RX 3 p.20-26 of 39)

Dr. Sudekum, in answer to questions posed to him by Ms. Robinson of Tristar opined:

- "There is no indication in the medical records that (Petitioner) sustained any injury to either upper extremity as a result of a work-related accident, injury or activity." He then noted she had several neck strains, back strains, and injuries to her arms and shoulders from domestic events from 1994 through 2006. (RX 3 p.28,29)
- He diagnosed several hand and arm conditions, including right carpal and cubital tunnel syndromes, which were resolved after surgical treatment, right intersection syndrome, which was resolved after conservative treatment, bilateral thumb CMC arthritis, history of left wrist ganglion with surgical excision, and history of hand and wrist peripheral edema requiring diuretic treatment. (RX 3 p.35)
- He noted Petitioner had multiple nonwork related risk factors and comorbid conditions which could cause or aggravate her arm symptoms, including her age, her sex, arthritis affecting her arms and neck, cervical radiculopathy, arm tendinitis, morbid obesity, smoking history, systemic lupus, high blood pressure, peripheral edema and congestive heart failure. He said it

was not unusual for people to have subjective symptoms associated with pathologic processes such as arthritis, tendinitis, or peripheral neuropathy, and it was possible she suffered some symptoms in her arms while performing her job duties, but he did not think having symptoms while at work would indicate that "the benign activity as (sic) caused or aggravated the underlying pathologic process or condition." He noted that there were a number of studies which indicated no significant causal relationship between typing and keyboarding on a sustained basis. He believed Petitioner's upper extremity problems were the result of her comorbidities and not her work activities. (RX 3 p35,36)

- Dr. Sudekum did believe the medical treatment Petitioner had received was reasonable and necessary, that she needed no further treatment, and that she might have ongoing or progressive problems due to her "significant nonwork related risk factors and comorbid conditions." (RX p.36,37)

## ARBITRATOR CREDIBILITY ASSESSMENT

Petitioner appeared to be a cooperative witness for both parties, she answered all questions posed to her by both attorneys with no obvious effort to evade or argue with counsel for Respondent. She did not appear to exaggerate in regard to either her work duties or her complaints. No evidence was introduced which contradicted her testimony in regard to her work duties, or how long she performed tasks. The Arbitrator finds Petitioner to be a credible witness.

Mellisa Batty also appeared to be a cooperative witness. While she corroborated Petitioner's description of what she physically did in performing her job tasks, Ms. Batty did not appear to exaggerate Petitioner's duties or problems performing those duties. While she did not perform the same job as Petitioner, she shared a cubicle with Petitioner for an extended period of time and was in position to describe what Petitioner did in performing her job duties. The Arbitrator finds Ms. Batty to be 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 September 6, 2016, and whether Petitioner's current conditions of ill-being, right carpal tunnel and right cubital tunnel syndromes, are causally related to the accident of September 6, 2016, and whether the medical services that were provided to Petitioner were reasonable and necessary as a result of the Accident of September 6, 2016, the Arbitrator makes the following findings:**

The findings of fact, above, are incorporated herein.

The summaries of medical evidence, including causal connection letters and independent medical examination report, above, are incorporated herein.

Petitioner and Melissa Batty, a former coworker, both testified that the vast majority of Petitioner's work was performed using a keyboard and mouse. By September of 2016 Petitioner had spent 10 to 15 years

with almost all of her job duties with Respondent involving keyboarding and using a mouse for six to six and-a-half hours per day. This constitutes a repetitive job activity.

Petitioner herself was of the opinion that these repetitive job activities either caused or contributed to the development of her right carpal and right cubital tunnel syndromes. Petitioner in her initial visits with NP Witmer on September 6, 2016, the manifestation date used for this repetitive trauma accident, and Dr. Ma on October 11, 2016 noted her belief that her lengthy work using a keyboard and mouse was the cause of her problem. Petitioner's only other activities cited as causing her problems were driving and sleeping. Dr. Ma's causation report clearly states that he does not believe Petitioner's keyboard and mouse work could cause her carpal and cubital tunnel syndromes. But in his causation letter, Dr. Ma further stated that, in his opinion, the work activities described in Petitioner attorney's letter, which was consistent with Petitioner's later testimony at arbitration, over a period of many years, could have aggravated or accelerated the symptoms related to these conditions and required her to have surgical treatment. He believed the treatment she received for these conditions was reasonable and necessary.

Dr. Sudekum, Respondent's examining physician, indicated in his report that Petitioner's job duties included keyboarding were intermittent throughout the workday. Petitioner's unrebutted testimony, supported by the testimony of Ms. Batty, indicates her keyboard and mouse usage was for almost the entire day, not intermittent. That testimony was unrebutted. Dr. Sudekum also reviewed and relied on medical records of Petitioner dating back as far as 1994, identifying multiple non work-related risk factors and comorbid conditions which could cause or aggravate carpal or cubital tunnel syndrome including her age, gender, arthritis, cervical radiculopathy, upper arm tendonitis, morbid obesity, smoking history, systemic lupus erythematosus hypertension, peripheral edema and congestive heart failure. It is noted that many of these records are for left arm and shoulder problems, smoking which had ceased quite some time prior to arbitration, perhaps as early as 1998, lupus, which appeared to be asymptomatic, as well as numerous other maladies which did not appear to be causing Petitioner problems at work. Dr. Sudekum noted that multiple studies have found that there is no *significant* (emphasis supplied) causal relationship between keyboarding and the development of carpal and cubital tunnel syndromes. This is consistent with Dr. Ma, who did not feel Petitioner's work activities of keyboarding, use of mouse and positioning of her arms and hands would have caused Petitioner's right carpal tunnel syndrome and right cubital tunnel syndrome, but stated that those work activities could have aggravated the symptoms related to those diagnoses. Further, Dr. Ma said all of the treatment Petitioner received from NP Naughton and himself were reasonable and were necessary to treat those conditions.

Petitioner need only prove by a preponderance of the evidence that her repetitive job activities were a cause of her injury.

In essence, Dr. Sudekum simply does not believe that computer use can cause or aggravate carpal tunnel syndrome or cubital tunnel syndrome, but believes that any of her comorbidities could. He did, however, admit that the treatment performed by Dr. Ma was reasonable and was necessary.

**The Arbitrator finds that Petitioner suffered an accident on September 6, 2016, which arose out of and in the course of her employment by Respondent.**

**The Arbitrator further finds that Petitioner's medical conditions, right carpal tunnel and right cubital tunnel syndromes, are causally related to the accident of September 6, 2016.**

**The Arbitrator further finds that the following bills introduced into evidence in Petitioner Exhibit 7 are related to Petitioner's right carpal tunnel and right cubital tunnel injuries, are reasonable, were necessitated to treat or cure Petitioner's injuries suffered in this accident, and are to be paid pursuant to the Medical Fee Schedule:**

- Page 1, the three dates of service not crossed out are causally related.
- Page 2, all of the dates of service dated 11-1-2016 and 11/08/2016 are causally related except for the immunizations administered on 11-01-2016. These bills, with the noted exceptions, are for petitioner's pre- surgical workup.
- Page 3, 4, and 5, the dates of service not crossed out are causally related to the injury.

None of the remaining bills contained in Petitioner Exhibit 7 are related to this accident, and, as such, are not awarded in this case.

**The Arbitrator further finds that Respondent shall reimburse Petitioner for her out-of-pocket payments of $70.00.**

**The Arbitrator further finds that pursuant to the stipulation of the parties, Respondent is entitled to a Section 8 (j) credit for all group health insurance payments made towards the medical bills awarded in this decision.** These findings are based on the unrebutted testimony of Petitioner and Ms. Batty, the medical records of NP Witmer, Dr. Becker, and Dr. Ma, and the causation letter of Dr. Ma. The opinions of Dr. Sudekum are not accepted by the Arbitrator as they are based upon incorrect factual conclusions, to wit only intermittent keyboard use, and acceptance of comorbid conditions being capable of aggravating Petitioner's conditions, while voicing opinions that actual physical, repetitive action involving the hands and arms not being capable of being an aggravating factor in Petitioner's symptoms and need for treatment. Dr. Sudekum's opinions are felt to be inconsistent and unbelievable.

**In support of the Arbitrator's decision relating to what temporary benefits Petitioner is entitled to as a result of the accident of September 6, 2016, the Arbitrator makes the following findings:**

The findings of fact, above, are incorporated herein.

The summaries of medical evidence, including causal connection letters and independent medical examination report, above, are incorporated herein.

The findings in regard to accident and causal connection, above, are incorporated herein.

While the parties stipulated as to the period of time Petitioner was off work, that being from November 28, 2016, through December 8, 2016, a period of 1 4/7 weeks, Respondent did not stipulate that Petitioner was entitled to temporary total disability for that period of time, writing on Arbitrator Exhibit 1 the phrase, "no liability." Petitioner is required to prove with credible evidence each element of her case, including entitlement to payment of temporary total disability.

The medical records of NP Witmer, Dr. Becker, and Dr. Ma are devoid of any mention of restriction from work. Dr. Ma at the end of his operative report noted that Petitioner was "instructed to avoid any lifting, pushing, grasping or pulling at this time." When seen on December 13, 2016, Dr. Ma gave those same

instructions to Petitioner. That is three days prior to the date she said she claimed she ceased being temporarily totally disabled. Petitioner did not see any other medical provider prior to December 16, 2016. No off work instruction appears to be memorialized in the records for the period for which Petitioner is claiming benefits.

**The Arbitrator finds that Petitioner was not temporarily totally disabled as a result of the accident for the period claimed by Petitioner.** This finding is based upon the absence of medical restrictions in the exhibits admitted into evidence.

**In support of the Arbitrator's decision relating to the nature and extent of the injury the Arbitrator makes the following findings:**

The findings of fact, above, are incorporated herein.

The summaries of medical evidence, including causal connection letters and independent medical examination report, above, are incorporated herein.

The findings in regard to accident, causal connection, and temporary total disability, above, are incorporated herein.

As the accident occurred after September 1, 2011, the nature and extent of the injury must be determined through the five-factor test set out in §8.1b(b) of the Act.

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.

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 Public Service Administrator at the time of the accident and that she *is* able to return to work in his prior capacity as a result of said injury. The Arbitrator notes this is a sedentary job requiring Petitioner to sit at a desk working at a computer for the majority of her workday. No apparent physical labor is required in this position. . Because of the light nature of her job and Petitioner's having worked said job for over five years since ceasing to be treated for these injuries, the Arbitrator therefore gives *lesser* weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 55 years old at the time of the accident. Because of her having approximately ten years of additional working life, and having a sedentary job, the Arbitrator therefore gives *moderate* weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes no evidence of loss of earnings was introduced into evidence. Petitioner said she earned more as of the date of

arbitration than she did on the date of the first accident. Because of her continuing to work her previous job for the five or more years since the date of this accident and her earning more as of the date of arbitration than she had on the date of accident, 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 at arbitration testified she still had grasping problems on occasion, weakness in her right hand, including in gripping, and daily pain in her right elbow. She said she would occasionally take Tylenol and had a steroid gel that she put on her right hand and right elbow. She said she wears a compression sleeve on her right hand with the fingers cut out, which allowed her to work on her keyboard without intense throbbing. At the end of the work day she would take it off and apply the gel. She said she would occasionally apply the gel at lunch as well. Post-operatively Petitioner saw Dr. Ma on December 13, 2016 and reported the numbness and tingling in her right hand had improved significantly. When she last saw Dr. Ma for this condition on January 24, 2017, she advised him that she was extremely pleased with her recovery, and he found her median and ulnar nerve distributions were improving. He felt she was recovering well, and in a hand symptom form she filled out on that date Petitioner denied having hand or wrist pain, said she had not woken up at night due to hand or wrist pain in the past two weeks, had mild pain once or twice during the day for less than ten minutes, had no numbness, tingling or weakness in her hand or at night, and had no difficulty grasping small objects or doing other hand activities. Petitioner was released on a PRN basis on January 24, 2017 and had not returned to see Dr. Ma or any other physician since that date with right hand or wrist complaints other than trigger finger complaints which are the subject of a separate workers' compensation claim. Because of the lack of corroborating medical evidence supporting her complaints at arbitration, the Arbitrator therefore gives *lesser* 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 10% loss of use of the right hand pursuant to §8(e) of the Act as a result of this repetitive trauma injury, 19 weeks of permanent partial disability at a weekly rate of $775.18, and 10% loss of use of the right arm pursuant to §8(e) of the Act as a result of this injury, 25.3 weeks of permanent partial disability at a weekly rate of $775.18.**

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 18WC014641 |
| Case Name | Sally Becherer v.<br>State of Illinois - Illinois Department of Healthcare and Family Services |
| Consolidated Cases | 17WC017900;<br>21WC006630;<br>21WC006631; |
| Proceeding Type | Petition for Review |
| Decision Type | Commission Decision |
| Commission Decision Number | 23IWCC0542 |
| Number of Pages of Decision | 22 |
| Decision Issued By | Marc Parker, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Martin Haxel |
| Respondent Attorney | Kayla Koyne |

DATE FILED: 12/19/2023

/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 down | ☒ None of the above |

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Sally Becherer,

Petitioner,

vs. No. 18 WC 014641

Illinois Department of Healthcare &
Family Services and DoIT,

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, benefit rates, medical expenses, permanent disability, and whether the correct body parts were addressed in the correct decisions, 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.

On October 11, 2017, Petitioner saw nurse practitioner, Mirjam Naughton, for complaints of right hand and wrist pain. During that visit, Petitioner also complained of pain involving her right index and middle fingers, but received no treatment for them. Petitioner had no complaints involving her right ring finger. Petitioner's only diagnosis on this date was extensor intersection syndrome of the right wrist.

On November 15, 2018, Petitioner saw Dr. Mark Greatting for catching and clicking in her right middle finger. Dr. Greatting diagnosed Petitioner with right trigger middle finger and administered a corticosteroid injection to it. Not long thereafter, Petitioner was diagnosed with right ring trigger finger. In 2019, Petitioner received injections to both her right middle and ring fingers, and ultimately, Dr. Greatting performed surgical releases of the right middle and ring fingers on September 5, 2019. Dr. Greatting subsequently opined that Petitioner's work activities could have aggravated or accelerated her right middle and ring trigger finger conditions.

The Arbitrator believed that Petitioner had alleged injuries to her right middle and ring fingers on two different dates: October 11, 2017 (this claim), and again on November 15, 2018. In the current claim, the Arbitrator wrote, "Petitioner filed *another* Application for Adjustment of Claim in reference to these same right middle and right ring trigger fingers in 21 WC 006630, with a claimed date of accident of November 15, 2018." The Arbitrator then concluded that Petitioner's right middle and ring trigger finger injuries were causally related to her October 11, 2017 claim.

We view the evidence regarding the manifestation date of Petitioner's right middle and ring trigger fingers differently than the Arbitrator. Petitioner only alleged injuries to those fingers on November 15, 2018, in claim number 21 WC 6630. Petitioner neither claimed, nor offered proof, that her right middle and ring trigger finger conditions were causally related to her October 11, 2017 claim.

When Petitioner sought treatment for her right wrist on October 11, 2017, she made no complaints at all regarding her right ring finger. Although she did complain of some right middle finger pain, on that date she was only diagnosed with a right wrist injury: extensor intersection syndrome. Petitioner's right middle and ring trigger finger diagnoses were not made prior to November 15, 2018, and she received no treatment for those conditions before that date.

For these reasons, we find the manifestation date of Petitioner's right middle and right ring trigger finger injuries to be November 15, 2018, not October 11, 2017. We address those injuries in Petitioner's companion claim, 21 WC 6630. We vacate the Arbitrator's finding that Petitioner's right middle and right ring trigger finger injuries manifested on, or were casually related to, an accident on October 11, 2017, and we strike from the Arbitration Decision all language so stating. We find the only injury causally related to Petitioner's October 11, 2017 accident was her right wrist extensor intersection syndrome.

In the current claim, the Arbitrator ordered Respondent pay Petitioner certain medical bills listed in Petitioner's Exhibit 7, finding them, "related to Petitioner's right middle trigger finger and right ring trigger finger injuries." We affirm the award of those medical bills in this claim, but find them to be causally related only to Petitioner's right wrist extensor intersection syndrome condition. We do agree with the Arbitrator that the awards of permanent partial disability and medical bills relating to Petitioner's right middle and ring fingers, were properly awarded in claim number 21 WC 6630.

The Commission also notes, and now corrects, clerical errors in the Arbitrator's Decision. On page 13 of that Decision, the Conclusions of Law section begins by stating: "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 October 11, 2017, and whether Petitioner's current conditions of ill-being, *right carpal tunnel and right cubital tunnel syndromes*, *are* causally related… the Arbitrator makes the following findings…" That statement is incorrect; this claim did not involve right carpal tunnel syndrome or cubital tunnel syndrome. We therefore replace

that phrase on page 13 of the Arbitration Decision in the Conclusions of Law section with*:* "current condition of ill-being, *right wrist extensor intersection syndrome, is* casually related..."

Similarly, on page 15 of the Arbitrator's Decision, we change the sentence, "The Arbitrator further finds that the following bills introduced into evidence in Petitioner Exhibit 7 are related to Petitioner's *right carpal tunnel and right cubital tunnel injuries…,"* to: "The Arbitrator further finds that the following bills introduced into evidence in Petitioner Exhibit 7 are related to Petitioner's *right wrist extensor intersection syndrome*…"

Finally, we correct the clerical error on page 3 of the Arbitration Decision, in which the Arbitrator awarded Petitioner, for her right wrist extensor intersection syndrome injury, 5.125 weeks of permanent partial disability, representing 2½% loss of use of the right hand, at a weekly rate of *$813.87*. We affirm the award of 2½% of a hand, but find the PPD rate should be *$790.64* per week – the statutory maximum PPD rate in effect for accidents occurring on October 11, 2017. We modify that award to so reflect.

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

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.

**December 19, 2023**

MP/mcp
o-12/07/23
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 | 18WC014641 |
| Case Name | BECHERER, SALLY v. ILLINOIS DEPARTMENT OF HEALTHCARE AND FAMILY SERVICES |
| Consolidated Cases | |
| Proceeding Type | |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 18 |
| Decision Issued By | Dennis OBrien, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Martin Haxel |
| Respondent Attorney | Kayla Koyne |

DATE FILED: 9/6/2022

**THE INTEREST RATE FOR THE WEEK OF AUGUST 30, 2022 3.23%**

/s/ Dennis OBrien, Arbitrator
Signature

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

September 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**

**SALLY BECHERER**
Employee/Petitioner

v.

**ILLINOIS DEPARTMENT OF HEALTHCARE AND FAMILY SERVICES**
Employer/Respondent

Case # **18** WC **014641**

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 **July 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 _____

**FINDINGS**

On **October 11, 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.

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

In the year preceding the injury, Petitioner earned $**99,504.28**; the average weekly wage was $**1,913.54**.

On the date of accident, Petitioner was **57** years of age, ***married*** with **no** dependent children.

Petitioner ***has*** received 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 **all amounts paid by its group health insurer as noted on Petitioner Exhibit 7** under Section 8(j) of the Act.

**ORDER**

**Petitioner suffered an accident on October 11, 2017, which arose out of and in the course of her employment by Respondent.**

**Petitioner's medical conditions, right middle trigger finger, right ring trigger finger, and extensor intersection syndrome of the right wrist, are causally related to the accident of October 11, 2017.**

**The following bills introduced into evidence in Petitioner Exhibit 7 are related to Petitioner's right middle trigger finger and right ring trigger finger injuries, are reasonable, were necessitated to treat or cure Petitioner's injuries suffered in this accident, and are to be paid pursuant to the Medical Fee Schedule:**

- The dates of service not crossed out on pages 6, 7, 8, 9, and 10 are causally related to this claim.

None of the remaining bills contained in Petitioner Exhibit 7 are related to this accident, and, as such, are not awarded in this case.

**The Arbitrator further finds that Respondent shall reimburse petitioner for her out-of-pocket payments of $110.00.**

**The Arbitrator further finds that pursuant to the stipulation of the parties, Respondent is entitled to a Section 8 (j) credit for all group health insurance payments made towards the medical bills awarded in this decision.**

**Petitioner's right middle trigger finger and right ring trigger finger injuries had not reached a point of maximum medical improvement by November 15, 2018, the date of the other alleged accident involving those fingers, and due to that intervening accident no permanent partial disability is awardable in this claim, any permanent partial disability award for those injuries will be adjudicated in the Decision of Arbitrator in 21 WC 006630.**

**Petitioner sustained permanent partial disability to the extent of 2 ½% loss of use of the right hand pursuant to §8(e) of the Act as a result of the extensor intersection syndrome injury, 5.125 weeks of permanent partial disability at a weekly rate of $813.87.**

**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 6, 2022**

Signature of Arbitrator

**FINDINGS OF FACT:**

**TESTIMONY AT ARBITRATION**

**Petitioner**

Petitioner testified that she was employed as a Public Service Administrator, Option 1, having been employed by Respondent over 24 years as of the date of arbitration. She said that for the 10 to 15 years prior to the date of arbitration she performed her work using a keyboard and mouse, viewing work on two monitors, with her computer tower being behind one of the towers. She said that since 2011 she has been doing web services work. She has been working in a building on Churchill Road since 2015 at a desk in a cubical. Her keyboard is on top of the desk with the mouse next to it. She noted that she is right hand dominant.

Petitioner identified Petitioner Exhibit 8 as a document created at Petitioner counsel's request. She said it lists projects she worked on from 2015 through 2020. She said it did not list everything she did, but highlighted the projects she worked on. She said she would do her work using the keyboard and mouse unless she was in a meeting or a training. Some of those trainings also involved the use of keyboards and computer setup, while meetings would have her taking notes. She noted that meetings were infrequent, possibly two or three a year. She testified that in a typical day she would be keyboarding or using a mouse for approximately six hours, and had done so since 1999.

Petitioner said she had an EMG performed by Dr. Fortin in 2005 which was positive for mild right carpal tunnel syndrome. She said at that time she was an administrative assistant and was asked to do a large project in the file room, searching for misplaced files and then helping physically moving the file room, supervising 12 or 14 members of the staff physically moving files to reduce the number of filing cabinets. After that was complete non-administrative staff came in and moved the filing cabinets to the new file room. She said this project was huge and took nearly three months to complete. She said she had problems with her right hand, saw Dr. Fortin and was tested, and after the project was completed the symptoms subsided, and she saw no further doctors after the project ended, until 2016.

Petitioner said that in 2016 her right elbow began aching and her right hand became numb. She said in the year prior to that she did more keyboarding than she had ever previously performed while working for the State as there was a huge migration project from a software program called Dreamweaver to a new program, Sharepoint, the equivalent of replacing the whole website. She said she contributed to migrating the policy notices, doing over 300 of those, and she was asked to do that for one year's data, for instance 2011, and when done with that year she would be asked to do another year's data.

Petitioner said she eventually sought medical treatment in 2016, apparently first seeing her primary care physician, Dr. Richards, or his Physician Assistant (PA), Ms. Whitler, on September 6, 2016. She said she originally picked August 5, 2016 as her accident date as when she told the adjuster at Tristar that there was no date, that it had just come on gradually, she was told there had to be an accident date or they could not file a

claim, she said August 5. She said she was referred to Dr. Becker for an EMG test, and then to Dr. Ma, a hand surgeon, seeing him on October 11, 2016. She said she told Dr. Ma that she believed her keyboarding at work contributed to her symptoms. After a number of tests were performed to clear her for surgery, Dr. Ma performed right carpal and cubital tunnel surgeries on November 28, 2016. Petitioner said she was off work for a period of time following those surgeries.

Petitioner testified that there was then a period of time when she was not under medical treatment, but she returned and saw PA Naughton, who was physician assistant to both Dr. Ma and Dr. Greatting, on October 11, 2017, as she was having problems with her right wrist "hanging up." She received the first of two cortisone shots on that date. She then saw Dr. Ma, and he advised her he did not think she needed surgery and instead gave her another injection. She said the injections only gave her temporary relief.

On November 15, 2018, Petitioner sought treatment with Dr. Greatting due to symptoms in her left hand and elbow, carpal and cubital tunnel symptoms, as well as problems she was having grasping things with her right hand, causing her to drop things. She said she saw Dr. Becker for a second time for EMG testing of the left hand and arm before Dr. Greatting eventually performed left carpal and cubital tunnel syndrome surgeries. She said Dr. Greatting initially tried to care for her right long and ring finger problems with injections, but that did not help. Dr. Greatting eventually performed surgery on those fingers in 2019.

Petitioner said she saw Dr. Greatting in regard to two trigger fingers in her left hand on March 3, 2020. She said her supervisor at that time was Ann Marie Anderson, and she advised Ms. Anderson about her left trigger fingers prior to March of 2020 as well as after she saw Dr. Greatting on March 3, 2020, she made Ms. Anderson aware of every time she went to the doctor while Ms. Anderson was her supervisor, and why she was going to the doctor. Dr. Greatting performed surgery in 2020 on her left long and ring fingers.

Petitioner said that she began working at home when the pandemic began, and continued doing so as of the date of arbitration. She said her computer use was about the same working at home as it was working in the office, she still spent most of her day on the computer. She said she is performing the same job that she had before and was able to do that job. Petitioner said she has gotten work evaluations since her return to work and has been deemed exceptional.

Petitioner said these surgeries alleviated the severe symptoms she was experiencing, but she still had grasping problems on occasion, weakness in both her hands, including in gripping, achiness in her right elbow and daily pain in her left elbow. She said she occasionally takes Tylenol and had a steroid gel that she put on her hands and elbows. She testified that she had to sleep with her left arm extended due to her elbow as otherwise it would throb and feel like it had lost circulation, and with a pillow on her fingers to keep her hand open. She said she wears compression sleeves with the fingers cut out on both hands, they allow her to work on her keyboard without intense throbbing. At the end of the day she takes them off and applies the gel. She said she would occasionally apply the gel at lunch as well.

On cross examination Petitioner said she was not being seen any by physician for injuries to her hands and elbows. She could not remember the date of the last time she saw a doctor for her hands and elbows. She said she did not use tobacco, was not diabetic or pre-diabetic, but was diagnosed with hypertension in 2018 or 2019. She said she took a diuretic for that condition.

Petitioner said Nurse Practitioner (NP) Naughton had prescribed a wrist brace for her, but she found it too cumbersome, so she bought the compression sleeves as she needed something for her left hand.

Petitioner testified that the job duty form she filled out at the request of her attorney was prepared a year to a year-and-a-half prior to arbitration, and it does not contain all of her duties, but it contains her significant duties. She said she also had three breaks during the day, attended meetings, and helped with IRS and Social Security audits. She said her work duties had changed since her first date of accident, that while it was still on the keyboard and the mouse, she no longer did web work, she does audit work, with spreadsheets and databases.

Petitioner said she may have first experienced symptoms in her left hand and elbow in perhaps 2017, and in the right wrist and elbow in the summer of 2016. She said that she would get symptoms while working with her arms held as they were at her desk while working, in the elbows. She said she never asked her employer for any accommodations such as a standing desk or a gel wrist pad.

Petitioner said she did not do many activities outside of work, such as gardening, she was a bit of a homebody.

Petitioner said she earned more as of the date of arbitration than she did on the date of the first accident.

Petitioner was asked about her current complaints and said she wore sleeves now, used gel cream, and had difficulty grabbing things when her hand was numb. She said the surgeries improved her condition, but she was not cured. She said she did follow up with Dr. Greatting after her last surgery and told him of her complaints, but she could not remember the date she did so.

She said the keyboarding she currently did involved typing and mouse work and sometimes she would be doing data entry.

On redirect examination Petitioner said she did her keyboarding with both hands.

**Melissa Batty**

Ms. Batty was called as a witness by Petitioner. She testified that she works for the State of Illinois in the Division of Child Support Enforcement. She had been employed by the State for 32 years and had worked with Petitioner on a daily basis at Healthcare & Family Services starting in 2015 and for about a year and-a-half. They shared a work station, with a table splitting their work stations. She said she observed Petitioner as she worked through the day. Ms. Batty said she performed her work on the computer, using a keyboard, as did Petitioner. She said Petitioner would be keyboarding all day long, just as she would.

On cross examination Ms. Batty said she and Petitioner did not have the same job titles.

**MEDICAL EVIDENCE**

Petitioner was seen by NP Witmer on September 6, 2016 with complaints of right fourth and fifth finger numbness since August 5, with the whole hand being tingly and weak. She said she also had right elbow pain for the same amount of time, with occasional shock-like sensations on the ulnar side of the elbow radiating to the ulnar wrist and hand. She said the felt her symptoms were work related as she is on her computer all of the time, for years, but the computer usage had increased a year earlier. She said she used a mouse with her right, dominant, hand. She had suffered no recent injuries, exercises or activities which would explain the symptoms.

Physical examination revealed a negative Tinel's sign at both wrists and elbows, no thenar atrophy, decreased right grip strength, normal sensation of the right hand. NP Witmer strongly suspected cubital tunnel entrapment, and advised Petitioner to wear a splint at night. An EMG test was ordered. (PX 3 p.1,3)

Petitioner saw Dr. Becker on September 19, 2016 for EMG testing of her right hand. She advised Dr. Becker that the numbness and tingling in the 4th and 5th digits of her right hand started in August. Petitioner said she did not have symptoms on the left. On physical examination Dr. Becker noted atrophy of the ulnar innervated intrinsic hand muscles. After performing the electrodiagnostic testing in the right arm Dr. Becker felt the findings were consistent with severe ulnar mononeuropathy at the right elbow and mild carpal tunnel at the right wrist. No testing was performed on the left side. (PX 5 p.1)

Dr. Ma first saw Petitioner on October 11, 2016. Petitioner was complaining of numbness and tingling in the right hand. She advised Dr. Ma that she had worked for the State for 17 years, typing and using a mouse constantly, all day. She said numbness and tingling in the right had developed at the end of July, 2016. She also complained of right elbow pain which was constant and throbbing. She stated that her symptoms definitely were aggravated with repeat motion at work, typing and using the mouse. She noted recent EMG/NCV suggesting carpal and cubital tunnel. On physical examination Petitioner had a positive Tinel at both the carpal and cubital tunnels, decreased sensation in both median and ulnar nerve distributions, positive Durkan and Phalen tests, and significant weakness in the intrinsic muscle of the right hand. He noted Dr. Becker's test results suggesting severe right cubital tunnel and mild right carpal tunnel syndromes. He suggested Petitioner have surgery on both the carpal and cubital tunnels, and Petitioner agreed. (PX 4 p.1,3)

Dr. Ma performed the right carpal and right cubital tunnel surgeries on November 28, 2016. During the carpal tunnel surgery he noted that the median nerve was swollen. During the cubital tunnel surgery, Dr. Ma noted the ulnar nerve was subluxated with elbow flexion of 90 degrees leading to the decision to anteriorly transpose the ulnar nerve anteriorly. (PX 4 p.4,5)

Petitioner was seen post-operatively by Dr. Ma on December 13, 2016. Petitioner reported the numbness and tingling n the right hand was improved significantly. Physical examination revealed the incisions were healing well. Petitioner was advised to continue a home exercise program, with range of motion and stretching. She was to avoid lifting, pushing or grasping. (PX 4 p.12)

Petitioner saw Dr. Ma again on January 24, 2017, saying she was extremely pleased with her recovery. Dr. Ma found her median and ulnar nerve distributions to be improving. He felt she was recovering well. In a Brigham Hand Symptom Severity Scale form on that date, Petitioner said she did not have hand or wrist pain when seen, did not wake up on a typical night due to hand or wrist pain in past two weeks, had mild pain during the day, once or twice a day, for less than 10 minutes, did not have numbness, tingling, or weakness in her hand, or at night, and had no difficulty with grasping small objects, or doing several other hand activities.. She was released on a prn basis at this time. (PX 4 p.14,16,20,21)

On October 11, 2017 Petitioner saw NP Naughton with complaints about her right index and middle fingers as well as the dorsum of the hand and her wrist. She was denying any specific injury. She noted pain was sharp when she was gripping. Her pain was 5/10 at rest and 7/10 when gripping and doing computer-based activities. It was noted her work was primarily computer based. On exam she had tenderness over the second dorsal compartment of the wrist, pain with resisted extension of the index and middle fingers, some pain with

resisted wrist extension, and less pain with resisted wrist flexion. She had full range of motion and muscle strength of the right wrist. Intersection syndrome was discussed with Petitioner and an injection into the second dorsal compartment of the right wrist was performed for that condition. Petitioner was provided with a splint while up and active. (PX 4 p.24)

NP Naughton saw Petitioner on November 8, 2017 for follow up of the right second dorsal compartment injection. Petitioner said the injection gave her some relief, but her pain was not entirely resolved, she continued to have discomfort in the right index and middle fingers as well as the dorsum of the hand and the wrist extending into the distal forearm. She rated her pain as 3/10. Physical examination showed tenderness to palpation over the second dorsal compartment of the right wrist, pain with resisted wrist extension and resisted extension of the index and middle fingers of the MCP joint. The right wrist had full range of motion and muscle strength. It was agreed to continue conservative treatment, which included her starting use of Voltaren gel. (PX 4 p.28)

On January 10, 2018 Petitioner saw NP Naughton, and advised her the Voltaren gel did not give much relief. Her symptoms were basically unchanged, as was her physical examination. A second injection into the right second dorsal compartment was performed during this visit. It was noted that if she had not had significant improvement at her next visit they would discuss surgical options. (PX 4 p.32)

Petitioner was seen again by NP Naughton on February 8, 2018. Despite her injection a month earlier, her pain had returned. The pain was primarily along the dorsum of the hand and in the second dorsal compartment. Her physical examination findings remained about the same. Debridement and release of the second dorsal compartment of the right wrist for intersection syndrome by Dr. Ma was discussed, and Petitioner elected to have that surgery. (PX 4 p.36)

Petitioner saw Dr. Ma on February 13, 2018. Dr. Ma noted her recent complaints and physical examination findings as well as injections. X-rays of the right hand were done on February 13, 2018 and were interpreted as only showing mild degenerative changes. His physical examination on this date found significant tenderness to palpation to the right thumb CMC joint, a positive grinds test, and mild swelling around the CMC joint of the right hand. Dr. Ma felt Petitioner's pain was due to multiple issues, which included arthritis in the right wrist and finger arthritis. He felt nonsurgical treatment would help her, they reviewed those options and Petitioner opted for an injection of the right CMC joint, which was performed. Dr. Ma felt Petitioner could be helped by occupational therapy, but Petitioner said it had not been obtained in the past due to money issues. (PX 4 p.23,40)

Petitioner was seen by NP Naughton on November 15, 2018. On the Orthopedic Surgeon Intake form filled out and signed by Petitioner on that date she noted she was to be seen for right hand middle finger trigger finger, left hand tingling, numbness, and pain in the arm and wrist. She noted she had been experiencing these symptoms for three months, they came on gradually, and the activities of daily living where it bothered her were driving and work/typing. She noted she had seen Dr. Greatting previously for left trigger thumb, and had seen Dr. Ma for right trigger thumb. When asked if this problem interfered with her work she wrote that she had to rest the left hand. Her pain drawing that day showed aching in the right hand and aching, numbness and tins and needles sensation in the left hand. Petitioner told NP Naughton of the left hand pain coming on over the past three months and of the symptoms being exacerbated by driving and typing. She said it had been progressively

getting worse in the last six weeks. An x-ray of the left hand on this date only showed mild degenerative changes in the first carpometacarpal joint. On exam Tinel's, Phalen's and compression tests were all positive over the carpal tunnel on the left. The right hand had a small nodule in the area of the A1 pulley adjacent to the right middle finger which was tender to palpation, with catching and clicking of the flexor tendon as it passed through the A1 pulley system of that right middle finger. It was decided to inject the right middle finger that day, which was performed, and to send her to Dr. Becker for electrodiagnostic testing. (PX 6 p.1-4,10)

Dr. Becker saw Petitioner for a second time on November 20, 2018. On this occasion Petitioner was complaining of numbness and tingling in the left hand which woke her at night and which had begun 1 and-a-half months earlier. EMG testing was interpreted as showing a mild left carpal tunnel syndrome and a mild ulnar mononeuropathy at the left elbow. (PX 5 p.1)

NP Naughton again saw Petitioner on December 13, 2018. Petitioner said her right middle finger complaints had resolved following the injection, with no clicking, catching, or discomfort. She said her left hand complaints were bothering her considerably, and, again, were aggravated by driving and typing. Her previous exam findings remained the same, other than the resolution of right middle finger tenderness and the absence of catching or clicking of the flexor tendon at the A1 pulley system. They discussed Dr. Becker's findings and Petitioner stated she would like to undergo left carpal and cubital tunnel releases by Dr. Greatting. (PX 6 p.11)

Petitioner was seen by Dr. Greatting on January 28, 2019 for a pre-op physical. Her exam findings were generally unchanged.. (PX 6 p.22)

On February 5, 2019, Dr. Greatting performed a release of the left cubital tunnel, a release of the left carpal tunnel, and injections of the right middle and ring fingers' flexor tendon sheaths. The ulnar nerve was found to be compressed and narrowed and decompression was accomplished. The median nerve was found to be compressed and narrowed under the middle third of the transverse carpal ligament, and decompression was accomplished. (PX 6 p.32,33)

Dr. Greatting saw Petitioner on March 19, 2019 and Petitioner advised him that her numbness was resolved and her sutures removed. She was advised to call and return for follow up in four to six weeks if she was having any significant problems or concerns. (PX 6 p.37)

Petitioner was next seen on August 8, 2019 as she was again having triggering of the right middle and ring fingers. She said her fingers would lock completely to the palm and she would have to use her other hand to manually unlock them. She wanted injections as she was going to be going on vacation. Her physical examination was similar to what it had been prior to her injecitons, with tenderness over the A1 pulley system and catching and clicking of the flexor tendons as they passed through the A1 pulley system of those fingers. Surgery to correct the trigger fingers was discussed, and Petitioner said she would like the surgeries. (PX 6 p.40)

Dr. Greatting saw Petitioner on August 14, 2019, and injected her right trigger fingers. Due to left arm numbness and tingling, Petitioner was again referred to Dr. Becker for electrodiagnostic testing. Dr. Greatting saw her again on August 28, 2019 with continuing right middle and ring finger triggering and surgery was discussed and scheduled. (PX 6 p.44,45,52)

Surgeries for the release of the right long and ring fingers were performed on September 4, 2019, by Dr. Greatting. Petitioner was seen post-operatively by Dr. Greatting on September 18, 2019, and she was already getting good motion in the fingers. Her sutures were removed and she was told to return if she had any significant problems or concerns. (PX 6 p.56,57,59)

Petitioner returned to see NP Naughton on March 3, 2020, this time with catching and clicking of her left middle and ring fingers, which she said was a new problem for her. She said it had been worsening over the last several weeks. There was palpable catching and clicking of the flexor tendons of the left middle and ring fingers. Petitioner said she wanted surgical releases by Dr. Greatting. Petitioner received injections of the fingers on this date. (PX 6 p.63)

Petitioner saw Dr. Greatting on May 7, 2020, and after being examined, surgery was scheduled. Dr. Greatting performed the pre-op physical the next day, May 8, 2020. Dr. Greatting performed releases of the left long finger trigger finger and the left ring finger trigger finger on May 19, 2020. (PX 6 p.71,77,87,88)

NP Naughton saw Petitioner on Jun 4, 2020 and Petitioner said she was doing well, no longer having any mechanical symptoms or pain. She denied numbness or tingling in the left hand. Sutures were removed. Petitioner was told to contact Dr. Greatting's office if she had any concerns. This appears to be Petitioner's last visit with any physician for her right hand, wrist or elbow and her left hand, wrist, or elbow. (PX 6 p.90)

**CAUSATION REPORT OF DR. MARK GREATTING**

Petitioner's attorney wrote Dr. Greatting on March 26, 2021 with copies of Petitioner's pertinent medical records. Je descrobed Petitioner's work for Respondent as:

> "While her job duties were many and varied, the common denominator was that she spent 90% of her time at work using her computer, both keyboard and mouse. * * * He (sic) told me that she would rest her forearms on the top of the edge of the desk, elbows bent with her hands on top of the desk to use the mouse and keyboard." (PX 1 p.1)

Dr. Greatting was then asked a series of questions which he was asked to answer within a reasonable degree of medical certainty. In answer to those questions Dr. Greatting wrote a letter to Petitioner's attorney on June 17, 2021, in which he stated:

- He treated Petitioner for left carpal tunnel syndrome, left cubital tunnel syndrome, right middle trigger finger, right ring trigger finger, left middle trigger finger and left ring trigger finger.
- He performed the left cubital and carpal tunnel surgeries, right middle and ring trigger finger releases, and left middle and ring trigger finger releases summarized above.
- He opined that Petitioner's work did not cause any of those conditions.
- He opined that the work activities described in Petitioner attorney's letter over a period of many years could have aggravated or accelerated the symptoms related to these conditions and required her to have surgical treatment. He believed the treatment she received for these conditions was reasonable and necessary. He had no specific information about any time Petitioner may have been off work for these conditions.

- Petitioner also was treated for left trigger thumb and recurrent left wrist volar and dorsal carpal ganglions, but he did not believe those conditions were in any way related to Petitioner's work activities. (PX 1 p.4)

**CAUSATION REPORT OF DR. JIANJUN MA**

The parties stipulated that a letter was sent to Dr. Ma by Petitioner's attorney with a job description, but that letter was not available for subpoena purposes at the time of arbitration. The attorneys stipulated that the letter sent to Dr. Ma was the same as the letter sent to Dr. Greatting. For the contents of that letter, please see the summary of Dr. Greatting's causation report, above.

Dr. Ma, in answer to the questions posed to him in Petitioner counsel's letter wrote a letter to Petitioner's attorney on October 4, 2021, in which he stated:

- He treated Petitioner's right hand and wrist conditions she complained of, numbness and tingling in the right hand.
- He performed right carpal tunnel release and ulnar nerve anterior transposition on November 28, 2016.
- She was released from his care on November 11, 2016.
- He opined that Petitioner's work activities of keyboarding, use of mouse and positioning of her arms and hands would not have caused Petitioner's right carpal tunnel syndrome, right cubital tunnel syndrome or extensor intersection of the right wrist, but those work activities could have aggravated the symptoms related to those diagnoses. He said all of the treatment Petitioner received from NP Naughton and himself were reasonable and were necessary to treat those conditions.
- He said Petitioner was authorized to be off work "for a period of time" after her November 2016 surgery, followed by a return to work with "certain restrictions." (PX 2 p.1)

**IME REPORT OF DR. ANTHONY E. SUDEKUM**

Dr. Sudekum performed an IME of Petitioner on October 4, 2018. He reviewed medical records dating back to 1994, many of which were not introduced into evidence at arbitration. Many of the pre-accident dates records are for complaints on other parts of her body other than fingers, hands, and elbows, and for hand and wrist complaints (ganglion cysts, headache, anemia, stresses with a co-worker affecting her health, etc.) which are not claimed as work related injuries. Some are related to the areas of the body that are the subject matter of Petitioner's current claims, but are double hearsay (the report itself being hearsay) which was not specifically objected to at arbitration, but in addition are obviously incomplete in their summarization in this report. The report does appear to indicate a review of all medical treatment and testing performed from September 6, 2016 through February 13, 2018, but not thereafter. (RX 3 p.1 – 12,16,17 of 39)

Dr. Sudekum received a history of Petitioner's complaints from her during his examination. He then performed a physical examination which revealed well-healed incisions on her right medial elbow and right proximal palm as well as well-healed incisions on the left wrist from non-related ganglion cyst excisions. He found Tinel's and Phalen's signs to be negative bilaterally at the wrist and elbows, full range of motion of

bilateral elbows, wrists and fingers, normal sensation throughout both upper extremities, full strength of the right shoulder, upper arm, elbow, forearm and wrist and grip and pinch strength which was considered in the low normal range. He found a palpable nodule on Petitioner's right middle finger flexor tendon at the MP flexor crease, without pain on palpation and with no triggering. He noted a slight muscular change in the right forearm which he felt could be mild muscular atrophy from her ulnar nerve release/transposition. (RX 3 p.12,14)

Dr. Sudekum had a section of his report entitled, "Job analysis." This section set out what positions Petitioner had worked for the State of Illinois by year, division, and duties. It appears this information was from Petitioner as at one point in the four paragraph descriptions of four different jobs Dr. Sudekum wrote, "She states that her duties included …" The description of the work would appear to be more detailed than the description given by Petitioner at arbitration, though the description of the work both at arbitration and in Dr. Sudekum's report appears to be almost entirely computer work, with the exception of meetings. (RX 3 p.17 of 39)

Dr. Sudekum also included in his report what purports to be a document for Public Service Administrators in general, that being a class of employees, describing work done by people who have vastly different job duties than those described by Petitioner at arbitration or to Dr. Sudekum during this examination. This description obviously is not derived from a copy of the position description introduced into evidence as Respondent's Exhibit #4. (RX 3 p.18-20 of 39)

Dr. Sudekum did include in his report the contents of a typed document Petitioner brought with her to her appointment describing what she did in all of her positions from 1999 through 2016. This was quite detailed and generally was consistent with her arbitration testimony, though the description given to Dr. Sudekum in writing was more detailed than her arbitration testimony. This description is also consistent with Petitioner spending the vast majority of her time working at her computer. Petitioner also advised Dr. Sudekum that on average 90 percent of her work day was spent sitting at her work station doing keyboarding, paperwork and phone work, with the remaining 10 percent being attendance at meetings. (RX 3 p.20-26 of 39)

Dr. Sudekum, in answer to questions posed to him by Ms. Robinson of Tristar opined:

- "There is no indication in the medical records that (Petitioner) sustained any injury to either upper extremity as a result of a work-related accident, injury or activity." He then noted she had several neck strains, back strains, and injuries to her arms and shoulders from domestic events from 1994 through 2006. (RX 3 p.28,29)
- He diagnosed several hand and arm conditions, including right carpal and cubital tunnel syndromes, which were resolved after surgical treatment, right intersection syndrome, which was resolved after conservative treatment, bilateral thumb CMC arthritis, history of left wrist ganglion with surgical excision, and history of hand and wrist peripheral edema requiring diuretic treatment. (RX 3 p.35)
- He noted Petitioner had multiple nonwork related risk factors and comorbid conditions which could cause or aggravate her arm symptoms, including her age, her sex, arthritis affecting her arms and neck, cervical radiculopathy, arm tendinitis, morbid obesity, smoking history, systemic lupus, high blood pressure, peripheral edema and congestive heart failure. He said it

was not unusual for people to have subjective symptoms associated with pathologic processes such as arthritis, tendinitis, or peripheral neuropathy, and it was possible she suffered some symptoms in her arms while performing her job duties, but he did not think having symptoms while at work would indicate that "the benign activity as (sic) caused or aggravated the underlying pathologic process or condition." He noted that there were a number of studies which indicated no significant causal relationship between typing and keyboarding on a sustained basis. He believed Petitioner's upper extremity problems were the result of her comorbidities and not her work activities. (RX 3 p35,36)

- Dr. Sudekum did believe the medical treatment Petitioner had received was reasonable and necessary, that she needed no further treatment, and that she might have ongoing or progressive problems due to her "significant nonwork related risk factors and comorbid conditions." (RX p.36,37)

## ARBITRATOR CREDIBILITY ASSESSMENT

Petitioner appeared to be a cooperative witness for both parties, she answered all questions posed to her by both attorneys with no obvious effort to evade or argue with counsel for Respondent. She did not appear to exaggerate in regard to either her work duties or her complaints. No evidence was introduced which contradicted her testimony in regard to her work duties, or how long she performed tasks. The Arbitrator finds Petitioner to be a credible witness.

Mellisa Batty also appeared to be a cooperative witness. While she corroborated Petitioner's description of what she physically did in performing her job tasks, Ms. Batty did not appear to exaggerate Petitioner's duties or problems performing those duties. While she did not perform the same job as Petitioner, she shared a cubicle with Petitioner for an extended period of time and was in position to describe what Petitioner did in performing her job duties. The Arbitrator finds Ms. Batty to be 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 October 11, 2017, and whether Petitioner's current conditions of ill-being, right carpal tunnel and right cubital tunnel syndromes, are causally related to the accident of October 11, 2017, and whether the medical services that were provided to Petitioner were reasonable and necessary as a result of the Accident of October 11, 2017, the Arbitrator makes the following findings:**

The findings of fact, above, are incorporated herein.

The summaries of medical evidence, including causal connection letters and independent medical examination report, above, are incorporated herein.

Petitioner and Melissa Batty, a former coworker, both testified that the vast majority of Petitioner's work was performed using a keyboard and mouse. By September of 2016 Petitioner had spent 10 to 15 years with almost all of her job duties with Respondent involving keyboarding and using a mouse for six to six-and-a-half hours per day. This constitutes a repetitive job activity.

On October 11, 2017 Petitioner saw NP Naughton with complaints about her right index and middle fingers. She was denying any specific injury. She noted pain was sharp when she was gripping. Her pain was 5/10 at rest and 7/10 when gripping and doing computer-based activities. It was noted her work was primarily computer based. On exam she had tenderness over the second dorsal compartment of the wrist, pain with resisted extension of the index and middle fingers, some pain with resisted wrist extension, and less pain with resisted wrist flexion. She had full range of motion and muscle strength of the right wrist. Intersection syndrome was discussed with Petitioner and an injection into the second dorsal compartment of the right wrist was performed for that condition.

NP Naughton saw Petitioner on November 8, 2017 for follow up of the right second dorsal compartment injection. Petitioner said the injection gave her some relief, but her pain was not entirely resolved, she continued to have discomfort in the right index and middle fingers as well as the dorsum of the hand and the wrist extending into the distal forearm. Physical examination showed tenderness to palpation over the second dorsal compartment of the right wrist, pain with resisted wrist extension and resisted extension of the index and middle fingers of the MCP joint. It was agreed to continue conservative treatment, which included her starting use of Voltaren gel.

On January 10, 2018 Petitioner saw NP Naughton and advised her the Voltaren gel did not give much relief. A second injection into the right second dorsal compartment was performed during this visit.

Petitioner was seen again by NP Naughton on February 8, 2018. Despite her injection a month earlier, her pain had returned. Debridement and release of the second dorsal compartment of the right wrist for intersection syndrome by Dr. Ma was discussed, and Petitioner elected to have that surgery.

In his causation letter Dr. Ma opined that Petitioner's work activities of keyboarding, use of mouse and positioning of her arms and hands would not have caused Petitioner's extensor intersection of the right wrist condition, but those work activities could have aggravated the symptoms related to that diagnosis. Dr. Ma did not address right long and ring finger trigger finger conditions in his causation letter. He said all of the treatment Petitioner received from NP Naughton and himself was reasonable and was necessary to treat her conditions.

It is noted that Petitioner was treated for extensor intersection of the right wrist were on dates that Petitioner was also treated for right carpal tunnel syndrome, and that those medical charges were awarded in a separate decision, 17 WC 017900, and are not being awarded a second time in this decision.

Dr. Sudekum saw Petitioner for an IME on October 4, 2018, and on physical examination found a palpable nodule on Petitioner's right middle finger flexor tendon at the MP flexor crease, without pain on palpation and with no triggering. He diagnosed several hand and arm conditions, including right intersection syndrome, which he said had resolved after conservative treatment. He believed Petitioner's upper extremity

problems were the result of her comorbidities and not her work activities. He did believe the medical treatment Petitioner had received through the date he saw her, October 4, 2018, was reasonable and necessary.

Petitioner filed another Application for Adjustment of Claim in reference to these same right middle and right ring trigger fingers in 21 WC 006630, with a claimed date of accident of November 15, 2018.

Petitioner need only prove by a preponderance of the evidence that her repetitive job activities were a cause of her injury.

**The Arbitrator finds that Petitioner suffered an accident on October 11, 2017, which arose out of and in the course of her employment by Respondent.**

**The Arbitrator further finds that Petitioner's medical conditions, right middle trigger finger, right ring trigger finger, and extensor intersection syndrome of the right wrist, are causally related to the accident of October 11, 2017.**

**The Arbitrator further finds that the following bills introduced into evidence in Petitioner Exhibit 7 are related to Petitioner's right carpal tunnel and right cubital tunnel injuries, are reasonable, were necessitated to treat or cure Petitioner's injuries suffered in this accident, and are to be paid pursuant to the Medical Fee Schedule:**

- The dates of service not crossed out on pages 6, 7, 8, 9, and 10 are causally related to this claim.

None of the remaining bills contained in Petitioner Exhibit 7 are related to this accident, and, as such, are not awarded in this case.

**The Arbitrator further finds that Respondent shall reimburse petitioner for her out-of-pocket payments of $110.00.**

**The Arbitrator further finds that pursuant to the stipulation of the parties, Respondent is entitled to a Section 8 (j) credit for all group health insurance payments made towards the medical bills awarded in this decision.** These findings are based on the unrebutted testimony of Petitioner and Ms. Batty, and the medical records of NP Naughton and Dr. Ma.

**In support of the Arbitrator's decision relating to the nature and extent of the injury the Arbitrator makes the following findings:**

The findings of fact, above, are incorporated herein.

The summaries of medical evidence, including causal connection letters and independent medical examination report, above, are incorporated herein.

The findings in regard to accident, causal connection, and notice, above, are incorporated herein.

Petitioner filed another Application for Adjustment of Claim in reference to these same right middle and right ring trigger fingers in 21 WC 006630, with a claimed date of accident of November 15, 2018. Injections and surgeries to the right middle and ring fingers occurred after the November 15, 2018 date of accident.

**The Arbitrator finds that Petitioner's right middle trigger finger and right ring trigger finger injuries had not reached a point of maximum medical improvement by November 15, 2018, the date of the other alleged accident involving those fingers, and due to that intervening accident no permanent partial disability is awardable in this claim, any permanent partial disability award for those injuries will be adjudicated in the Decision of Arbitrator in 21 WC 006630.**

As the accident occurred after September 1, 2011, the nature and extent of the injury must be determined through the five-factor test set out in §8.1b(b) of the Act.

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.

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 Public Service Administrator at the time of the accident and that she *is* able to return to work in his prior capacity as a result of said injury. The Arbitrator notes this is a sedentary job requiring Petitioner to sit at a desk working at a computer for the majority of her workday. No apparent physical labor is required in this position. . Because of the light nature of her job and Petitioner's having worked said job for over two and-a-half years since ceasing to be treated for these injuries on October 11, 2017, the Arbitrator therefore gives *lesser* weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 57 years old at the time of the accident. Because of her having approximately ten years of additional working life, and having a sedentary job, the Arbitrator therefore gives *moderate* weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes no evidence of loss of earnings was introduced into evidence. Petitioner said she earned more as of the date of arbitration than she did on the date of her first claimed accident, September 6, 2016, and Petitioner stipulated her average weekly wage for the year preceding this accident was the same as it had been on the date of that earlier accident. Because of her continuing to work her previous job for the three and-a-half or more years since the date of this accident and her earning more as of the date of this arbitration than she had on the date of this accident, 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 at arbitration testified she still had grasping problems on occasion, weakness in both her right hand, including in gripping. It is not clear whether these complaints are attributable to the extensor intersection syndrome of the right wrist, or to the right middle trigger finger, right ring trigger

finger or the right carpal tunnel and cubital tunnel syndromes which were the injuries claimed in 17 WC 017900. Petitioner had her wrist injected as a result of this injury on several occasions and after the last injection noted she wanted to have the intersection syndrome surgically repaired by Dr. Ma. That surgery never occurred and Petitioner was not seen for that malady again. Petitioner has not seen a physician for treatment of the extensor intersection injuries since February 8, 2018. Because of the amount of treatment required for these injuries, the Arbitrator therefore gives *moderate* 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 ½% loss of use of the right hand pursuant to §8(e) of the Act as a result of the extensor intersection syndrome injury, 5.125 weeks of permanent partial disability at a weekly rate of $813.87.**

| | |
|---|---|
| Affirm and Adopt (No Changes) No<br>Affirm with Changes No<br>No Reverse Reason<br><br>Yes Modify Down | Injured Workers' Benefit Fund (§4(d)) No<br>Rate Adjustment Fund (§8(g)) No<br>Second Injury Fund (§8(e)18) No<br>PTD/Fatal denied No |

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 21WC006630 |
| Case Name | Sally Becherer v.<br>State of Illinois - Illinois Department of Healthcare and Family Services & DoIT |
| Consolidated Cases | 17WC017900;<br>18WC014641;<br>21WC006631; |
| Proceeding Type | Petition for Review |
| Decision Type | Commission Decision |
| Commission Decision Number | 23IWCC0543 |
| Number of Pages of Decision | 23 |
| Decision Issued By | Marc Parker, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Martin Haxel |
| Respondent Attorney | Kayla Koyne,<br>Kayla Koyne |

DATE FILED: 12/19/2023

/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 down | ☒ None of the above |

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Sally Becherer,

Petitioner,

vs. No. 21 WC 006630

Illinois Department of Healthcare &
Family Services and DoIT,

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, benefit rates, medical expenses, permanent disability, and whether the correct body parts were addressed in the correct decisions, 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 this claim Petitioner alleged, as a result of an accident occurring on November 15, 2018, repetitive injuries to her left hand, left arm, right middle finger, and right ring finger. The Arbitrator found Petitioner proved causation of injuries to each of those body parts and awarded Petitioner her reasonable and necessary medical bills, and permanent partial disability.

However, in Petitioner's companion claim, 18 WC 014641, the Arbitrator also found that Petitioner's right middle and ring trigger fingers had been injured in an earlier accident occurring on October 11, 2017 – and that those fingers were reinjured on November 15, 2018. The Arbitrator referenced that finding on page 15-16 of the current Decision, stating,

> "Petitioner filed another Application of Adjustment of Claim in reference to these same right middle and right ring trigger fingers in 18 WC 014641, with a claimed date of accident of October 11, 2017. Treatment of the right middle trigger finger

> and the right ring trigger finger had ceased following that October 11, 2017 accident on February 8, 2018. The Arbitrator found in 18 WC 014641 that Petitioner's right middle trigger finger and right ring trigger finger injuries had not reached a point of maximum medical improvement by November 15, 2018, and did not award permanent partial disability benefits for those injuries in that case, instead finding that any such benefits would be adjudicated in the present case."

As we explained in our Decision in 18 WC 014641, we view the evidence regarding the manifestation date of Petitioner's right middle and ring trigger fingers differently than the Arbitrator. Petitioner did not allege right middle and right ring trigger finger injuries in her October 11, 2017 claim. For her right trigger finger injuries, Petitioner filed only one Application for Adjustment of Claim – alleging injury only on November 15, 2018. In our Decision for claim 18 WC 014641, we found that the only injury causally related to Petitioner's October 11, 2017 accident was her right wrist extensor intersection syndrome.

We do not find that the evidence supports a conclusion that Petitioner's right middle and ring trigger finger conditions were caused or aggravated by any injury manifesting on October 11, 2017. No medical providers made such a diagnosis on that date, or on any other, prior to November 15, 2018. Nor was any treatment provided prior to November 15, 2018, for Petitioner's right trigger finger conditions. Accordingly, the Commission strikes the aforecited paragraph from the Arbitration Decision in this case. We find the evidence shows Petitioner's right middle and ring trigger finger conditions manifested on November 15, 2018.

The Commission also notes other errors in the Arbitrator's Decision, and now corrects them. On page 2 of that Decision, the Arbitrator awarded Petitioner certain medical bills which the Arbitrator found were related to Petitioner's *right* carpal tunnel and *right* cubital tunnel conditions. However, the current claim involves *left* carpal tunnel and *left* cubital tunnel conditions. We correct the Arbitration Decision Order to state that the medical bills awarded in this case, for carpal and cubital tunnel conditions, were for Petitioner's *left* carpal and cubital tunnel conditions.

Also, on page 2 of the Arbitration Decision, the Arbitrator awarded Petitioner for her left hand injury, 10% of a hand, or 19 weeks of permanent partial disability, at a weekly rate of *$913.87*. We affirm the award of 10% left hand, but find the weekly PPD rate for that award should be *$813.87* – the statutory maximum PPD rate for accidents occurring on November 15, 2018, and we modify that award to so reflect.

The Arbitrator also awarded Petitioner, on page 2 of his Decision, 15% of the right middle finger, or *7.6 weeks* of permanent partial disability. We affirm the PPD award of 15% right middle finger, but find that to be *5.7 weeks* of PPD. We modify the award to so reflect.

Finally, we correct the clerical error on page 3 of the Arbitration Decision, in which the Arbitrator awarded Petitioner 15% of the right ring finger, or *5.4 weeks* of permanent partial

disability. We affirm the PPD award of 15% right ring finger, but find that to be *4.05 weeks* of PPD. We modify that award to so reflect.

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

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.

**December 19, 2023**

MP/mcp
o-12/07/23
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 | 21WC006630 |
| Case Name | BECHERER, SALLY v. ILLINOIS DEPARTMENT OF HEALTHCARE AND FAMILY SERVICES |
| Consolidated Cases | |
| Proceeding Type | |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 20 |
| Decision Issued By | Dennis OBrien, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Martin Haxel |
| Respondent Attorney | Kayla Koyne |

DATE FILED: 9/6/2022

**THE INTEREST RATE FOR THE WEEK OF AUGUST 30, 2022 3.23%**

/s/ Dennis OBrien, Arbitrator
Signature

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

September 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**

**SALLY BECHERER**
Employee/Petitioner

v.

**ILLINOIS DEPARTMENT OF HEALTHCARE AND FAMILY SERVICES**
Employer/Respondent

**Case # 21 WC 006630**

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 **July 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 _____

**FINDINGS**

On **October 11, 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.

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

In the year preceding the injury, Petitioner earned $**99,504.28**; the average weekly wage was $**1,913.54**.

On the date of accident, Petitioner was **56** years of age, ***married*** with **no** dependent children.

Petitioner ***has*** received 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 **all amounts paid by its group health insurer as noted on Petitioner Exhibit 7** under Section 8(j) of the Act.

**ORDER**

**Petitioner suffered an accident on November 15, 2018, which arose out of and in the course of his employment by Respondent.**

**Petitioner's medical conditions, left carpal tunnel syndrome, left cubital tunnel syndrome, right middle finger trigger finger and right ring finger trigger finger, are causally related to the accident of November 15, 2018.**

**The Arbitrator further finds that the following bills introduced into evidence in Petitioner Exhibit 7 are related to Petitioner's right carpal tunnel, right cubital tunnel, right middle finger trigger finger, and right ring finger trigger finger injuries, are reasonable, were necessitated to treat or cure Petitioner's injuries suffered in this accident, and are to be paid pursuant to the Medical Fee Schedule:**

- On pages 11, 12, 13, 15, 16, and 17, all of the dates of service not crossed out are causally related and are to be paid.

  None of the remaining bills found on preceding or subsequent pages of PX7 are causally related to this injury.

**The Arbitrator further finds that Respondent shall reimburse petitioner for her out-of-pocket payments of $240.00.**

**Petitioner was not temporarily totally disabled as a result of the accident for the period claimed by Petitioner.**

**Petitioner sustained permanent partial disability to the extent of 10% loss of use of the left hand pursuant to §8(e) of the Act as a result of this repetitive trauma injury, 19 weeks of permanent partial disability at a weekly rate of $913.87, 10% loss of use of the left arm pursuant to §8(e) of the Act as a result of this injury, 25.3 weeks of permanent partial disability at a weekly rate of $813.87, a 15% loss of use of the right middle finger pursuant to §8(e) of the Act as a result of this injury, 7.6 weeks of permanent partial**

**disability at a weekly rate of $813.87, and a 15% loss of use of the right ring finger, pursuant to §8(e) of the Act as a result of this injury, 5.4 weeks of permanent partial disability at a weekly rate of $813.87.**

**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 6, 2022**

Signature of Arbitrator

**FINDINGS OF FACT:**

**TESTIMONY AT ARBITRATION**

**Petitioner**

Petitioner testified that she was employed as a Public Service Administrator, Option 1, having been employed by Respondent over 24 years as of the date of arbitration. She said that for the 10 to 15 years prior to the date of arbitration she performed her work using a keyboard and mouse, viewing work on two monitors, with her computer tower being behind one of the towers. She said that since 2011 she has been doing web services work. She has been working in a building on Churchill Road since 2015 at a desk in a cubical. Her keyboard is on top of the desk with the mouse next to it. She noted that she is right hand dominant.

Petitioner identified Petitioner Exhibit 8 as a document created at Petitioner counsel's request. She said it lists projects she worked on from 2015 through 2020. She said it did not list everything she did, but highlighted the projects she worked on. She said she would do her work using the keyboard and mouse unless she was in a meeting or a training. Some of those trainings also involved the use of keyboards and computer setup, while meetings would have her taking notes. She noted that meetings were infrequent, possibly two or three a year. She testified that in a typical day she would be keyboarding or using a mouse for approximately six hours, and had done so since 1999.

Petitioner said she had an EMG performed by Dr. Fortin in 2005 which was positive for mild right carpal tunnel syndrome. She said at that time she was an administrative assistant and was asked to do a large project in the file room, searching for misplaced files and then helping physically moving the file room, supervising 12 or 14 members of the staff physically moving files to reduce the number of filing cabinets. After that was complete non-administrative staff came in and moved the filing cabinets to the new file room. She said this project was huge and took nearly three months to complete. She said she had problems with her right hand, saw Dr. Fortin and was tested, and after the project was completed the symptoms subsided, and she saw no further doctors after the project ended, until 2016.

Petitioner said that in 2016 her right elbow began aching and her right hand became numb. She said in the year prior to that she did more keyboarding than she had ever previously performed while working for the State as there was a huge migration project from a software program called Dreamweaver to a new program, Sharepoint, the equivalent of replacing the whole website. She said she contributed to migrating the policy notices, doing over 300 of those, and she was asked to do that for one year's data, for instance 2011, and when done with that year she would be asked to do another year's data.

Petitioner said she eventually sought medical treatment in 2016, apparently first seeing her primary care physician, Dr. Richards, or his Physician Assistant (PA), Ms. Whitler, on September 6, 2016. She said she originally picked August 5, 2016 as her accident date as when she told the adjuster at Tristar that there was no date, that it had just come on gradually, she was told there had to be an accident date or they could not file a

claim, she said August 5. She said she was referred to Dr. Becker for an EMG test, and then to Dr. Ma, a hand surgeon, seeing him on October 11, 2016. She said she told Dr. Ma that she believed her keyboarding at work contributed to her symptoms. After a number of tests were performed to clear her for surgery, Dr. Ma performed right carpal and cubital tunnel surgeries on November 28, 2016. Petitioner said she was off work for a period of time following those surgeries.

Petitioner testified that there was then a period of time when she was not under medical treatment, but she returned and saw PA Naughton, who was physician assistant to both Dr. Ma and Dr. Greatting, on October 11, 2017, as she was having problems with her right wrist "hanging up." She received the first of two cortisone shots on that date. She then saw Dr. Ma, and he advised her he did not think she needed surgery and instead gave her another injection. She said the injections only gave her temporary relief.

On November 15, 2018, Petitioner sought treatment with Dr. Greatting due to symptoms in her left hand and elbow, carpal and cubital tunnel symptoms, as well as problems she was having grasping things with her right hand, causing her to drop things. She said she saw Dr. Becker for a second time for EMG testing of the left hand and arm before Dr. Greatting eventually performed left carpal and cubital tunnel syndrome surgeries. She said Dr. Greatting initially tried to care for her right long and ring finger problems with injections, but that did not help. Dr. Greatting eventually performed surgery on those fingers in 2019.

Petitioner said she saw Dr. Greatting in regard to two trigger fingers in her left hand on March 3, 2020. She said her supervisor at that time was Ann Marie Anderson, and she advised Ms. Anderson about her left trigger fingers prior to March of 2020 as well as after she saw Dr. Greatting on March 3, 2020, she made Ms. Anderson aware of every time she went to the doctor while Ms. Anderson was her supervisor, and why she was going to the doctor. Dr. Greatting performed surgery in 2020 on her left long and ring fingers.

Petitioner said that she began working at home when the pandemic began, and continued doing so as of the date of arbitration. She said her computer use was about the same working at home as it was working in the office, she still spent most of her day on the computer. She said she is performing the same job that she had before and was able to do that job. Petitioner said she has gotten work evaluations since her return to work and has been deemed exceptional.

Petitioner said these surgeries alleviated the severe symptoms she was experiencing, but she still had grasping problems on occasion, weakness in both her hands, including in gripping, achiness in her right elbow and daily pain in her left elbow. She said she occasionally takes Tylenol and had a steroid gel that she put on her hands and elbows. She testified that she had to sleep with her left arm extended due to her elbow as otherwise it would throb and feel like it had lost circulation, and with a pillow on her fingers to keep her hand open. She said she wears compression sleeves with the fingers cut out on both hands, they allow her to work on her keyboard without intense throbbing. At the end of the day she takes them off and applies the gel. She said she would occasionally apply the gel at lunch as well.

On cross examination Petitioner said she was not being seen by any physician for injuries to her hands and elbows. She could not remember the date of the last time she saw a doctor for her hands and elbows. She said she did not use tobacco, was not diabetic or pre-diabetic, but was diagnosed with hypertension in 2018 or 2019. She said she took a diuretic for that condition.

Petitioner said Nurse Practitioner (NP) Naughton had prescribed a wrist brace for her, but she found it too cumbersome, so she bought the compression sleeves as she needed something for her left hand.

Petitioner testified that the job duty form she filled out at the request of her attorney was prepared a year to a year-and-a-half prior to arbitration, and it does not contain all of her duties, but it contains her significant duties. She said she also had three breaks during the day, attended meetings, and helped with IRS and Social Security audits. She said her work duties had changed since her first date of accident, that while it was still on the keyboard and the mouse, she no longer did web work, she does audit work, with spreadsheets and databases.

Petitioner said she may have first experienced symptoms in her left hand and elbow in perhaps 2017, and in the right wrist and elbow in the summer of 2016. She said that she would get symptoms while working with her arms held as they were at her desk while working, in the elbows. She said she never asked her employer for any accommodations such as a standing desk or a gel wrist pad.

Petitioner said she did not do many activities outside of work, such as gardening, she was a bit of a homebody.

Petitioner said she earned more as of the date of arbitration than she did on the date of the first accident.

Petitioner was asked about her current complaints and said she wore sleeves now, used gel cream, and had difficulty grabbing things when her hand was numb. She said the surgeries improved her condition, but she was not cured. She said she did follow up with Dr. Greatting after her last surgery and told him of her complaints, but she could not remember the date she did so.

She said the keyboarding she currently did involved typing and mouse work and sometimes she would be doing data entry.

On redirect examination Petitioner said she did her keyboarding with both hands.

**Melissa Batty**

Ms. Batty was called as a witness by Petitioner. She testified that she works for the State of Illinois in the Division of Child Support Enforcement. She had been employed by the State for 32 years and had worked with Petitioner on a daily basis at Healthcare & Family Services starting in 2015 and for about a year and-a-half. They shared a work station, with a table splitting their work stations. She said she observed Petitioner as she worked through the day. Ms. Batty said she performed her work on the computer, using a keyboard, as did Petitioner. She said Petitioner would be keyboarding all day long, just as she would.

On cross examination Ms. Batty said she and Petitioner did not have the same job titles.

**MEDICAL EVIDENCE**

Petitioner was seen by NP Witmer on September 6, 2016 with complaints of right fourth and fifth finger numbness since August 5, with the whole hand being tingly and weak. She said she also had right elbow pain for the same amount of time, with occasional shock-like sensations on the ulnar side of the elbow radiating to the ulnar wrist and hand. She said the felt her symptoms were work related as she is on her computer all of the time, for years, but the computer usage had increased a year earlier. She said she used a mouse with her right, dominant, hand. She had suffered no recent injuries, exercises or activities which would explain the symptoms.

Physical examination revealed a negative Tinel's sign at both wrists and elbows, no thenar atrophy, decreased right grip strength, normal sensation of the right hand. NP Witmer strongly suspected cubital tunnel entrapment, and advised Petitioner to wear a splint at night. An EMG test was ordered. (PX 3 p.1,3)

Petitioner saw Dr. Becker on September 19, 2016 for EMG testing of her right hand. She advised Dr. Becker that the numbness and tingling in the 4th and 5th digits of her right hand started in August. Petitioner said she did not have symptoms on the left. On physical examination Dr. Becker noted atrophy of the ulnar innervated intrinsic hand muscles. After performing the electrodiagnostic testing in the right arm Dr. Becker felt the findings were consistent with severe ulnar mononeuropathy at the right elbow and mild carpal tunnel at the right wrist. No testing was performed on the left side. (PX 5 p.1)

Dr. Ma first saw Petitioner on October 11, 2016. Petitioner was complaining of numbness and tingling in the right hand. She advised Dr. Ma that she had worked for the State for 17 years, typing and using a mouse constantly, all day. She said numbness and tingling in the right had developed at the end of July, 2016. She also complained of right elbow pain which was constant and throbbing. She stated that her symptoms definitely were aggravated with repeat motion at work, typing and using the mouse. She noted recent EMG/NCV suggesting carpal and cubital tunnel. On physical examination Petitioner had a positive Tinel at both the carpal and cubital tunnels, decreased sensation in both median and ulnar nerve distributions, positive Durkan and Phalen tests, and significant weakness in the intrinsic muscle of the right hand. He noted Dr. Becker's test results suggesting severe right cubital tunnel and mild right carpal tunnel syndromes. He suggested Petitioner have surgery on both the carpal and cubital tunnels, and Petitioner agreed. (PX 4 p.1,3)

Dr. Ma performed the right carpal and right cubital tunnel surgeries on November 28, 2016. During the carpal tunnel surgery he noted that the median nerve was swollen. During the cubital tunnel surgery, Dr. Ma noted the ulnar nerve was subluxated with elbow flexion of 90 degrees leading to the decision to anteriorly transpose the ulnar nerve anteriorly. (PX 4 p.4,5)

Petitioner was seen post-operatively by Dr. Ma on December 13, 2016. Petitioner reported the numbness and tingling n the right hand was improved significantly. Physical examination revealed the incisions were healing well. Petitioner was advised to continue a home exercise program, with range of motion and stretching. She was to avoid lifting, pushing or grasping. (PX 4 p.12)

Petitioner saw Dr. Ma again on January 24, 2017, saying she was extremely pleased with her recovery. Dr. Ma found her median and ulnar nerve distributions to be improving. He felt she was recovering well. In a Brigham Hand Symptom Severity Scale form on that date, Petitioner said she did not have hand or wrist pain when seen, did not wake up on a typical night due to hand or wrist pain in past two weeks, had mild pain during the day, once or twice a day, for less than 10 minutes, did not have numbness, tingling, or weakness in her hand, or at night, and had no difficulty with grasping small objects, or doing several other hand activities.. She was released on a prn basis at this time. (PX 4 p.14,16,20,21)

On October 11, 2017 Petitioner saw NP Naughton with complaints about her right index and middle fingers as well as the dorsum of the hand and her wrist. She was denying any specific injury. She noted pain was sharp when she was gripping. Her pain was 5/10 at rest and 7/10 when gripping and doing computer-based activities. It was noted her work was primarily computer based. On exam she had tenderness over the second dorsal compartment of the wrist, pain with resisted extension of the index and middle fingers, some pain with

resisted wrist extension, and less pain with resisted wrist flexion. She had full range of motion and muscle strength of the right wrist. Intersection syndrome was discussed with Petitioner and an injection into the second dorsal compartment of the right wrist was performed for that condition. Petitioner was provided with a splint while up and active. (PX 4 p.24)

NP Naughton saw Petitioner on November 8, 2017 for follow up of the right second dorsal compartment injection. Petitioner said the injection gave her some relief, but her pain was not entirely resolved, she continued to have discomfort in the right index and middle fingers as well as the dorsum of the hand and the wrist extending into the distal forearm. She rated her pain as 3/10. Physical examination showed tenderness to palpation over the second dorsal compartment of the right wrist, pain with resisted wrist extension and resisted extension of the index and middle fingers of the MCP joint. The right wrist had full range of motion and muscle strength. It was agreed to continue conservative treatment, which included her starting use of Voltaren gel. (PX 4 p.28)

On January 10, 2018 Petitioner saw NP Naughton, and advised her the Voltaren gel did not give much relief. Her symptoms were basically unchanged, as was her physical examination. A second injection into the right second dorsal compartment was performed during this visit. It was noted that if she had not had significant improvement at her next visit they would discuss surgical options. (PX 4 p.32)

Petitioner was seen again by NP Naughton on February 8, 2018. Despite her injection a month earlier, her pain had returned. The pain was primarily along the dorsum of the hand and in the second dorsal compartment. Her physical examination findings remained about the same. Debridement and release of the second dorsal compartment of the right wrist for intersection syndrome by Dr. Ma was discussed, and Petitioner elected to have that surgery. (PX 4 p.36)

Petitioner saw Dr. Ma on February 13, 2018. Dr. Ma noted her recent complaints and physical examination findings as well as injections. X-rays of the right hand were done on February 13, 2018 and were interpreted as only showing mild degenerative changes. His physical examination on this date found significant tenderness to palpation to the right thumb CMC joint, a positive grinds test, and mild swelling around the CMC joint of the right hand. Dr. Ma felt Petitioner's pain was due to multiple issues, which included arthritis in the right wrist and finger arthritis. He felt nonsurgical treatment would help her, they reviewed those options and Petitioner opted for an injection of the right CMC joint, which was performed. Dr. Ma felt Petitioner could be helped by occupational therapy, but Petitioner said it had not been obtained in the past due to money issues. (PX 4 p.23,40)

Petitioner was seen by NP Naughton on November 15, 2018. On the Orthopedic Surgeon Intake form filled out and signed by Petitioner on that date she noted she was to be seen for right hand middle finger trigger finger, left hand tingling, numbness, and pain in the arm and wrist. She noted she had been experiencing these symptoms for three months, they came on gradually, and the activities of daily living where it bothered her were driving and work/typing. She noted she had seen Dr. Greatting previously for left trigger thumb, and had seen Dr. Ma for right trigger thumb. When asked if this problem interfered with her work she wrote that she had to rest the left hand. Her pain drawing that day showed aching in the right hand and aching, numbness and tins and needles sensation in the left hand. Petitioner told NP Naughton of the left hand pain coming on over the past three months and of the symptoms being exacerbated by driving and typing. She said it had been progressively

getting worse in the last six weeks. An x-ray of the left hand on this date only showed mild degenerative changes in the first carpometacarpal joint. On exam Tinel's, Phalen's and compression tests were all positive over the carpal tunnel on the left. The right hand had a small nodule in the area of the A1 pulley adjacent to the right middle finger which was tender to palpation, with catching and clicking of the flexor tendon as it passed through the A1 pulley system of that right middle finger. It was decided to inject the right middle finger that day, which was performed, and to send her to Dr. Becker for electrodiagnostic testing. (PX 6 p.1-4,10)

Dr. Becker saw Petitioner for a second time on November 20, 2018. On this occasion Petitioner was complaining of numbness and tingling in the left hand which woke her at night and which had begun 1 and-a-half months earlier. EMG testing was interpreted as showing a mild left carpal tunnel syndrome and a mild ulnar mononeuropathy at the left elbow. (PX 5 p.1)

NP Naughton again saw Petitioner on December 13, 2018. Petitioner said her right middle finger complaints had resolved following the injection, with no clicking, catching, or discomfort. She said her left hand complaints were bothering her considerably, and, again, were aggravated by driving and typing. Her previous exam findings remained the same. other than the resolution of right middle finger tenderness and the absence of catching or clicking of the flexor tendon at the A1 pulley system. They discussed Dr. Becker's findings and Petitioner stated she would like to undergo left carpal and cubital tunnel releases by Dr. Greatting. (PX 6 p.11)

Petitioner was seen by Dr. Greatting on January 28, 2019 for a pre-op physical. Her exam findings were generally unchanged.. (PX 6 p.22)

On February 5, 2019, Dr. Greatting performed a release of the left cubital tunnel, a release of the left carpal tunnel, and injections of the right middle and ring fingers' flexor tendon sheaths. The ulnar nerve was found to be compressed and narrowed and decompression was accomplished. The median nerve was found to be compressed and narrowed under the middle third of the transverse carpal ligament, and decompression was accomplished. (PX 6 p.32,33)

Dr. Greatting saw Petitioner on March 19, 2019 and Petitioner advised him that her numbness was resolved and her sutures removed. She was advised to call and return for follow up in four to six weeks if she was having any significant problems or concerns. (PX 6 p.37)

Petitioner was next seen on August 8, 2019 as she was again having triggering of the right middle and ring fingers. She said her fingers would lock completely to the palm and she would have to use her other hand to manually unlock them. She wanted injections as she was going to be going on vacation. Her physical examination was similar to what it had been prior to her injections, with tenderness over the A1 pulley system and catching and clicking of the flexor tendons as they passed through the A1 pulley system of those fingers. Surgery to correct the trigger fingers was discussed, and Petitioner said she would like the surgeries. (PX 6 p.40)

Dr. Greatting saw Petitioner on August 14, 2019, and injected her right trigger fingers. Due to left arm numbness and tingling, Petitioner was again referred to Dr. Becker for electrodiagnostic testing. Dr. Greatting saw her again on August 28, 2019 with continuing right middle and ring finger triggering and surgery was discussed and scheduled. (PX 6 p.44,45,52)

Surgeries for the release of the right long and ring fingers were performed on September 4, 2019, by Dr. Greatting. Petitioner was seen post-operatively by Dr. Greatting on September 18, 2019, and she was already getting good motion in the fingers. Her sutures were removed and she was told to return if she had any significant problems or concerns. (PX 6 p.56,57,59)

Petitioner returned to see NP Naughton on March 3, 2020, this time with catching and clicking of her left middle and ring fingers, which she said was a new problem for her. She said it had been worsening over the last several weeks. There was palpable catching and clicking of the flexor tendons of the left middle and ring fingers. Petitioner said she wanted surgical releases by Dr. Greatting. Petitioner received injections of the fingers on this date. (PX 6 p.63)

Petitioner saw Dr. Greatting on May 7, 2020, and after being examined, surgery was scheduled. Dr. Greatting performed the pre-op physical the next day, May 8, 2020. Dr. Greatting performed releases of the left long finger trigger finger and the left ring finger trigger finger on May 19, 2020. (PX 6 p.71,77,87,88)

NP Naughton saw Petitioner on June 4, 2020 and Petitioner said she was doing well, no longer having any mechanical symptoms or pain. She denied numbness or tingling in the left hand. Sutures were removed. Petitioner was told to contact Dr. Greatting's office if she had any concerns. This appears to be Petitioner's last visit with any physician for her right hand, wrist or elbow and her left hand, wrist, or elbow. (PX 6 p.90)

**CAUSATION REPORT OF DR. MARK GREATTING**

Petitioner's attorney wrote Dr. Greatting on March 26, 2021 with copies of Petitioner's pertinent medical records. He described Petitioner's work for Respondent as:

> "While her job duties were many and varied, the common denominator was that she spent 90% of her time at work using her computer, both keyboard and mouse. * * * He (sic) told me that she would rest her forearms on the top of the edge of the desk, elbows bent with her hands on top of the desk to use the mouse and keyboard." (PX 1 p.1)

Dr. Greatting was then asked a series of questions which he was asked to answer within a reasonable degree of medical certainty. In answer to those questions Dr. Greatting wrote a letter to Petitioner's attorney on June 17, 2021, in which he stated:

- He treated Petitioner for left carpal tunnel syndrome, left cubital tunnel syndrome, right middle trigger finger, right ring trigger finger, left middle trigger finger and left ring trigger finger.
- He performed the left cubital and carpal tunnel surgeries, right middle and ring trigger finger releases, and left middle and ring trigger finger releases summarized above.
- He opined that Petitioner's work did not cause any of those conditions.
- He opined that the work activities described in Petitioner attorney's letter over a period of many years could have aggravated or accelerated the symptoms related to these conditions and required her to have surgical treatment. He believed the treatment she received for these conditions was reasonable and necessary. He had no specific information about any time Petitioner may have been off work for these conditions.

- Petitioner also was treated for left trigger thumb and recurrent left wrist volar and dorsal carpal ganglions, but he did not believe those conditions were in any way related to Petitioner's work activities. (PX 1 p.4)

**CAUSATION REPORT OF DR. JIANJUN MA**

The parties stipulated that a letter was sent to Dr. Ma by Petitioner's attorney with a job description, but that letter was not available for subpoena purposes at the time of arbitration. The attorneys stipulated that the letter sent to Dr. Ma was the same as the letter sent to Dr. Greatting. For the contents of that letter, please see the summary of Dr. Greatting's causation report, above.

Dr. Ma, in answer to the questions posed to him in Petitioner counsel's letter wrote a letter to Petitioner's attorney on October 4, 2021, in which he stated:

- He treated Petitioner's right hand and wrist conditions she complained of, numbness and tingling in the right hand.
- He performed right carpal tunnel release and ulnar nerve anterior transposition on November 28, 2016.
- She was released from his care on November 11, 2016.
- He opined that Petitioner's work activities of keyboarding, use of mouse and positioning of her arms and hands would not have caused Petitioner's right carpal tunnel syndrome, right cubital tunnel syndrome or extensor intersection of the right wrist, but those work activities could have aggravated the symptoms related to those diagnoses. He said all of the treatment Petitioner received from NP Naughton and himself were reasonable and were necessary to treat those conditions.
- He said Petitioner was authorized to be off work "for a period of time" after her November 2016 surgery, followed by a return to work with "certain restrictions." (PX 2 p.1)

**IME REPORT OF DR. ANTHONY E. SUDEKUM**

Dr. Sudekum performed an IME of Petitioner on October 4, 2018. He reviewed medical records dating back to 1994, many of which were not introduced into evidence at arbitration. Many of the pre-accident dates records are for complaints on other parts of her body other than fingers, hands, and elbows, and for hand and wrist complaints (ganglion cysts, headache, anemia, stresses with a co-worker affecting her health, etc.) which are not claimed as work related injuries. Some are related to the areas of the body that are the subject matter of Petitioner's current claims, but are double hearsay (the report itself being hearsay) which was not specifically objected to at arbitration, but in addition are obviously incomplete in their summarization in this report. The report does appear to indicate a review of all medical treatment and testing performed from September 6, 2016 through February 13, 2018, but not thereafter. (RX 3 p.1 – 12,16,17 of 39)

Dr. Sudekum received a history of Petitioner's complaints from her during his examination. He then performed a physical examination which revealed well-healed incisions on her right medial elbow and right proximal palm as well as well-healed incisions on the left wrist from non-related ganglion cyst excisions. He found Tinel's and Phalen's signs to be negative bilaterally at the wrist and elbows, full range of motion of

bilateral elbows, wrists and fingers, normal sensation throughout both upper extremities, full strength of the right shoulder, upper arm, elbow, forearm and wrist and grip and pinch strength which was considered in the low normal range. He found a palpable nodule on Petitioner's right middle finger flexor tendon at the MP flexor crease, without pain on palpation and with no triggering. He noted a slight muscular change in the right forearm which he felt could be mild muscular atrophy from her ulnar nerve release/transposition. (RX 3 p.12,14)

Dr. Sudekum had a section of his report entitled, "Job analysis." This section set out what positions Petitioner had worked for the State of Illinois by year, division, and duties. It appears this information was from Petitioner as at one point in the four paragraph descriptions of four different jobs Dr. Sudekum wrote, "She states that her duties included …" The description of the work would appear to be more detailed than the description given by Petitioner at arbitration, though the description of the work both at arbitration and in Dr. Sudekum's report appears to be almost entirely computer work, with the exception of meetings. (RX 3 p.17 of 39)

Dr. Sudekum also included in his report what purports to be a document for Public Service Administrators in general, that being a class of employees, describing work done by people who have vastly different job duties than those described by Petitioner at arbitration or to Dr. Sudekum during this examination. This description obviously is not derived from a copy of the position description introduced into evidence as Respondent's Exhibit #4. (RX 3 p.18-20 of 39)

Dr. Sudekum did include in his report the contents of a typed document Petitioner brought with her to her appointment describing what she did in all of her positions from 1999 through 2016. This was quite detailed and generally was consistent with her arbitration testimony, though the description given to Dr. Sudekum in writing was more detailed than her arbitration testimony. This description is also consistent with Petitioner spending the vast majority of her time working at her computer. Petitioner also advised Dr. Sudekum that on average 90 percent of her work day was spent sitting at her work station doing keyboarding, paperwork and phone work, with the remaining 10 percent being attendance at meetings. (RX 3 p.20-26 of 39)

Dr. Sudekum, in answer to questions posed to him by Ms. Robinson of Tristar opined:

- "There is no indication in the medical records that (Petitioner) sustained any injury to either upper extremity as a result of a work-related accident, injury or activity." He then noted she had several neck strains, back strains, and injuries to her arms and shoulders from domestic events from 1994 through 2006. (RX 3 p.28,29)
- He diagnosed several hand and arm conditions, including right carpal and cubital tunnel syndromes, which were resolved after surgical treatment, right intersection syndrome, which was resolved after conservative treatment, bilateral thumb CMC arthritis, history of left wrist ganglion with surgical excision, and history of hand and wrist peripheral edema requiring diuretic treatment. (RX 3 p.35)
- He noted Petitioner had multiple nonwork related risk factors and comorbid conditions which could cause or aggravate her arm symptoms, including her age, her sex, arthritis affecting her arms and neck, cervical radiculopathy, arm tendinitis, morbid obesity, smoking history, systemic lupus, high blood pressure, peripheral edema and congestive heart failure. He said it

was not unusual for people to have subjective symptoms associated with pathologic processes such as arthritis, tendinitis, or peripheral neuropathy, and it was possible she suffered some symptoms in her arms while performing her job duties, but he did not think having symptoms while at work would indicate that "the benign activity as (sic) caused or aggravated the underlying pathologic process or condition." He noted that there were a number of studies which indicated no significant causal relationship between typing and keyboarding on a sustained basis. He believed Petitioner's upper extremity problems were the result of her comorbidities and not her work activities. (RX 3 p35,36)

- Dr. Sudekum did believe the medical treatment Petitioner had received was reasonable and necessary, that she needed no further treatment, and that she might have ongoing or progressive problems due to her "significant nonwork related risk factors and comorbid conditions." (RX p.36,37)

## ARBITRATOR CREDIBILITY ASSESSMENT

Petitioner appeared to be a cooperative witness for both parties, she answered all questions posed to her by both attorneys with no obvious effort to evade or argue with counsel for Respondent. She did not appear to exaggerate in regard to either her work duties or her complaints. No evidence was introduced which contradicted her testimony in regard to her work duties, or how long she performed tasks. The Arbitrator finds Petitioner to be a credible witness.

Mellisa Batty also appeared to be a cooperative witness. While she corroborated Petitioner's description of what she physically did in performing her job tasks, Ms. Batty did not appear to exaggerate Petitioner's duties or problems performing those duties. While she did not perform the same job as Petitioner, she shared a cubicle with Petitioner for an extended period of time and was in position to describe what Petitioner did in performing her job duties. The Arbitrator finds Ms. Batty to be 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 15, 2018, and whether Petitioner's current conditions of ill-being, left carpal tunnel and left cubital tunnel syndromes, and right middle trigger finger and right ring trigger finger are causally related to the accident of November 15, 2018, and whether the medical services that were provided to Petitioner were reasonable and necessary as a result of the Accident of November 15, 2018, the Arbitrator makes the following findings:**

The findings of fact, above, are incorporated herein.

The summaries of medical evidence, including causal connection letters and independent medical examination report, above, are incorporated herein.

Petitioner and Melissa Batty, a former coworker, both testified that the vast majority of Petitioner's work was performed using a keyboard and mouse. By September of 2016 Petitioner had spent 10 to 15 years with almost all of her job duties with Respondent involving keyboarding and using a mouse for six to six-and-a-half hours per day. This constitutes a repetitive job activity.

On October 11, 2017 Petitioner saw NP Naughton with complaints about her right index and middle fingers. She was denying any specific injury. She noted pain was sharp when she was gripping. Her pain was 5/10 at rest and 7/10 when gripping and doing computer-based activities. It was noted her work was primarily computer based. On exam she had pain with resisted extension of the index and middle fingers.

NP Naughton saw Petitioner on November 8, 2017. for follow up of the right second dorsal compartment injection. Petitioner said she continued to have discomfort in the right index and middle fingers. Physical examination found pain with resisted wrist extension and resisted extension of the index and middle fingers of the MCP joint. It was agreed to continue conservative treatment.

Petitioner was seen by NP Naughton on November 15, 2018. In the Orthopedic Surgeon Intake form filled out and signed by Petitioner on that date she noted she was to be seen for right hand middle finger trigger fingers, as well as other problems. She noted she had been experiencing these symptoms for three months, they came on gradually, and the activities of daily living where it bothered her were driving and work/typing. On exam the right hand had a small nodule in the area of the A1 pulley adjacent to the right middle finger which was tender to palpation, with catching and clicking of the flexor tendon as it passed through the A1 pulley system of that right middle finger. A right middle finger injection was performed at that time.

Dr. Becker saw Petitioner for a second time on November 20, 2018. On this occasion Petitioner was complaining of numbness and tingling in the left hand which woke her at night and which had begun one and-a-half months earlier. EMG testing was interpreted as showing a mild left carpal tunnel syndrome and a mild ulnar mononeuropathy at the left elbow.

NP Naughton again saw Petitioner on December 13, 2018. Petitioner said her right middle finger complaints had resolved following the injection, with no clicking, catching, or discomfort. She said her left hand complaints were bothering her considerably, and, again, were aggravated by driving and typing. Her previous exam findings remained the same, other than the resolution of right middle finger tenderness and the absence of catching or clicking of the flexor tendon at the A1 pulley system. They discussed Dr. Becker's findings and Petitioner stated she would like to undergo left carpal and cubital tunnel releases by Dr. Greatting.

Petitioner was seen by Dr. Greatting on January 28, 2019 for a pre-op physical. Her exam findings were generally unchanged.

On February 5, 2019, Dr. Greatting performed a release of the left cubital tunnel, a release of the left carpal tunnel, and injections of the right middle and ring fingers' flexor tendon sheaths. The ulnar nerve was found to be compressed and narrowed and decompression was accomplished. The median nerve was found to be compressed and narrowed under the middle third of the transverse carpal ligament, and decompression was accomplished.

Dr. Greatting saw Petitioner on March 19, 2019 and Petitioner advised him that her numbness had resolved. She was advised to call and return for follow up in four to six weeks if she was having any significant problems or concerns.

Petitioner was next seen on August 8, 2019 as she was again having triggering of the right middle and ring fingers. She said her fingers would lock completely to the palm and she would have to use her other hand to manually unlock them. She wanted injections as she was going to be going on vacation. Her physical examination was similar to what it had been prior to her injections, with tenderness over the A1 pulley system and catching and clicking of the flexor tendons as they passed through the A1 pulley system of those fingers. Surgery to correct the trigger fingers was discussed, and Petitioner said she would like the surgeries.

Dr. Greatting saw Petitioner on August 14, 2019, and injected her right trigger fingers. Due to left arm numbness and tingling.

Dr. Greatting saw her again on August 28, 2019 with continuing right middle and ring finger triggering and surgery was discussed and scheduled.

Surgeries for the release of the right long and ring fingers were performed on September 4, 2019, by Dr. Greatting.

Petitioner was seen post-operatively by Dr. Greatting on September 18, 2019, and she was already getting good motion in the fingers. Her sutures were removed and she was told to return if she had any significant problems or concerns. Petitioner has not returned to Dr. Greatting or any other physician due to problems with her right long and ring fingers.

Dr. Greatting issued a causation letter after receiving a letter from Petitioner's attorney which noted Petitioner's "job duties were many and varied, the common denominator was that she spent 90% of her time at work using her computer, both keyboard and mouse. * * * He (sic) told me that she would rest her forearms on the top of the edge of the desk, elbows bent with her hands on top of the desk to use the mouse and keyboard." Dr. Greatting noted he treated Petitioner for right middle trigger finger and right ring trigger finger, and he performed right middle and ring trigger finger releases. He said Petitioner's work did not cause these conditions, but the work activities described in Petitioner attorney's letter over a period of many years could have aggravated or accelerated the symptoms related to these conditions and required her to have surgical treatment. He believed the treatment she received for these conditions was reasonable and necessary.

Dr. Sudekum during his October 4, 2018 IME performed a physical examination which revealed a palpable nodule on Petitioner's right middle finger flexor tendon at the MP flexor crease, without pain on palpation and with no triggering. He did not believe Petitioner's work caused any of her bilateral hand and arm problems, feeling they were a result of her comorbidities.

Petitioner filed another Application for Adjustment of Claim in reference to these same right middle and right ring trigger fingers in 18 WC 014641, with a claimed date of accident of October 11, 2017. Treatment of the right middle trigger finger and the right ring trigger finger had ceased following that October 11, 2017 accident on February 8. 2018. The Arbitrator found in 18 WC 014641 that Petitioner's right middle trigger finger and right ring trigger finger injuries had not reached a point of maximum medical improvement by

November 15, 2018, and did not award permanent partial disability benefits for those injuries in that case, instead finding that any such benefits would be adjudicated in the present case.

Petitioner need only prove by a preponderance of the evidence that her repetitive job activities were a cause of her injury.

**The Arbitrator finds that Petitioner suffered an accident on November 15, 2018, which arose out of and in the course of his employment by Respondent.**

**The Arbitrator further finds that Petitioner's medical conditions, left carpal tunnel syndrome, left cubital tunnel syndrome, right middle finger trigger finger, and right ring finger trigger finger, are causally related to the accident of November 15, 2018.**

**The Arbitrator further finds that the following bills introduced into evidence in Petitioner Exhibit 7 are related to Petitioner's right carpal tunnel and right cubital tunnel injuries, are reasonable, were necessitated to treat or cure Petitioner's injuries suffered in this accident, and are to be paid pursuant to the Medical Fee Schedule:**

- On pages 11, 12, 13, 15, 16, and 17, all of the dates of service not crossed out are causally related and are to be paid.

  None of the remaining bills found on preceding or subsequent pages of PX7 are causally related to this injury.

**The Arbitrator further finds that Respondent shall reimburse petitioner for her out-of-pocket payments of $240.00.**

These findings are based on the unrebutted testimony of Petitioner and Ms. Batty, the medical records of NP Naughton and Dr. Greatting, and the causation letter of Dr. Greatting. The opinions of Dr. Sudekum are not accepted by the Arbitrator as they are based upon incorrect factual conclusions, to wit only intermittent keyboard use, and acceptance of comorbid conditions being capable of aggravating Petitioner's conditions, while voicing opinions that actual physical, repetitive action involving the hands and arms not being capable of being an aggravating factor in Petitioner's symptoms and need for treatment. Dr. Sudekum's opinions are felt to be inconsistent and unbelievable. In addition, many of the medical complaints in this case, as well as much of the treatment, occurred subsequent to Dr. Sudekum's examination of Petitioner.

**In support of the Arbitrator's decision relating to what temporary benefits Petitioner is entitled to as a result of the accident of November 15, 2018, the Arbitrator makes the following findings:**

The findings of fact, above, are incorporated herein.

The summaries of medical evidence, including causal connection letters and independent medical examination report, above, are incorporated herein.

The findings in regard to accident and causal connection, above, are incorporated herein.

While the parties stipulated as to the periods of time Petitioner was off work, those being from February 5, 2019 through February 15, 2019, a period of 1 4/7 weeks, and from September 4, 2019 through September

13, 2019, a period of 1 3/7 weeks, Respondent did not stipulate that Petitioner was entitled to temporary total disability for that period of time, writing on Arbitrator Exhibit 1 the phrase, "no liability." Petitioner is required to prove with credible evidence each element of her case, including entitlement to payment of temporary total disability.

The medical records of NP Naughton and Dr. Greatting are devoid of any mention of restriction from work. Dr. Greatting in his causation letter stated that he had no specific information about any time Petitioner may have been off work for these conditions. No off work instruction appears to be memorialized in the records for the period for which Petitioner is claiming benefits.

**The Arbitrator finds that Petitioner was not temporarily totally disabled as a result of the accident for the period claimed by Petitioner.** This finding is based upon the absence of medical restrictions in the exhibits admitted into evidence.

**In support of the Arbitrator's decision relating to the nature and extent of the injury the Arbitrator makes the following findings:**

The findings of fact, above, are incorporated herein.

The summaries of medical evidence, including causal connection letters and independent medical examination report, above, are incorporated herein.

The findings in regard to accident, causal connection, and temporary total disability, above, are incorporated herein.

As the accident occurred after September 1, 2011, the nature and extent of the injury must be determined through the five-factor test set out in §8.1b(b) of the Act.

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.

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 Public Service Administrator at the time of the accident and that she *is* able to return to work in his prior capacity as a result of said injury. The Arbitrator notes this is a sedentary job requiring Petitioner to sit at a desk working at a computer for the majority of her workday. No apparent physical labor is required in this position. . Because of the light nature of her job and Petitioner's having worked said job for over five years since ceasing to be treated for these injuries, the Arbitrator therefore gives *lesser* weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 57 years old at the time of the accident. Because of her having approximately ten years of additional working life, and having a sedentary job, the Arbitrator therefore gives *moderate* weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes no evidence of loss of earnings was introduced into evidence. Petitioner said she earned more as of the date of arbitration than she did on the date of the first accident. Because of her continuing to work her previous job for the three or more years since the date of this accident and her earning more as of the date of arbitration than she had on the date of accident, 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 at arbitration testified she still had grasping problems on occasion, weakness in both her hands, including in gripping, achiness in her right elbow and daily pain in her left elbow. She said she occasionally takes Tylenol and had a steroid gel that she put on her hands and elbows. She testified that she had to sleep with her left arm extended due to her elbow as otherwise it would throb and feel like it had lost circulation, and with a pillow on her fingers to keep her hand open. She said she wears compression sleeves with the fingers cut out on both hands, they allow her to work on her keyboard without intense throbbing. At the end of the day she takes them off and applies the gel. She said she would occasionally apply the gel at lunch as well. After the left carpal and cubital tunnel surgeries, Dr. Greatting saw Petitioner on March 19, 2019, at which time she advised him that her numbness had resolved. Dr. Greatting advised Petitioner to call and return for follow up in four to six weeks if she was having any significant problems or concerns. It does not appear Petitioner ever returned to either Dr. Greatting or any other physician with carpal or cubital syndrome complaints, though she did receive subsequent treatment for right and left trigger finger problems. Post-operatively, after her right long and ring finger surgeries, Petitioner saw Dr. Greatting on September 18, 2019, at which time she was already getting good motion in the fingers. Her sutures were removed and she was told to return if she had any significant problems or concerns. It does not appear Petitioner ever returned to either Dr. Greatting or any other physician with right finger complaints. Because of the number of surgeries performed but the lack of corroborating medical evidence supporting her post-surgical complaints at arbitration, the Arbitrator therefore gives *lesser* 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 10% loss of use of the left hand pursuant to §8(e) of the Act as a result of this repetitive trauma injury, 19 weeks of permanent partial disability at a weekly rate of $913.87, 10% loss of use of the left arm pursuant to §8(e) of the Act as a result of this injury, 25.3 weeks of permanent partial disability at a weekly rate of $813.87, a 15% loss of use of the right middle finger pursuant to §8(e) of the Act as a result of this injury, 5.7 weeks of permanent partial disability at a weekly rate of $813.87, and a 15% loss of use of the right ring finger, pursuant to §8(e) of the Act as a result of this injury, 4.05 weeks of permanent partial disability at a weekly rate of $813.87.**

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 21WC006631 |
| Case Name | Sally Becherer v.<br>State of Illinois - Illinois Department of Healthcare and Family Services |
| Consolidated Cases | 17WC017900;<br>18WC014641;<br>21WC006630; |
| Proceeding Type | Petition for Review |
| Decision Type | Commission Decision |
| Commission Decision Number | 23IWCC0544 |
| Number of Pages of Decision | 20 |
| Decision Issued By | Marc Parker, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Martin Haxel |
| Respondent Attorney | Kayla Koyne |

DATE FILED: 12/19/2023

/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

Sally Becherer,

Petitioner,

vs. No. 21 WC 006631

Illinois Department of Healthcare &
Family Services and DoIT,

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, benefit rates, medical expenses, permanent disability, and whether the correct body parts were addressed in the correct decisions, 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 notes, and now corrects, a clerical error in the Arbitrator's Decision. In awarding Petitioner the medical bills incurred for treating her left middle and ring fingers, the body parts alleged in this claim, the Arbitrator ordered, on page 2 on the Decision, that: "The following bills introduced into evidence in Petitioner Exhibit 7 are related to Petitioner's *right carpal tunnel and right cubital tunnel injuries*…" We correct that sentence to state, "The following bills introduced into evidence in Petitioner Exhibit 7 are related to Petitioner's *left middle finger and left ring finger injuries*…" All else in the Arbitration Decision is affirmed and adopted.

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

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.

**December 19, 2023**

MP/mcp
o-12/07/23
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 | 21WC006631 |
| Case Name | BECHERER, SALLY v. ILLINOIS DEPARTMENT OF HEALTHCARE AND FAMILY SERVICES |
| Consolidated Cases | |
| Proceeding Type | Request for Hearing |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 17 |
| Decision Issued By | Dennis OBrien, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Martin Haxel |
| Respondent Attorney | Kayla Koyne |

DATE FILED: 9/6/2022

**THE INTEREST RATE FOR THE WEEK OF AUGUST 30, 2022 3.23%**

/s/ Dennis OBrien, Arbitrator
Signature

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

September 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**

**SALLY BECHERER**
Employee/Petitioner

v.

**ILLINOIS DEPARTMENT OF HEALTHCARE AND FAMILY SERVICES**
Employer/Respondent

**Case # 21 WC 006631**

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 **July 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 _____

**FINDINGS**

On **March 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.

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

In the year preceding the injury, Petitioner earned $**99,504.28**; the average weekly wage was $**1,913.54**.

On the date of accident, Petitioner was **58** years of age, ***married*** with **no** dependent children.

Petitioner ***has*** received 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 **all amounts paid by its group health insurer as noted on Petitioner Exhibit 7** under Section 8(j) of the Act.

**ORDER**

**Petitioner suffered an accident on March 3, 2020, which arose out of and in the course of his employment by Respondent.**

**Petitioner's medical conditions, left middle finger trigger finger and left ring finger trigger finger are causally related to the accident of March 3, 2020.**

**The following bills introduced into evidence in Petitioner Exhibit 7 are related to Petitioner's right carpal tunnel and right cubital tunnel injuries, are reasonable, were necessitated to treat or cure Petitioner's injuries suffered in this accident, and are to be paid pursuant to the Medical Fee Schedule:**

- On page 18, the fees for services rendered on March 3, 2020, in the amounts of $294.00, $247.00, $18.00, and $18.00.
- On page 20, the fees for services rendered on May 7, 2020, in the amount of $197.00 and May 19, 2020 in the amounts of $2,480.00 (left middle finger) and $2,480.00 (left ring finger). (It is noted that page 21 includes two additional fees for the same two tendon sheath incisions, on the same dates, in larger amounts, $3,559.00. As duplicative bills, these charges on page 21 are not awarded.)
- On page 21, the fees for services rendered on May 19, 2020 in the amounts of $46.70 and $16.00. are dates of service which are causally related to this injury.

**Respondent shall reimburse petitioner for her out-of-pocket payments of $60.00.**

**Pursuant to the stipulation of the parties, Respondent is entitled to a Section 8 (j) credit for all group health insurance payments made towards the medical bills awarded in this decision.**

**Petitioner gave Respondent notice of the accident within the time limits stated in the Act.**

**Petitioner sustained permanent partial disability to the extent of a 15% loss of use of the left middle finger pursuant to §8(e) of the Act as a result of this injury, 5.7 weeks of permanent partial disability at a**

**weekly rate of $836.69, and a 15% loss of use of the left ring finger, pursuant to §8(e) of the Act as a result of this injury, 4.05 weeks of permanent partial disability at a weekly rate of $836.69.**

**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 6, 2022**

Signature of Arbitrator

**FINDINGS OF FACT:**

## TESTIMONY AT ARBITRATION

### Petitioner

Petitioner testified that she was employed as a Public Service Administrator, Option 1, having been employed by Respondent over 24 years as of the date of arbitration. She said that for the 10 to 15 years prior to the date of arbitration she performed her work using a keyboard and mouse, viewing work on two monitors, with her computer tower being behind one of the towers. She said that since 2011 she has been doing web services work. She has been working in a building on Churchill Road since 2015 at a desk in a cubical. Her keyboard is on top of the desk with the mouse next to it. She noted that she is right hand dominant.

Petitioner identified Petitioner Exhibit 8 as a document created at Petitioner counsel's request. She said it lists projects she worked on from 2015 through 2020. She said it did not list everything she did, but highlighted the projects she worked on. She said she would do her work using the keyboard and mouse unless she was in a meeting or a training. Some of those trainings also involved the use of keyboards and computer setup, while meetings would have her taking notes. She noted that meetings were infrequent, possibly two or three a year. She testified that in a typical day she would be keyboarding or using a mouse for approximately six hours, and had done so since 1999.

Petitioner said she had an EMG performed by Dr. Fortin in 2005 which was positive for mild right carpal tunnel syndrome. She said at that time she was an administrative assistant and was asked to do a large project in the file room, searching for misplaced files and then helping physically moving the file room, supervising 12 or 14 members of the staff physically moving files to reduce the number of filing cabinets. After that was complete non-administrative staff came in and moved the filing cabinets to the new file room. She said this project was huge and took nearly three months to complete. She said she had problems with her right hand, saw Dr. Fortin and was tested, and after the project was completed the symptoms subsided, and she saw no further doctors after the project ended, until 2016.

Petitioner said that in 2016 her right elbow began aching and her right hand became numb. She said in the year prior to that she did more keyboarding than she had ever previously performed while working for the State as there was a huge migration project from a software program called Dreamweaver to a new program, Sharepoint, the equivalent of replacing the whole website. She said she contributed to migrating the policy notices, doing over 300 of those, and she was asked to do that for one year's data, for instance 2011, and when done with that year she would be asked to do another year's data.

Petitioner said she eventually sought medical treatment in 2016, apparently first seeing her primary care physician, Dr. Richards, or his Physician Assistant (PA), Ms. Whitler, on September 6, 2016. She said she originally picked August 5, 2016 as her accident date as when she told the adjuster at Tristar that there was no date, that it had just come on gradually, she was told there had to be an accident date or they could not file a

claim, she said August 5. She said she was referred to Dr. Becker for an EMG test, and then to Dr. Ma, a hand surgeon, seeing him on October 11, 2016. She said she told Dr. Ma that she believed her keyboarding at work contributed to her symptoms. After a number of tests were performed to clear her for surgery, Dr. Ma performed right carpal and cubital tunnel surgeries on November 28, 2016. Petitioner said she was off work for a period of time following those surgeries.

Petitioner testified that there was then a period of time when she was not under medical treatment, but she returned and saw PA Naughton, who was physician assistant to both Dr. Ma and Dr. Greatting, on October 11, 2017, as she was having problems with her right wrist "hanging up." She received the first of two cortisone shots on that date. She then saw Dr. Ma, and he advised her he did not think she needed surgery and instead gave her another injection. She said the injections only gave her temporary relief.

On November 15, 2018, Petitioner sought treatment with Dr. Greatting due to symptoms in her left hand and elbow, carpal and cubital tunnel symptoms, as well as problems she was having grasping things with her right hand, causing her to drop things. She said she saw Dr. Becker for a second time for EMG testing of the left hand and arm before Dr. Greatting eventually performed left carpal and cubital tunnel syndrome surgeries. She said Dr. Greatting initially tried to care for her right long and ring finger problems with injections, but that did not help. Dr. Greatting eventually performed surgery on those fingers in 2019.

Petitioner said she saw Dr. Greatting in regard to two trigger fingers in her left hand on March 3, 2020. She said her supervisor at that time was Ann Marie Anderson, and she advised Ms. Anderson about her left trigger fingers prior to March of 2020 as well as after she saw Dr. Greatting on March 3, 2020, she made Ms. Anderson aware of every time she went to the doctor while Ms. Anderson was her supervisor, and why she was going to the doctor. Dr. Greatting performed surgery in 2020 on her left long and ring fingers.

Petitioner said that she began working at home when the pandemic began, and continued doing so as of the date of arbitration. She said her computer use was about the same working at home as it was working in the office, she still spent most of her day on the computer. She said she is performing the same job that she had before and was able to do that job. Petitioner said she has gotten work evaluations since her return to work and has been deemed exceptional.

Petitioner said these surgeries alleviated the severe symptoms she was experiencing, but she still had grasping problems on occasion, weakness in both her hands, including in gripping, achiness in her right elbow and daily pain in her left elbow. She said she occasionally takes Tylenol and had a steroid gel that she put on her hands and elbows. She testified that she had to sleep with her left arm extended due to her elbow as otherwise it would throb and feel like it had lost circulation, and with a pillow on her fingers to keep her hand open. She said she wears compression sleeves with the fingers cut out on both hands, they allow her to work on her keyboard without intense throbbing. At the end of the day she takes them off and applies the gel. She said she would occasionally apply the gel at lunch as well.

On cross examination Petitioner said she was not being seen by any physician for injuries to her hands and elbows. She could not remember the date of the last time she saw a doctor for her hands and elbows. She said she did not use tobacco, was not diabetic or pre-diabetic, but was diagnosed with hypertension in 2018 or 2019. She said she took a diuretic for that condition.

Petitioner said Nurse Practitioner (NP) Naughton had prescribed a wrist brace for her, but she found it too cumbersome, so she bought the compression sleeves as she needed something for her left hand.

Petitioner testified that the job duty form she filled out at the request of her attorney was prepared a year to a year-and-a-half prior to arbitration, and it does not contain all of her duties, but it contains her significant duties. She said she also had three breaks during the day, attended meetings, and helped with IRS and Social Security audits. She said her work duties had changed since her first date of accident, that while it was still on the keyboard and the mouse, she no longer did web work, she does audit work, with spreadsheets and databases.

Petitioner said she may have first experienced symptoms in her left hand and elbow in perhaps 2017, and in the right wrist and elbow in the summer of 2016. She said that she would get symptoms while working with her arms held as they were at her desk while working, in the elbows. She said she never asked her employer for any accommodations such as a standing desk or a gel wrist pad.

Petitioner said she did not do many activities outside of work, such as gardening, she was a bit of a homebody.

Petitioner said she earned more as of the date of arbitration than she did on the date of the first accident.

Petitioner was asked about her current complaints and said she wore sleeves now, used gel cream, and had difficulty grabbing things when her hand was numb. She said the surgeries improved her condition, but she was not cured. She said she did follow up with Dr. Greatting after her last surgery and told him of her complaints, but she could not remember the date she did so.

She said the keyboarding she currently did involved typing and mouse work and sometimes she would be doing data entry.

On redirect examination Petitioner said she did her keyboarding with both hands.

**Melissa Batty**

Ms. Batty was called as a witness by Petitioner. She testified that she works for the State of Illinois in the Division of Child Support Enforcement. She had been employed by the State for 32 years and had worked with Petitioner on a daily basis at Healthcare & Family Services starting in 2015 and for about a year and-a-half. They shared a work station, with a table splitting their work stations. She said she observed Petitioner as she worked through the day. Ms. Batty said she performed her work on the computer, using a keyboard, as did Petitioner. She said Petitioner would be keyboarding all day long, just as she would.

On cross examination Ms. Batty said she and Petitioner did not have the same job titles.

**MEDICAL EVIDENCE**

Petitioner was seen by NP Witmer on September 6, 2016 with complaints of right fourth and fifth finger numbness since August 5, with the whole hand being tingly and weak. She said she also had right elbow pain for the same amount of time, with occasional shock-like sensations on the ulnar side of the elbow radiating to the ulnar wrist and hand. She said the felt her symptoms were work related as she is on her computer all of the time, for years, but the computer usage had increased a year earlier. She said she used a mouse with her right, dominant, hand. She had suffered no recent injuries, exercises or activities which would explain the symptoms. Physical examination revealed a negative Tinel's sign at both wrists and elbows, no thenar atrophy, decreased right grip strength, normal sensation of the right hand. NP Witmer strongly suspected cubital tunnel entrapment, and advised Petitioner to wear a splint at night. An EMG test was ordered. (PX 3 p.1,3)

Petitioner saw Dr. Becker on September 19, 2016 for EMG testing of her right hand. She advised Dr. Becker that the numbness and tingling in the 4th and 5th digits of her right hand started in August. Petitioner said she did not have symptoms on the left. On physical examination Dr. Becker noted atrophy of the ulnar innervated intrinsic hand muscles. After performing the electrodiagnostic testing in the right arm Dr. Becker felt the findings were consistent with severe ulnar mononeuropathy at the right elbow and mild carpal tunnel at the right wrist. No testing was performed on the left side. (PX 5 p.1)

Dr. Ma first saw Petitioner on October 11, 2016. Petitioner was complaining of numbness and tingling in the right hand. She advised Dr. Ma that she had worked for the State for 17 years, typing and using a mouse constantly, all day. She said numbness and tingling in the right had developed at the end of July, 2016. She also complained of right elbow pain which was constant and throbbing. She stated that her symptoms definitely were aggravated with repeat motion at work, typing and using the mouse. She noted recent EMG/NCV suggesting carpal and cubital tunnel. On physical examination Petitioner had a positive Tinel at both the carpal and cubital tunnels, decreased sensation in both median and ulnar nerve distributions, positive Durkan and Phalen tests, and significant weakness in the intrinsic muscle of the right hand. He noted Dr. Becker's test results suggesting severe right cubital tunnel and mild right carpal tunnel syndromes. He suggested Petitioner have surgery on both the carpal and cubital tunnels, and Petitioner agreed. (PX 4 p.1,3)

Dr. Ma performed the right carpal and right cubital tunnel surgeries on November 28, 2016. During the carpal tunnel surgery he noted that the median nerve was swollen. During the cubital tunnel surgery, Dr. Ma noted the ulnar nerve was subluxated with elbow flexion of 90 degrees leading to the decision to anteriorly transpose the ulnar nerve anteriorly. (PX 4 p.4,5)

Petitioner was seen post-operatively by Dr. Ma on December 13, 2016. Petitioner reported the numbness and tingling n the right hand was improved significantly. Physical examination revealed the incisions were healing well. Petitioner was advised to continue a home exercise program, with range of motion and stretching. She was to avoid lifting, pushing or grasping. (PX 4 p.12)

Petitioner saw Dr. Ma again on January 24, 2017, saying she was extremely pleased with her recovery. Dr. Ma found her median and ulnar nerve distributions to be improving. He felt she was recovering well. In a Brigham Hand Symptom Severity Scale form on that date, Petitioner said she did not have hand or wrist pain when seen, did not wake up on a typical night due to hand or wrist pain in past two weeks, had mild pain during the day, once or twice a day, for less than 10 minutes, did not have numbness, tingling, or weakness in her hand, or at night, and had no difficulty with grasping small objects, or doing several other hand activities.. She was released on a prn basis at this time. (PX 4 p.14,16,20,21)

On October 11, 2017 Petitioner saw NP Naughton with complaints about her right index and middle fingers as well as the dorsum of the hand and her wrist. She was denying any specific injury. She noted pain was sharp when she was gripping. Her pain was 5/10 at rest and 7/10 when gripping and doing computer-based activities. It was noted her work was primarily computer based. On exam she had tenderness over the second dorsal compartment of the wrist, pain with resisted extension of the index and middle fingers, some pain with resisted wrist extension, and less pain with resisted wrist flexion. She had full range of motion and muscle strength of the right wrist. Intersection syndrome was discussed with Petitioner and an injection into the second dorsal compartment of the right wrist was performed for that condition. Petitioner was provided with a splint while up and active. (PX 4 p.24)

NP Naughton saw Petitioner on November 8, 2017 for follow up of the right second dorsal compartment injection. Petitioner said the injection gave her some relief, but her pain was not entirely resolved, she continued to have discomfort in the right index and middle fingers as well as the dorsum of the hand and the wrist extending into the distal forearm. She rated her pain as 3/10. Physical examination showed tenderness to palpation over the second dorsal compartment of the right wrist, pain with resisted wrist extension and resisted extension of the index and middle fingers of the MCP joint. The right wrist had full range of motion and muscle strength. It was agreed to continue conservative treatment, which included her starting use of Voltaren gel. (PX 4 p.28)

On January 10, 2018 Petitioner saw NP Naughton, and advised her the Voltaren gel did not give much relief. Her symptoms were basically unchanged, as was her physical examination. A second injection into the right second dorsal compartment was performed during this visit. It was noted that if she had not had significant improvement at her next visit they would discuss surgical options. (PX 4 p.32)

Petitioner was seen again by NP Naughton on February 8, 2018. Despite her injection a month earlier, her pain had returned. The pain was primarily along the dorsum of the hand and in the second dorsal compartment. Her physical examination findings remained about the same. Debridement and release of the second dorsal compartment of the right wrist for intersection syndrome by Dr. Ma was discussed, and Petitioner elected to have that surgery. (PX 4 p.36)

Petitioner saw Dr. Ma on February 13, 2018. Dr. Ma noted her recent complaints and physical examination findings as well as injections. X-rays of the right hand were done on February 13, 2018 and were interpreted as only showing mild degenerative changes. His physical examination on this date found significant tenderness to palpation to the right thumb CMC joint, a positive grinds test, and mild swelling around the CMC joint of the right hand. Dr. Ma felt Petitioner's pain was due to multiple issues, which included arthritis in the right wrist and finger arthritis. He felt nonsurgical treatment would help her, they reviewed those options and Petitioner opted for an injection of the right CMC joint, which was performed. Dr. Ma felt Petitioner could be helped by occupational therapy, but Petitioner said it had not been obtained in the past due to money issues. (PX 4 p.23,40)

Petitioner was seen by NP Naughton on November 15, 2018. On the Orthopedic Surgeon Intake form filled out and signed by Petitioner on that date she noted she was to be seen for right hand middle finger trigger finger, left hand tingling, numbness, and pain in the arm and wrist. She noted she had been experiencing these symptoms for three months, they came on gradually, and the activities of daily living where it bothered her were driving and work/typing. She noted she had seen Dr. Greatting previously for left trigger thumb, and had seen Dr. Ma for right trigger thumb. When asked if this problem interfered with her work she wrote that she had to rest the left hand. Her pain drawing that day showed aching in the right hand and aching, numbness and tins and needles sensation in the left hand. Petitioner told NP Naughton of the left hand pain coming on over the past three months and of the symptoms being exacerbated by driving and typing. She said it had been progressively getting worse in the last six weeks. An x-ray of the left hand on this date only showed mild degenerative changes in the first carpometacarpal joint. On exam Tinel's, Phalen's and compression tests were all positive over the carpal tunnel on the left. The right hand had a small nodule in the area of the A1 pulley adjacent to the right middle finger which was tender to palpation, with catching and clicking of the flexor tendon as it passed through the A1 pulley system of that right middle finger. It was decided to inject the right middle finger that day, which was performed, and to send her to Dr. Becker for electrodiagnostic testing. (PX 6 p.1-4,10)

Dr. Becker saw Petitioner for a second time on November 20, 2018. On this occasion Petitioner was complaining of numbness and tingling in the left hand which woke her at night and which had begun 1 and-a-half months earlier. EMG testing was interpreted as showing a mild left carpal tunnel syndrome and a mild ulnar mononeuropathy at the left elbow. (PX 5 p.1)

NP Naughton again saw Petitioner on December 13, 2018. Petitioner said her right middle finger complaints had resolved following the injection, with no clicking, catching, or discomfort. She said her left hand complaints were bothering her considerably, and, again, were aggravated by driving and typing. Her previous exam findings remained the same. other than the resolution of right middle finger tenderness and the absence of catching or clicking of the flexor tendon at the A1 pulley system. They discussed Dr. Becker's findings and Petitioner stated she would like to undergo left carpal and cubital tunnel releases by Dr. Greatting. (PX 6 p.11)

Petitioner was seen by Dr. Greatting on January 28, 2019 for a pre-op physical. Her exam findings were generally unchanged.. (PX 6 p.22)

On February 5, 2019, Dr. Greatting performed a release of the left cubital tunnel, a release of the left carpal tunnel, and injections of the right middle and ring fingers' flexor tendon sheaths. The ulnar nerve was found to be compressed and narrowed and decompression was accomplished. The median nerve was found to be compressed and narrowed under the middle third of the transverse carpal ligament, and decompression was accomplished. (PX 6 p.32,33)

Dr. Greatting saw Petitioner on March 19, 2019 and Petitioner advised him that her numbness was resolved and her sutures removed. She was advised to call and return for follow up in four to six weeks if she was having any significant problems or concerns. (PX 6 p.37)

Petitioner was next seen on August 8, 2019 as she was again having triggering of the right middle and ring fingers. She said her fingers would lock completely to the palm and she would have to use her other hand to manually unlock them. She wanted injections as she was going to be going on vacation. Her physical examination was similar to what it had been prior to her injections, with tenderness over the A1 pulley system and catching and clicking of the flexor tendons as they passed through the A1 pulley system of those fingers. Surgery to correct the trigger fingers was discussed, and Petitioner said she would like the surgeries. (PX 6 p.40)

Dr. Greatting saw Petitioner on August 14, 2019, and injected her right trigger fingers. Due to left arm numbness and tingling, Petitioner was again referred to Dr. Becker for electrodiagnostic testing. Dr. Greatting saw her again on August 28, 2019 with continuing right middle and ring finger triggering and surgery was discussed and scheduled. (PX 6 p.44,45,52)

Surgeries for the release of the right long and ring fingers were performed on September 4, 2019, by Dr. Greatting. Petitioner was seen post-operatively by Dr. Greatting on September 18, 2019, and she was already getting good motion in the fingers. Her sutures were removed and she was told to return if she had any significant problems or concerns. (PX 6 p.56,57,59)

Petitioner returned to see NP Naughton on March 3, 2020, this time with catching and clicking of her left middle and ring fingers, which she said was a new problem for her. She said it had been worsening over the last several weeks. There was palpable catching and clicking of the flexor tendons of the left middle and ring

fingers. Petitioner said she wanted surgical releases by Dr. Greatting. Petitioner received injections of the fingers on this date. (PX 6 p.63)

Petitioner saw Dr. Greatting on May 7, 2020, and after being examined surgery was scheduled. Dr. Greatting performed the pre-op physical the next day, May 8, 2020. Dr. Greatting performed releases of the left long finger trigger finger and the left ring finger trigger finger on May 19, 2020. (PX 6 p.71,77,87,88)

NP Naughton saw Petitioner on June 4, 2020 and Petitioner said she was doing well, no longer having any mechanical symptoms or pain. She denied numbness or tingling in the left hand. Sutures were removed. Petitioner was told to contact Dr. Greatting's office if she had any concerns. This appears to be Petitioner's last visit with any physician for her right hand, wrist or elbow and her left hand, wrist, or elbow. (PX 6 p.90)

**CAUSATION REPORT OF DR. MARK GREATTING**

Petitioner's attorney wrote Dr. Greatting on March 26, 2021 with copies of Petitioner's pertinent medical records. He described Petitioner's work for Respondent as:

> "While her job duties were many and varied, the common denominator was that she spent 90% of her time at work using her computer, both keyboard and mouse. * * * He (sic) told me that she would rest her forearms on the top of the edge of the desk, elbows bent with her hands on top of the desk to use the mouse and keyboard." (PX 1 p.1)

Petitioner's attorney also included copies of medical records which appear to be included in the medical record summary, above. Dr. Greatting was then asked a series of questions which he was asked to answer within a reasonable degree of medical certainty. In answer to those questions Dr. Greatting wrote a letter to Petitioner's attorney on June 17, 2021, in which he stated:

- He treated Petitioner for left carpal tunnel syndrome, left cubital tunnel syndrome, right middle trigger finger, right ring trigger finger, left middle trigger finger and left ring trigger finger.
- He performed the left cubital and carpal tunnel surgeries, right middle and ring trigger finger releases, and left middle and ring trigger finger releases summarized above.
- He opined that Petitioner's work did not cause any of those conditions.
- He opined that the work activities described in Petitioner attorney's letter over a period of many years could have aggravated or accelerated the symptoms related to these conditions and required her to have surgical treatment. He believed the treatment she received for these conditions was reasonable and necessary. He had no specific information about any time Petitioner may have been off work for these conditions.
- Petitioner also was treated for left trigger thumb and recurrent left wrist volar and dorsal carpal ganglions, but he did not believe those conditions were in any way related to Petitioner's work activities. (PX 1 p.4)

**CAUSATION REPORT OF DR. JIANJUN MA**

The parties stipulated that a letter was sent to Dr. Ma by Petitioner's attorney with a job description, but that letter was not available for subpoena purposes at the time of arbitration. The attorneys stipulated that the

letter sent to Dr. Ma was the same as the letter sent to Dr. Greatting. For the contents of that letter, please see the summary of Dr. Greatting's causation report, above.

Dr. Ma, in answer to the questions posed to him in Petitioner counsel's letter wrote a letter to Petitioner's attorney on October 4, 2021, in which he stated:

- He treated Petitioner's right hand and wrist conditions she complained of, numbness and tingling in the right hand.
- He performed right carpal tunnel release and ulnar nerve anterior transposition on November 28, 2016.
- She was released from his care on November 11, 2016.
- He opined that Petitioner's work activities of keyboarding, use of mouse and positioning of her arms and hands would not have caused Petitioner's right carpal tunnel syndrome, right cubital tunnel syndrome or extensor intersection of the right wrist, but those work activities could have aggravated the symptoms related to those diagnoses. He said all of the treatment Petitioner received from NP Naughton and himself were reasonable and were necessary to treat those conditions.
- He said Petitioner was authorized to be off work "for a period of time" after her November 2016 surgery, followed by a return to work with "certain restrictions." (PX 2 p.1)

**IME REPORT OF DR. ANTHONY E. SUDEKUM**

Dr. Sudekum performed an IME of Petitioner on October 4, 2018. He reviewed medical records dating back to 1994, many of which were not introduced into evidence at arbitration. Many of the pre-accident dates records are for complaints on other parts of her body other than fingers, hands, and elbows, and for hand and wrist complaints (ganglion cysts, headache, anemia, stresses with a co-worker affecting her health, etc.) which are not claimed as work related injuries. Some are related to the areas of the body that are the subject matter of Petitioner's current claims, but are double hearsay (the report itself being hearsay) which was not specifically objected to at arbitration, but in addition are obviously incomplete in their summarization in this report. The report does appear to indicate a review of all medical treatment and testing performed from September 6, 2016 through February 13, 2018, but not thereafter. (RX 3 p.1 – 12,16,17 of 39)

Dr. Sudekum received a history of Petitioner's complaints from her during his examination. He then performed a physical examination which revealed well-healed incisions on her right medial elbow and right proximal palm as well as well-healed incisions on the left wrist from non-related ganglion cyst excisions. He found Tinel's and Phalen's signs to be negative bilaterally at the wrist and elbows, full range of motion of bilateral elbows, wrists and fingers, normal sensation throughout both upper extremities, full strength of the right shoulder, upper arm, elbow, forearm and wrist and grip and pinch strength which was considered in the low normal range. He found a palpable nodule on Petitioner's right middle finger flexor tendon at the MP flexor crease, without pain on palpation and with no triggering. He noted a slight muscular change in the right forearm which he felt could be mild muscular atrophy from her ulnar nerve release/transposition. (RX 3 p.12,14)

Dr. Sudekum had a section of his report entitled, "Job analysis." This section set out what positions Petitioner had worked for the State of Illinois by year, division, and duties. It appears this information was from

Petitioner as at one point in the four paragraph descriptions of four different jobs Dr. Sudekum wrote, "She states that her duties included …" The description of the work would appear to be more detailed than the description given by Petitioner at arbitration, though the description of the work both at arbitration and in Dr. Sudekum's report appears to be almost entirely computer work, with the exception of meetings. (RX 3 p.17 of 39)

Dr. Sudekum also included in his report what purports to be a document for Public Service Administrators in general, that being a class of employees, describing work done by people who have vastly different job duties than those described by Petitioner at arbitration or to Dr. Sudekum during this examination. This description obviously is not derived from a copy of the position description introduced into evidence as Respondent's Exhibit #4. (RX 3 p.18-20 of 39)

Dr. Sudekum did include in his report the contents of a typed document Petitioner brought with her to her appointment describing what she did in all of her positions from 1999 through 2016. This was quite detailed and generally was consistent with her arbitration testimony, though the description given to Dr. Sudekum in writing was more detailed than her arbitration testimony. This description is also consistent with Petitioner spending the vast majority of her time working at her computer. Petitioner also advised Dr. Sudekum that on average 90 percent of her work day was spent sitting at her work station doing keyboarding, paperwork and phone work, with the remaining 10 percent being attendance at meetings. (RX 3 p.20-26 of 39)

Dr. Sudekum, in answer to questions posed to him by Ms. Robinson of Tristar opined:

- "There is no indication in the medical records that (Petitioner) sustained any injury to either upper extremity as a result of a work-related accident, injury or activity." He then noted she had several neck strains, back strains, and injuries to her arms and shoulders from domestic events from 1994 through 2006. (RX 3 p.28,29)
- He diagnosed several hand and arm conditions, including right carpal and cubital tunnel syndromes, which were resolved after surgical treatment, right intersection syndrome, which was resolved after conservative treatment, bilateral thumb CMC arthritis, history of left wrist ganglion with surgical excision, and history of hand and wrist peripheral edema requiring diuretic treatment. (RX 3 p.35)
- He noted Petitioner had multiple nonwork related risk factors and comorbid conditions which could cause or aggravate her arm symptoms, including her age, her sex, arthritis affecting her arms and neck, cervical radiculopathy, arm tendinitis, morbid obesity, smoking history, systemic lupus, high blood pressure, peripheral edema and congestive heart failure. He said it was not unusual for people to have subjective symptoms associated with pathologic processes such as arthritis, tendinitis, or peripheral neuropathy, and it was possible she suffered some symptoms in her arms while performing her job duties, but he did not think having symptoms while at work would indicate that "the benign activity as (sic) caused or aggravated the underlying pathologic process or condition." He noted that there were a number of studies which indicated no significant causal relationship between typing and keyboarding on a sustained basis. He believed Petitioner's upper extremity problems were the result of her comorbidities and not her work activities. (RX 3 p35,36)

- Dr. Sudekum did believe the medical treatment Petitioner had received was reasonable and necessary, that she needed no further treatment, and that she might have ongoing or progressive problems due to her "significant nonwork related risk factors and comorbid conditions." (RX p.36,37)

## ARBITRATOR CREDIBILITY ASSESSMENT

Petitioner appeared to be a cooperative witness for both parties, she answered all questions posed to her by both attorneys with no obvious effort to evade or argue with counsel for Respondent. She did not appear to exaggerate in regard to either her work duties or her complaints. No evidence was introduced which contradicted her testimony in regard to her work duties, or how long she performed tasks. The Arbitrator finds Petitioner to be a credible witness.

Mellisa Batty also appeared to be a cooperative witness. While she corroborated Petitioner's description of what she physically did in performing her job tasks, Ms. Batty did not appear to exaggerate Petitioner's duties or problems performing those duties. While she did not perform the same job as Petitioner, she shared a cubicle with Petitioner for an extended period of time and was in position to describe what Petitioner did in performing her job duties. The Arbitrator finds Ms. Batty to be 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 March 3, 2020, and whether Petitioner's current conditions of ill-being, left middle finger trigger finger and left ring finger trigger finger are causally related to the accident of March 3, 2020, and whether the medical services that were provided to Petitioner were reasonable and necessary as a result of the Accident of March 3, 2020, the Arbitrator makes the following findings:**

The findings of fact, above, are incorporated herein.

The summaries of medical evidence, including causal connection letters and independent medical examination report, above, are incorporated herein.

Petitioner was seen by NP Naughton on March 3, 2020, with complaints of catching and clicking of her left middle and ring fingers, which she said was a new problem for her. She said it had been worsening over the last several weeks. There was palpable catching and clicking of the flexor tendons of the left middle and ring fingers. Petitioner said she wanted surgical releases by Dr. Greatting. Petitioner received injections of the fingers on this date.

Petitioner saw Dr. Greatting on May 7, 2020, and after being examined, surgery was scheduled. Dr. Greatting performed the pre-op physical the next day, May 8, 2020.

Dr. Greatting performed releases of the left long finger trigger finger and the left ring finger trigger finger on May 19, 2020.

NP Naughton saw Petitioner on June 4, 2020 and Petitioner told her that she was doing well, and no longer had any mechanical symptoms or pain. She denied numbness or tingling in the left hand. Sutures were removed. Petitioner was told to contact Dr. Greatting's office if she had any concerns. This appears to be Petitioner's last visit with any physician for her left middle and ring finger conditions.

**The Arbitrator finds that Petitioner suffered an accident on March 3, 2020, which arose out of and in the course of his employment by Respondent.**

**The Arbitrator finds that Petitioner's medical conditions, left middle finger trigger finger and left ring finger trigger finger are causally related to the accident of March 3, 2020.**

**The Arbitrator further finds that the following bills introduced into evidence in Petitioner Exhibit 7 are related to Petitioner's right carpal tunnel and right cubital tunnel injuries, are reasonable, were necessitated to treat or cure Petitioner's injuries suffered in this accident, and are to be paid pursuant to the Medical Fee Schedule:**

- On page 18, the fees for services rendered on March 3, 2020, in the amounts of $294.00, $247.00, $18.00, and $18.00.
- On page 20, the fees for services rendered on May 7, 2020, in the amount of $197.00 and May 19, 2020 in the amounts of $2,480.00 (left middle finger) and $2,480.00 (left ring finger). (It is noted that page 21 includes two additional fees for the same two tendon sheath incisions, on the same dates, in larger amounts, $3,559.00. As duplicative bills, these charges on page 21 are not awarded.)
- On page 21, the fees for services rendered on May 19, 2020 in the amounts of $46.70 and $16.00. are dates of service which are causally related to this injury.

**The Arbitrator further finds that Respondent shall reimburse petitioner for her out-of-pocket payments of $60.00.**

**The Arbitrator further finds that pursuant to the stipulation of the parties, Respondent is entitled to a Section 8 (j) credit for all group health insurance payments made towards the medical bills awarded in this decision.** These findings are based upon Petitioner's testimony and the medical records introduced into evidence, including the causation letter of Dr. Greatting.

**In support of the Arbitrator's decision relating to whether timely 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, including causal connection letters and independent medical examination report, above, are incorporated herein.

The findings in regard to accident and causal connection, above, are incorporated herein.

Petitioner testified that she advised her supervisor, Ann Marie Anderson, about her left trigger fingers both prior to March of 2020 and after she saw Dr. Greatting on March 3, 2020. She said she made Ms. Anderson aware of every time she went to the doctor while Ms. Anderson was her supervisor, as well as the reason she was seeing the doctor.

Respondent introduced approximately nine Form 45 reports noting different accident dates or supervisor's reports of injury or illness as Respondent Exhibit 1. The majority of these reports are unsigned, and none are signed by Petitioner. These are not a form which an employee would fill out after an accident, they are company forms for reporting to the Illinois Workers' Compensation Commission or to Tristar Risk Management. These forms are not proof of an accident not having been reported, and the propagation of these reports appears to be within the control of management, not the employee.

Respondent did not call Ms. Anderson or any other employee to rebut Petitioner's testimony that she gave notice at the time of her visit with Dr. Greatting (or his nurse practitioner, NP Naughton) on March 3, 2020, not did Respondent introduce any evidence that they were prejudiced in any way if Petitioner gave erroneous notice of the accident.

**The Arbitrator finds that Petitioner gave Respondent notice of the accident within the time limits stated in the Act.**

**In support of the Arbitrator's decision relating to the nature and extent of the injury the Arbitrator makes the following findings:**

The findings of fact, above, are incorporated herein.

The summaries of medical evidence, including causal connection letters and independent medical examination report, above, are incorporated herein.

The findings in regard to accident, causal connection, and temporary total disability, above, are incorporated herein.

As the accident occurred after September 1, 2011, the nature and extent of the injury must be determined through the five-factor test set out in §8.1b(b) of the Act.

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.

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 Public Service Administrator at the time of the accident and that she *is* able to return to work in his prior capacity as a result of said injury. The Arbitrator notes this is a sedentary job requiring Petitioner to sit at a desk working at a computer for the majority of her workday. No apparent physical labor is required in this position. Because of the light nature of her job and Petitioner's having worked

said job for over five years since ceasing to be treated for these injuries, the Arbitrator therefore gives *lesser* weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 58 years old at the time of the accident. Because of her having approximately ten years of additional working life, and having a sedentary job, the Arbitrator therefore gives *moderate* weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes no evidence of loss of earnings was introduced into evidence. Petitioner said she earned more as of the date of arbitration than she did on the date of the first accident. Because of her continuing to work her previous job for the three or more years since the date of this accident and her earning more as of the date of arbitration than she had on the date of accident, 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 at arbitration testified she still had grasping problems on occasion, weakness in both her hands, including in gripping, She said she occasionally takes Tylenol and had a steroid gel that she put on her hands and elbows. She testified that she had to sleep with a pillow on her left fingers to keep her hand open. She said she wears compression sleeves with the fingers cut out on both hands, they allow her to work on her keyboard without intense throbbing. At the end of the day she takes them off and applies the gel. She said she would occasionally apply the gel at lunch as well. The medical records reflect that Petitioner received injections of the fingers March 3, 2020. Petitioner saw Dr. Greatting on May 7, 2020, and after being examined surgery was scheduled. Dr. Greatting performed releases of the left long finger trigger finger and the left ring finger trigger finger on May 19, 2020. NP Naughton saw Petitioner on June 4, 2020 and Petitioner said she was doing well, no longer having any mechanical symptoms or pain. She denied numbness or tingling in the left hand. Sutures were removed. Petitioner was told to contact Dr. Greatting's office if she had any concerns. It does not appear Petitioner ever returned to either Dr. Greatting or any other physician with left finger complaints. Because of the number of surgeries performed but the lack of corroborating medical evidence supporting her post-surgical complaints at arbitration, the Arbitrator therefore gives *lesser* 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 a 15% loss of use of the left middle finger pursuant to §8(e) of the Act as a result of this injury, 5.7 weeks of permanent partial disability at a weekly rate of $836.69, and a 15% loss of use of the left ring finger, pursuant to §8(e) of the Act as a result of this injury, 4.05 weeks of permanent partial disability at a weekly rate of $836.69.**

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 09WC007746 |
| Case Name | Judy Jakuszewski v. Walgreens |
| Consolidated Cases | |
| Proceeding Type | 8(a)/19(h) Petition |
| Decision Type | Commission Decision |
| Commission Decision Number | 23IWCC0545 |
| Number of Pages of Decision | 4 |
| Decision Issued By | Stephen Mathis, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Rocco Motto |
| Respondent Attorney | Edward A. Coghlan |

DATE FILED: 12/28/2023

/s/Stephen Mathis, 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

JUDY JAKUSZEWSKI,

Petitioner,

vs. NO. 09 WC 07746

WALGREENS,

Respondent.

DECISION AND OPINION ON REVIEW UNDER SECTION 8(a)

Timely Petition for Review under section 8(a) having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issue of further medical benefits, and being advised in the facts and law, grants the 8(a) petition for the reasons set forth below.

Petitioner has been employed as a registered pharmacist since 1989. She was employed by Respondent Walgreen's on July 12, 2008, when she sustained an undisputed accident. Petitioner slipped and fell on a recently mopped floor. She suffered injuries to her low back, SI joint, and left shoulder. The matter was previously tried on a 19(b) petition before Arbitrator Hegarty. Arbitrator Hegarty's decision was appealed and came before the Commission on Respondent's Petition for Review.

On December 18, 2017, the Commission, on review of the 19(b) decision, modified the award in part, and affirmed the award of medical benefits pursuant to Section 8(a) of the Act and remanded the matter back to the Arbitrator for further findings. The matter next was heard by Arbitrator Friedman on the sole issue of nature and extent of disability.

Arbitrator Friedman noted that Petitioner suffered a fracture of the sacrum and S3 segment with extension to the S1 region and received treatment from Dr. Mayer and Dr.

Chenelle. Petitioner also treated with Dr. Bare for left shoulder and upper extremity pain. Throughout the interval between the prior 19(b) trial and the hearing before Arbitrator Friedman on nature and extent of disability Petitioner continued treatment with the same physicians.

On July 27, 2018, Arbitrator Friedman filed a Decision, awarding permanent partial disability benefits to Petitioner corresponding to 30 percent disability to the person as a whole. The Arbitrator noted that the Commission's 19(b) Decision finding Petitioner at MMI as of March 14, 2016, did not preclude the causal connection of any further treatment. This Decision was not appealed by either party and is the law of the case.

The sole issue in the present section 8(a) petition is whether Respondent is responsible for payment of the bills for medical treatment incurred by Petitioner since July 27, 2018. Hearing was conducted before Commissioner Simpson who was sitting in Commissioner Mathis' stead. At that hearing on September 7, 2023, Petitioner testified that she has remained under the care of Drs. Bare, Chanelle, Mayer, and McMahon. She has continued to receive treatment for her low back, left shoulder and SI joint pain.

Respondent has denied approval for her continuing treatment, including physical therapy, injections, and radiofrequency ablation therapy recommended by her treating physicians. Petitioner has been submitting her medical bills through her husband's group insurance. She has been especially concerned about receiving an ablation as that procedure has been highly effective in treating her low back pain in the past. She has been referred to additional physicians including Drs. Mathew, and Wilson, by Dr. Mayer and Dr. Chanelle for SI joint injections and radioablation. She continues to take medication for her low back, SI joint and left shoulder pain. Petitioner testified that these conditions are all the result of the 2008 work injury. She testified that she has not had any accidents or injuries since her trial in 2018.

Respondent sent Petitioner to Dr. Mark Levin, an orthopedic specialist for a Section 12 evaluation on November 17, 2020. Dr. Levin opined that he was not able to substantiate that any of Petitioner's objective orthopedic complaints were related to any injuries sustained in her work injuries in 2008. According to Dr. Levin Petitioner stated subjective complaints or restrictions which did not fit the objective orthopedic pathology. Finally, Dr. Levin opined that he cannot substantiate that any payment or medical treatment was at all related to the work injury of July 12, 2008.

On cross examination Dr. Levin admitted that he had reviewed none of the records of Petitioner's medical treatment prior to 2019. The basis for his opinions turns on his own subjective assessment of what he described as disparities between Petitioner's complaints versus his observations during distracted testing.

The Commission finds the opinions of Dr. Levin to be unpersuasive when considered in the context of Petitioner's regular and ongoing treatment with her longtime treating physicians

and the regularity with which she has continued follow-up for consistent complaints related to the same body parts that she injured in her 2008 work injury.

Based upon the foregoing the Commission finds that the medical treatment Petitioner has undergone following the June 27, 2018, hearing is reasonable, and necessary, and related to her July 12, 2008, work injury. Respondent is therefore responsible for payment of the bills outlined in Petitioner's Exhibit #8.

The Commission further finds that the treatment recommended by Dr. McMahon, Dr. Mayer, Dr. Bare, and Dr. Mathew is reasonable, necessary, and related to her July 12, 2008, work injury.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's petition under Section 8(a) of the Act is hereby granted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the medical bills in Petitioner's Exhibit #8 pursuant to Section 8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under Section 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.

**December 28, 2023**

SJM/msb
o-11/15/2023
44

/s/ *Stephen J. Mathis*
Stephen J. Mathis

/s/ *Deborah L. Simpson*
Deborah L. Simpson

/s/ *Marc Parker*
Marc Parker

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 09WC032249 |
| Case Name | Arnold Davis v.<br>Emerald Performance Materials |
| Consolidated Cases | |
| Proceeding Type | Petition for Review<br>Remand Arbitration |
| Decision Type | Commission Decision |
| Commission Decision Number | 23IWCC0546 |
| Number of Pages of Decision | 4 |
| Decision Issued By | Stephen Mathis, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Karin Connelly,<br>Timothy Shay |
| Respondent Attorney | R Mark Cosimini |

DATE FILED: 12/28/2023

/s/Stephen Mathis, 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

Arnold Davis,

Petitioner,

vs. No. 09 WC 32249[1]

Emerald Performance Materials,

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 jurisdiction and consolidation, and being advised of the facts and law, dismisses the petition for review for lack of jurisdiction and remands this case to the Arbitrator for further proceedings consistent with this Decision.

On August 3, 2009, Petitioner filed an application for adjustment of claim under the Workers' Compensation Act, which received docket number 09 WC 32249, alleging that on July 10, 2009 he sustained work-related injuries to the right arm and person as a whole.

On November 10, 2011, Petitioner filed an application for adjustment of claim under the Occupational Diseases Act, which received docket number 11 WC 43300, alleging injuries to the kidneys and person as a whole as a result of cumulative exposure to chemicals, with the manifestation date of July 10, 2009.

On October 7, 2019, Arbitrator Paul Seal, to whom case No. 09 WC 32249 was assigned, denied Petitioner's motion to consolidate the two claims. However, Petitioner also brought the motion to consolidate before Arbitrator Gerald Granada, to whom case No. 11 WC 43300 was assigned. On March 12, 2020, after a telephonic hearing, Arbitrator Granada suggested that

[1] Consolidated with No. 11 WC 43300.

Petitioner bring a motion to reconsider before the Commission. On or about March 17 and/or March 25, 2020, Petitioner filed before the Commission a motion to reconsider Arbitrator Seal's October 7, 2019 ruling.

On August 26, 2020, the Commission issued an Order finding that Arbitrator Seal's ruling was interlocutory and not appealable to the Commission until the issuance of an arbitration decision in the matter.[2] The Commission believed Petitioner would not be precluded from revisiting Arbitrator Seal's interlocutory ruling before Arbitrator Adam Hinrichs, to whom case No. 09 WC 32249 was now assigned.

On August 23, 2022, Arbitrator Hinrichs held a hearing on Petitioner's latest motion to consolidate, having previously denied a motion to reconsider Arbitrator Seal's ruling. Arbitrator Hinrichs ruled on the record as follows: "My previous denial was based entirely on whether or not I felt it was appropriate for me to rule on a motion to reconsider over a year prior to the initial denial. I agree the merits aren't at issue here today. The final order has not been issued in this case. The alleged accidents are both alleged to arise from the same incident as far as I can tell, and I do think that judicial economy would be served if these were consolidated and heard on the same day. So, I'm going to grant petitioner's motion to consolidate; and I will enter that later today." The Commission staff entered the Arbitrator's ruling on August 30, 2022. On September 20, 2022, Respondent timely filed a petition for review, captioned with case No. 09 WC 32249 only.

It is well established that a ruling on a motion to consolidate is interlocutory and not immediately appealable, absent a procedural rule or compelling reason. In *Harrison Sheet Steel Co. v. Lyons*, 15 Ill. 2d 532, 598-99 (1959), the supreme court explained: "Parey's appeal in the company's case is not from the final decree, but from the order denying his motion to consolidate the two cases. Such an order is not final, and so is not ordinarily appealable. There are instances in which particular circumstances have been held to give an order consolidating, or refusing to consolidate, sufficient characteristics of finality to support an appeal. (*Adler v. Seaman*, 266 Fed. 828, (C.C.A. 8); *Wilhelm v. Hendrick*, 177 Ky. 296, 197 S.W. 836, (Ky. Ct. of App. 1917).) There is in this case no comparable necessity to relax the requirement of finality."

Pursuant to the amended Supreme Court Rule 23, we also rely, as persuasive authority, on the appellate court's unpublished opinion in *CIT Bank, N.A. v. Unknown Heirs & Legatees of John Pino*, 2020 IL App (1st) 191416-U, ¶ 15, holding: "[T]he trust cannot escape the fact that the court's June 5, 2019 order did nothing more than grant the bank's motion to consolidate, and such an order is not appealable. Accordingly, we do not have jurisdiction to review the trust's challenge to the circuit court's June 5, 2019 order."

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent's petition for review is dismissed.

IT IS FURTHER ORDERED BY THE COMMISSION that this case is remanded to the Arbitrator for further proceedings consistent with this Decision.

[2] It was therefore unnecessary for the Commission to decide whether the Commission had jurisdiction pursuant to the motion to reconsider filed within 30 days of Arbitrator Granada's recommendation.

**December 28, 2023**

SJM/sk
o-11/15/2023
44

/s/*Stephen J. Mathis*
Stephen J. Mathis

/s/*Deborah L. Simpson*
Deborah L. Simpson

/s/*Marc Parker*
Marc Parker

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 18WC018296 |
| Case Name | June Moody v. Walmart |
| Consolidated Cases | |
| Proceeding Type | Petition for Review |
| Decision Type | Commission Decision |
| Commission Decision Number | 23IWCC0547 |
| Number of Pages of Decision | 20 |
| Decision Issued By | Stephen Mathis, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Erin Sievers |
| Respondent Attorney | Bret Taylor |

DATE FILED: 12/28/2023

/s/Stephen Mathis, Commissioner

Signature

STATE OF ILLINOIS )
) SS.
COUNTY OF MCHENRY )

| | |
|---|---|
| ☒ 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

June Moody,

Petitioner,

vs. NO. 18 WC 18296

Walmart,

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, temporary disability, 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 7, 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.

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.

**December 28, 2003**

/s/*Stephen J. Mathis*
Stephen J. Mathis

SJM/sj
o-11/01/2023
44

/s/ *Deborah L. Simpson*
Deborah L. Simpson

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

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 18WC018296 |
| Case Name | June Moody v. Walmart |
| Consolidated Cases | |
| Proceeding Type | |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 17 |
| Decision Issued By | Gerald Napleton, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Rich Hannigan |
| Respondent Attorney | Bret Taylor |

DATE FILED: 12/7/2022

**THE INTEREST RATE FOR THE WEEK OF DECEMBER 6, 2022 4.57%**

/s/Gerald Napleton, Arbitrator

Signature

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

**June Moody**
Employee/Petitioner

v.

**Walmart**
Employer/Respondent

Case # **18WC018296**

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 city of **Woodstock**, on **September 8, 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 **Prospective Vocational Rehabilitation**

**FINDINGS**

On **4/21/2018**, 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 $**8,008.00**; the average weekly wage was $**154.00**.

On the date of accident, Petitioner was **61** 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 is entitled to a credit of $**0.00** under Section 8(j) of the Act.

**ORDER**

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

Respondent shall pay Petitioner temporary total disability benefits of $154.00/week for 202 2/7 weeks, commencing 5/28/18 through 4/12/2022, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner maintenance benefits for 21 2/7 weeks commencing 4/13/22 through 9/8/2022

Respondent shall authorize vocational rehabilitation services with Mr. Blumenthal.

**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 — **DECEMBER 7, 2022**

Signature of Arbitrator

**JUNE MOODY v. WALMART - 18WC18296**

## FINDINGS OF FACT

### Prior Medical Conditions

Petitioner, June Moody, was exposed to carbon monoxide and subsequently was diagnosed with a brain condition in the late 1990s. As a result, she went on Social Security Disability (SSDI) in September 2000. (TX 6). Being on SSDI, she was able to work but kept her income under a certain threshold. On her 66th birthday, August 15, 2022, her benefits switched over to straight Social Security benefits and she does not have to limit her hours or income now. (TX 47-48). She has been treating with Dr. Onwuta, a pain management doctor since 2014 for right knee pain, cervical spine pain following a fusion at C5-C6, and a fusion of her right middle finger bones. (TX 6-7, PX9). She saw him on a regular basis thereafter for medication refills and reported her symptoms to him at each visit. (TX 7-8). On July 28, 2014, she saw Dr. Onwuta and reported right knee pain, cervical spine pain and right middle finger pain. (TX 8, PX9, p 123-126). She treated with Dr. Onwuta every other month for refills. Her complaints ranged from low back pain, right shoulder pain, knee pain, cervical pain, radicular pain down her left arm, right middle finger pain and varicose veins. (TX 8-9). On March 5, 2018, Petitioner saw Dr. Onwuta and reported right shoulder, knee, bilateral hand, low back, and neck pain. (PX9, p, 20-22

### Accident and Current Medical History

Petitioner was hired by Respondent on August 1, 2014. She was limited to part time work because of her SSDI status. (TX 7-8). On April 21, 2018, she reported to work as a cashier at 6:00 a.m. Her Walmart store was open 24 hours a day, 7 days a week. (TX9). She worked normally until approximately 9:00 a.m. Respondent's exhibit 8 is a video of the overhead view of Petitioner's cashier station beginning at 7:20 a.m. and goes through 10:00 a.m. At the hearing, Petitioner viewed a portion of the video beginning at 8:57:30 a.m. through 8:58:30 which shows Petitioner's accident (TX 10, 12, RX8). The video showed Petitioner accidentally striking a shopping basket with her right foot. Petitioner did not intentionally strike the basket, nor did she place the basket there. (TX 12). Petitioner reviewed Respondent's Exhibit 11, a Walmart shopping basket. Petitioner testified that the basket was the same type that she struck with her foot on April 21, 2018. (TX 40). She testified that the basket was empty when she struck it but does not recall if she rolled her ankle or not, she did not see her foot twist or roll on the video. (TX 49). She testified that the outside of her foot struck the basket, and she did not stumble or fall after striking it. (TX 49-51). On cross examination she testified that she had immediate pain, 7 out of 10, and she noticed it once she started walking a distance. (TX 51). She continued to work but felt her right foot starting to hurt along the side of her foot. She had never experienced that type of pain before. (TX 13). Petitioner, along with a co-worker Linda Stein, spoke to a supervisor, Rachel, and explained that she came around the register to help a customer and struck the basket with her right foot. (TX 14). Petitioner did not think much of hitting the basket with her foot, but when she told her co-worker, Linda, what happened and that her foot was beginning to hurt, she decided to fill out an accident report. (TX 15). At that point, Petitioner noticed that her right foot began to swell and throb. She took her shoe off and struggled to get the shoe back

on. (TX 15-16). At that time, the supervisor at Walmart had Petitioner sign a preferred provider program that outlines a list of providers chosen by Respondent that Petitioner can treat with when injured on the job, without forfeiting one of her choices in doctor. (TX 16, PX 14).

Petitioner directed to Advocate Outpatient Center in Algonquin for treatment. She stopped at home to pick up her husband to accompany her to Advocate as she gets panic attacks at hospitals. (TX 16-17). She arrived at Advocate at approximately 1:00 p.m. (TX 17). X-rays revealed degenerative changes but no fracture or dislocation. Her pain was 7 out of 10. She is given an Ace wrap and instructed to rest, ice, and elevate her foot. (TX 17). She was put on work restrictions of no climbing and sitting 85 percent of the day. (TX 18, PX 12 p 2, 24-29).

Petitioner continued to work for Respondent with these restrictions. (TX 18). Petitioner saw Dr. Onwuta for a regular follow up for her medication. At that time, she reported right ankle pain and gave a history of injuring her right ankle at work two weeks prior. (TX 18, PX9, p 12-19). On May 23, 2018, she was discharged from Advocate and referred to an orthopedic surgeon, Dr. Peterson at Suburban Orthopedics (TX 18, PX12, p 3-4).

Petitioner had her initial visit with Dr. Peterson on May 25, 2018. She gave a history of hitting her right foot against a shopping basket wile at work. She had burning and stabbing pain to the top of the lateral side of the right foot. Dr. Peterson noted that the x-ray of her right foot was negative for fracture, but the radiologist read it as showing multifocal marrow edema/contusion involving tarsal bones and metatarsal bases at the fourth proximal metatarsal raising suspicion of an underlying stress fracture. He ordered an MRI and took her off work. (TX 19, PX2, p 260-263).

On May 29, 2018, the MRI of right foot revealed multifocal marrow edema/contusion involving tarsal bones and metatarsal base with particular intensity at the fourth proximal metatarsal raising suspicion for underlying stress fracture. She saw Dr. Peterson again on June 15, 2018. She was using a CAM walking boot. Her ankle was doing better but her foot pain was not. She was again restricted from work and continued in the CAM walking boot due to the right lateral ankle sprain, ankle instability, lateral foot pain and stress fracture. (PX2, p 250-253).

Petitioner followed up with Dr. Peterson again on June 29, 2018, where she reported pain with prolonged standing and walking with numbness and tingling after activity. She reported burning and stabbing pain to the top and lateral side of the right foot. She was restricted from work and using a CAM walking boot. (PX2, p 245-249)On July 17, 2018, Petitioner again followed up with Dr. Peterson. At that time, she reported that she was icing and elevating her foot, but she had continued pain with walking and when she is out of her boot. Dr. Peterson noted that she had midfoot arthritis aggravated by her work injury as well as a stress fracture and ankle instability. Her symptoms were moderate and persisting. Dr. Peterson kept her off work. (PX2, p 240-244).

On July 31, 2018, Petitioner received a letter from Respondent indicating that her workers' compensation leave had been approved. (PX 10)

Petitioner saw Dr. Peterson again on August 3, 2018. At that time, her pain complaints had not changed. Dr. Peterson ordered a repeat MRI of the right foot and ankle. (PX2, p 235-239). She had another MRI done on August 9, 2018, which revealed multifocal marrow edema/contusion much of which is diminished compared to previously, however there is persistent intense marrow edema/contusion at the proximal shaft of the fourth metatarsal reflecting an underlying stress fracture perhaps relating to ongoing stress and trauma. (TX 20). She followed up again on August 14, 2018, with Dr. Peterson. Her pain complaints persisted, and she reported having difficulty sleeping due to foot pain when she removes her boot.

From the date of injury through this time, Petitioner testified that she had a lot of painful throbbing and a lot of swelling in her right foot. She found it difficult to do any walking. (TX 21, PX2, p 230-234).

During this time, Petitioner continued to follow up with Dr. Onwuta for her medications. On August 27, 2018, Dr. Onwuta increased her Norco to 10-325 for one month because of foot pain.

On September 7, 2018, Petitioner saw Dr. Peterson again and reported that the walking boot was causing a lump on her great toe from friction. She had numbness and tingling in the right food that came and went. (PX2, p 225-229) On September 25, 2018, Petitioner followed up with Dr. Peterson again. At that time her symptoms remained the same. Dr. Peterson reviewed the MRI which showed the fourth metatarsal stress fracture was still present. He discontinued the CAM walker and put her in a short leg cast. They discussed physical therapy, injections, and surgery in the future. Dr. Peterson noted that he reviewed the report of Dr. Senall and disagreed with his report because she had an objective stress fracture, and her pain did not come out of nowhere. (TX 22, PX2, p 220-224). She followed up again on October 12, 2018. Her symptoms remained the same and Dr. Peterson ordered another MRI of the right foot and ankle. (PX2, p 215-219).

Petitioner underwent another MRI on October 22, 2018 which revealed multifocal marrow edema/contusion and again demonstrated several areas marginally more conspicuous which may relate to recurrent and/or ongoing stress and trauma. Dr. Peterson reviewed the MRI with Petitioner at her next appointment on October 26, 2018. He discussed a possibility of an open reduction internal fixation of the second to fourth metatarsal fractures. (TX23, PX2, p 208-214).

Petitioner saw her primary care doctor on November 12, 2018, for a preoperative physical and is cleared for surgery with Dr. Peterson on December 12, 2018. (TX 23). Dr. Peterson performed a fixation of right metatarsal fractures 2, 3, and 4, and a cuboid fracture. (TX 23, PX2, p 270-271). Following surgery, Petitioner used a scooter to ambulate. Dr. Peterson saw Petitioner on December 18, 2018, and December 28, 2018, for post operative appointments. Her symptoms improved slightly but she still had numbness and tingling in her right toes. Petitioner was taking Percocet for pain and Dr. Peterson refilled that. She remained off work. (PX2, p 188-200). On January 15, 2019, Petitioner saw Dr. Peterson again. He recommended physical therapy and kept her off work. (TX 23, PX2, p 181-187).

Petitioner followed up with Dr. Peterson again on February 5, 2019. She reported that her ankle was doing well but she continued to have constant swelling in her right foot and occasional shocks with certain movements. She also continued to complain of numbness and tingling in her right foot. She was kept off work at this time. (PX2, p 174-180). On February 26, 2019, Petitioner saw Dr. Peterson again. She reported occasional pain that increased with prolonged walking and standing as well as swelling in her right foot. She had not started physical therapy yet. The doctor recommended cryotherapy, custom orthotics, and physical therapy. He also kept her off work. (TX 24, PX2, p 167-173).

Petitioner began physical therapy at ATI on March 7, 2019. (TX 23). On March 22, 2019, Petitioner again saw Dr. Peterson who noted that the MRIs continue to demonstrate bone marrow edema and stress fractures in the metatarsals. Dr. Peterson prescribes Mobic and pain patches. Petitioner could discontinue her CAM walker but should continue to use custom orthotics. They discussed a possible surgery in the future, and she was kept off work. (PX2, p 160-166)

Petitioner saw Dr. Peterson regularly through May, June, and July 2019. Despite physical therapy, custom orthotics, and work restrictions, her pain complaints did not change. She had intermittent pain in the right foot that was worse with driving and walking. She continued to have swelling in the right foot. MRIs continued to show an unhealed stress fracture in the right foot. Dr. Peterson noted that her work accident directly aggravated her arthritis which required another surgery. (TX 24-25) (PX2, p 118-152).

Dr. Peterson performed a right midfoot fusion of first through third tarsal metatarsal joints, distal bunion neck domain and bone marrow aspiration on October 25, 2019. (TX 25, PX2, p 265-267). Following the second surgery, Petitioner followed up with Dr. Peterson for post operative care on November 5, 2019, and November 11, 2019. She was put in a short leg cast and was non weight bearing on her right foot and remained off work. (PX2, 103-117).

On December 20, 2019, Petitioner saw Dr. Peterson again. She reports that she is taking oxycodone, gabapentin, and amoxicillin. She also reports pain that increases at night. Dr. Peterson recommends a CAM walker again and keeps her off work. (PX2, p 98-102).
On January 7, 2020, Petitioner saw Dr. Peterson again who noted mild to moderate pain in the ball of her foot. He recommended that she continue NSAIDs, and cryotherapy as needed. He ordered physical therapy and continued Petitioner off work. (TX 25, PX2, p 93-97).

Petitioner started physical therapy with Suburban Orthopedics on January 23, 2020. A January 28, 2020, MRI again showed bone marrow edema and a stress fracture in the metatarsal. He recommended continued use of the CAM walker, continued PT and kept Petitioner off work. (PX2, p 88-92). He indicated that a third surgery may be indicated. Petitioner continued to follow up with Dr. Peterson and go to physical therapy in April, May, and June of 2020. (PX2, 57-87). Dr. Peterson kept her off work during this time and she was using Norco, CAM walker and custom orthotics. Physical therapy helped with the swelling, but an MRI continued to show bone marrow edema.

Dr. Peterson recommended a third surgery, a midfoot fusion and distal bunionectomy. (TX 26). She had a CT scan of the right foot on July 1, 2020, which showed malalignment at the first tarsal metatarsal joint. (TX 26). She saw Dr. Peterson again on July 7, 2020. She reported that she continued to have pain and swelling in the right toes, the more active she was, the more pain and swelling she experienced. She continued to complain of numbness and tingling in the great right toe. She was continued off work at that time. Petitioner was discharged from physical therapy on August 14, 2020, after 14 visits.

On September 1, 2020, Dr. Peterson released Petitioner with permanent restrictions of sitting/desk work only. Dr. Peterson contacted Dr. Onwuta indicating that Petitioner will need ongoing pain management due to her chronic foot pain. (PX2, p 46-50). Petitioner followed up with Dr. Onwuta at Advocate Medical Group via telehealth visits for medication refills and continues to follow up with him for medication refills. (TX 27, PX 1A, p 2-36).

On September 10, 2021, Petitioner again saw Dr. Peterson. She reported that she was not doing any better after her surgeries and inquired as to whether anything else could be done for her pain. She continued to have numbness and tingling in her right foot. Dr. Peterson noted that she will likely have permanent pain and disability in her right foot and will need chronic pain management for the rest of her life. She will also likely deal with pain and swelling throughout her life as well. She can weight bear as tolerated and may work with permanent restrictions of sitting/desk work only. (TX 28, PX2, p 40-44).

Respondent did not offer her any work within these restrictions. She was informed by Respondent, on November 23, 2020, that her leave of absence had expired on September 5,

2020. On March 25, 2021, Petitioner attempted to use her employee discount at Walmart and was told she could not use it as she had been terminated. Nobody from Walmart had advised her that she was terminated prior to that time. (TX 27).

Petitioner next sought her own doctor and reported to Horizon Chiropractic with a chief complaint of right foot pain. She provided a history of accidentally kicking a shopping basket that was on the floor at work. They noted a history of surgeries and physical therapy. Physical exam showed edema across the top of her foot, numbness to touch, pain with flexion, extension, inversion of the right ankle. She underwent localized acupuncture to the lower right leg, ankle, and foot. She underwent acupuncture through October 20, 2021. Petitioner testified that she got temporary relief from acupuncture, only one- or two-days' worth. (TX 29, TX3).

Respondent did not offer Petitioner vocational services. (TX 28). At the request of Petitioner's attorney, she saw Steve Blumenthal, a vocational rehabilitation counselor for a vocational assessment. (PX4). Petitioner met with Mr. Blumenthal, answered his questions, filled out paperwork and described her daily activities.

Mr. Blumenthal rendered a report. In his report, he reviewed treating records and the section 12 examination. He conducted an initial interview on October 7, 2021 and did not note any overt pain behaviors. He noted that her current age is 65 and she holds a valid driver's license. He noted that her right foot surgery of December 12, 2018, did not work and she has pain postoperatively. She had further surgery on October 28, 2019, with fusion and hardware. She was released by Dr. Peterson on September 9, 2020, with a permanent restriction to do sit down desk work only. He noted that she was having acupuncture treatment on her own, was not doing formal physical or occupational therapy but she does home exercise program she uses custom orthotics. She was noted to use a cane on occasion. She doesn't use it in the house and will lean on the walls for balance. She has difficulty with curbs and uses cane when out of the house. Pain can go up to 7/10. With walking pain will increase to 9/10. She is taking Norco 10/325 mg four times a day and Flexeril. She takes Paxil for anxiety attacks. She can feed herself, but her husband prepares meals and does food shopping and preparation. Mr. Blumenthal noted that she can prepare simple meals, such as cereal or a sandwich. Her husband will assist her getting in and out of the bathtub. Emotionally she is okay. It is difficult because she cannot do a lot and does not drive because she has difficulty with the gas pedal. Her acupuncture takes place one block from her home. He recorded a day in her life which begins at 7:00 a.m. She does not sleep well and is up every two hours due to throbbing in her right foot. She can unload laundry, but her husband puts away the clothes. She does not read because she is dyslexic. She has been applying for cashier positions where she can sit but needs to be able to stand to bag items. Mr. Blumenthal is the only counselor for rehabilitation she has met with. She left high school in the middle of her third year, she does not have her GED or high school diploma, she has no military experience, she has not had any classroom-based software training and learned how to use an electric typewriter in high school. She can use email and use social media. She worked for Walmart beginning in 2014. She reported that her job at Walmart required her to do lifting and carrying up to 50 pounds including mini refrigerators or television sets that could not be put through the scanner. Prior to Walmart she worked at Devonshire nursing home as a shampoo girl four days a week two hours a day. She was unemployed from 1996 to 2011 and would babysit for her grandchildren. In 1983 she worked for what would become Comcast as a customer service representative using the telephone. She used a computer lookup accounts, check the customer's connection, and would send a signal to customers system when needed. She was receiving Social Security disability at the time of the interview.

Mr. Blumenthal noted a labor market survey would be required to confirm her access to open positions in a stable labor market. Based upon the current minimum wage in the state of Illinois she would not incur a wage loss differential. Minimum wage effective January 1, 2022 is $12.00 an hour. She could work as a telemarketer. He notes that section 12 examiner indicates she could work as a cashier standing for shorter periods of time building back up to her typical shift. Mr. Blumenthal noted that the Department of Labor indicates light job requires lifting up to 20 pounds and to frequently stand or walk which is not consistent with her restrictions. She has lost access to her occupation as a cashier based upon her inability to perform standing and walking that would be required for either a part-time or full-time cashier. He again indicates a labor market survey is necessary to determine access in her geographic area to open positions to accommodate her abilities. If labor market survey documents access to employment in a stable market she would enter a job readiness training and placement program. Conservatively it would take 10 to 12 months to secure employment with a projected cost of $30-$35,000. Projected earnings would be $11-$13 an hour.

Petitioner saw Dr. Peterson again on December 28, 2021, for right ankle and foot pain. She noted that her ankle is no longer a problem, but her foot is dropping, and it was difficult to weight bear. She again reported numbness and swelling as well as lateral peroneal tendonitis which was new. Dr. Peterson again indicated that she would need pain management for the chronic pain and will likely have swelling, pain, and numbness for the rest of her life. (PX2, p 34-38). Dr. Peterson saw Petitioner again on April 12, 2022 and noted that her right foot was dropping making it difficult for her to walk, she had sharp shooting pain on the side of her right foot. She had numbness and tingling on the top of her foot and great toe. He related all her complaints to the initial work injury and subsequent surgeries and released her at MMI with permanent restrictions of sitting/desk work only. (TX 35, PX2, p 30-33).

Petitioner continued to see Dr. Onwuta and his colleague, Dr. Yu at Advocate for medication refills. (PX1B, 1C)

Mr. Blumenthal performed a Labor Market Survey on April 30, 2022. In his report, he lists numerous staffing agencies that do not require a high school diploma. Without Microsoft office skills she has lost access to any stable labor market given her education, work history and physical abilities. If she had the Microsoft Office skills and keyboard training there would be a stable labor market for telemarketing, customer service, appointment setting and related job titles which would be secondary in nature, paying a minimum of $15 an hour. There are also individual firms, and she does not need a GED or high school diploma. The projected cost of vocational rehabilitation is $18,000-$25,000. She has lost access to her occupation as a cashier and requires rehabilitation training and job placement services. She is 65 years old, and this may elongate the length and cost of job placement.

Petitioner testified that she does not sleep well at night because of her right foot pain. She sleeps on her back, with the ice machine she got after surgery. She cannot keep covers on her foot because the weight of the covers causes her foot to throb. (TX 30). She sleeps with a cane next to her bed to use to get out of bed. She also must put on a shoe to walk as she is very unstable without a shoe on her right foot. So even if she wakes in the middle of the night to use the restroom, she must put a shoe on. (TX 30-31). She typically wakes up at around 6:00 a.m. and does not do much during the day. Her foot is always throbbing, and it is always swollen. She relies on her husband to do the laundry, cook, and other household activities. (TX 31). Her home has approximately 13 stairs down to the basement that she does not use anymore as she is unsteady on steps. Prior to this injury, she went on walks a lot with her husband. Now she does

not because of her foot pain. (TX 37). She avoids walking on grass because it is uneven, and she loses her balance. She uses a cane when walking but cannot go far as she will lose her balance. (TX 33). Walking makes her foot throb and hurt more.

During her work as a cashier at Walmart, she needed to lift 50 pounds occasionally, if someone bought a TV or a small refrigerator. And though she has a hand scanner, sometimes she would have to lift the item to find the barcode. (TX 33). Petitioner testified that her foot is always throbbing and always swollen. She notices now that her toes cross each other, she is never sure which way they will cross. She never experienced that before the accident. She and her husband would also ride bikes which she can no longer do because of her right foot pain. She has a small swimming pool that she can no longer use as she cannot get up on the stairs to get into the pool (TX 37). Dr. Peterson recommended that she get a certain type of shoes called Hokas. They cost approximately $180.00. She also wears compression socks every day and sleeps in them as well to help alleviate some of her pain and swelling. (TX 38). Petitioner testified that she has 13 grandchildren and prior to the accident she would do things like decorate cakes with the girls but cannot do that any longer as she cannot stand long enough to do that without losing her balance. (TX 38). Petitioner testified that she did not have any of these issues prior to April 21, 2018. (TX 40).

Petitioner also testified that should the Arbitrator award the vocational rehabilitation she would like to have it. (TX 39). Petitioner engaged in a self-directed job search. (TX 56, PX 5). She had some phone interviews but did not receive any job offers. (TX 57). The Arbitrator notes that he observed the Petitioner ambulating with the assistance of a cane and at times during her testimony, used the cane to elevate her right foot.

On cross-examination, Petitioner testified that she also continues to have pain with her neck, right knee, right shoulder, and low back. (TX 43-44). She continues to have issues with varicose veins as well. (TX 44). Petitioner has been under the care of Dr. Onwuta since 2014 who has prescribed her narcotic pain medication for many years. The medication he prescribed did not change for approximately 6 months after her work injury. (TX45).

**Deposition Testimony of Dr. Senall**

At the request of Respondent, Petitioner was seen by Dr. Senall pursuant to Section 12 of the Act. Dr. Senall testified via deposition on May 18, 2021 (RX3). Dr. Senall testified that he disagreed with Dr. Peterson's diagnosis of a stress fracture. (RX3, p 14). He testified that a stress fracture is related to a stress or a strain, so it's related to either overuse or poor bone quality. He does not believe she had a stress fracture. (RX3, p 14). He testified that a stress fracture will elicit swelling and pain just like an acute fracture would, but there is definitely some sort of bone injury or overuse type of condition. (RX3, p 15-16). He saw edema in the MRI studies which can be a result of a variety of causes and can usually be seen around arthritic joints. (RX3, p 16). Dr. Senall did not believe that the mechanism of injury, described at the deposition as a "brushing or kicking the basket with the foot" is consistent with an ankle injury and so he disagreed with Dr. Peterson's diagnosis of an ankle sprain. (RX3 p 16-17).

Dr. Senall opined that Petitioner could have had a contusion from the original episode but no degenerative arthritis and no ankle injury from it. (RX3, p 17). He testified that the biggest thing for her may be sone residual midfoot arthritis that has flared up, but he saw no evidence of an ankle injury. (RX3, p 17). He testified that he thought Petitioner could return to work with

some restrictions initially, that she could work while wearing the boot, and that he related that "to her symptoms, so probably the degenerative condition of the foot." (RX3, p 18).

Dr. Senall examined Petitioner again on May 22, 2019. At this examination, Petitioner had had the open reduction internal fixation surgery of the 2nd through 4th metatarsals. Dr. Senall did not agree with that procedure and testified that he has never heard of that procedure for anything related to the midfoot. (RX3, p 20). Dr. Senall testified that she did not have internal fixation as there were no plates or screws. He thought Dr. Peterson injected calcium phosphate cement into her metatarsal bones. He does not recall seeing hardware on x-rays. (RX3, p 21). He testified that he has not seen any literature supporting subchondroplasty to the mid foot. He testified that it's a newer procedure he believes used in knees and ankles. (RX3, p 22). Dr. Senall testified that degenerative arthritis of the midfoot is treated with supportive shoe wear and custom orthotics or rigid orthotics, sometimes cortisone injections. If conservative measures fail, an arthrodesis or a fusion of the joint to minimize pain is sometimes performed. (RX3, p 22).

Dr. Senall did not review any of Dr. Onwuta's records from prior to the accident. He had no indication that Petitioner ever treated for her right foot prior to the accident at issue. (RX3, p 29). Dr. Senall testified that if Petitioner worked three to four years at Walmart, standing seven hours a day, he would expect her to have some symptoms regarding her right foot with the preexisting arthritis. (RX3, p 30). Dr. Senall was not aware that Petitioner reported her injury the same day to a supervisor and presented to the emergency department that same day with foot pain. (RX3, p 32-33). It was noted that every medical provider that examined Petitioner since April 21, 2018 noted that she had swelling and tenderness in her right foot. (RX3, p 33). It was acknowledged that there has been no break in treatment to her right foot. (RX3, p 33-34).

Dr. Senall testified that with arthritis, it can progress over time, but with the video he saw, it would be very difficult to cause that much swelling and that much pain unless there is some other thing at hand, some type of nerve-related problem occurring but there is no nerve-related problem in Petitioner's ankle. (RX3, p 37-38). Dr. Senall acknowledged that the trail of medical treatment begins with the basket, then reports the accident, then presents to the emergency room and treats consistently to the date of his exam. (RX3, p 38). Dr. Senall agreed that a CAM boot would be the appropriate treatment given the initial diagnosis and symptoms during the first couple of months after the accident. (RX3, p 40). Dr. Senall also agreed that the October 22, 2018, MRI findings could be indicative of a stress fracture in and of itself. (RX3, p 40). Dr. Senall testified that when someone has an injury, symptoms can take time to develop, and edema can take time to manifest. (RX3, p 43). While Dr. Senall was not familiar with literature supporting subchrondroplasty, he did not believe Dr. Peterson performing that surgery on Petitioner was tantamount to malpractice. (RX3, p 44).

**Deposition Testimony of Dr. Peterson**

Dr. Peterson testified via deposition on November 13, 2020. (PX7 ) Dr. Peterson is a board-certified foot and ankle surgeon, certified in both foot surgery and reconstructive rear foot surgery. (PX7, p 5-6). Dr. Peterson testified that after months of conservative treatment, work restrictions, and immobilization in the CAM walker, he offered Petitioner two treatment options. First, she could continue with her current course of conservative treatment or treat her condition with a newer technology of subchondroplasty. He testified that there is not as much literature for use of this in the metatarsal bones, but it is very commonly used in the ankle and knee. (PX7, p

10). He switched her to a short cast from a CAM walker to immobilize her foot completely to aid in the healing of the stress fracture. (PX7 p 11).

Dr. Peterson testified that she had a contusion of her foot turned into a non-healing stress reaction mainly in the fourth metatarsal. He opined that Petitioner aggravated the arthritis that she had in the second and third metatarsals. At 6 months post-accident and not improving with the conservative care, he recommended surgery. (PX7 p 12). He testified that he performed an open reduction internal fixation of the second and third and fourth metatarsals by injecting calcium sulfate bone substitute which is injected into the bone and tries to stabilize the stress part of the bone fracture. (PX7 p 12).

Post operatively Petitioner improved somewhat but the stress on her foot from physical therapy was causing more pain in her foot secondary to her arthritis. (PX7 p 13). Dr. Peterson testified that the indication for his recommendation of the midfoot fusion was aggravation of the prior arthritis in her foot and ongoing pain with walking and standing. (PX7 p 14). He testified that the low impact contusion she had with the shopping basket caused the contusion and swelling of the bone which caused a change in her baseline homeostasis. That edema and inflammation in the bone then aggravated the arthritis that was previously mild and was becoming more significant. (PX7 p 15).

After the midfoot fusion, Dr. Peterson testified that Petitioner had some relief and was overall doing better. He testified that he gave Petitioner permanent restrictions based on the limited mobility and range of motion secondary to the fusion. Dr. Peterson had an opportunity to review the surveillance video that Dr. Senall reviewed and that was offered at trial as Respondent's exhibit 8. He testified that after reviewing the video, he would describe the impact as low impact, but it's still a collision of the foot with an external object. The weight of it doesn't change that it caused a change in her normal sate of being. So, the collision with the shopping basket caused edema, pain, and swelling and it set of a cascade of continued and worsening arthritis in her foot. (PX7 p 18). He testified that he believed, based on the video, the history, his physical examinations, the diagnostic images, that more likely than not, the accident at work was a direct cause of the pain and need for surgery. (PX7 p 18-19).

Dr. Peterson testified that he did not believe the stress fracture was preexisting, but rather caused by the swelling and standing and using her foot more. (PX7 p 19). He testified that there was no audio on the video so he cannot be sure if there was any outward sign of pain immediately following Petitioner's collision with the basket. (PX7 p 21). Dr. Peterson did not note any twisting of the ankle in the video, but she did have ankle pain at their first visit. (PX7 p 21-22).

Dr. Peterson testified that the low impact collision caused the inflammation that then led to a stress fracture diagnosis, approximately 2 to 3 months after her injury. (PX7 p 22). And despite use of the walking boot, her foot was not immobilized enough so the inflammation, coupled with the continued use of her foot, even with the boot, caused the stress fracture. (PX7 p 23). Dr. Peterson testified that while Petitioner could have potentially worked in a sedentary capacity it was in her best interest from a medical and surgical standpoint for recovery if she remained completely off work. (PX7 p 32-33).

## CONCLUSIONS OF LAW

**Regarding Issue C, whether an accident occurred that arose out of and in the course of Petitioner's employment, the Arbitrator finds as follows:**

A claimant bears the burden of proving by a preponderance of the evidence that her injury arose out of and in the course of the employment. 820 ILCS 305/2 (West 2002). Both elements must be present to justify compensation. *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 483, 546 N.E.2d 603, 137 Ill. Dec. 658 (1989).
The Illinois Supreme Court held in *McAllister v Illinois Workers' Compensation Comm'n,* 2020 IL 124828, that a sous-chef's knee injury "arose out" of an employment-related risk where he knelt on the ground to find a tray of carrots and injured his knee. They held that the injury was caused by a risk distinctly associated with his employment. They further held that the proper test for analyzing whether an injury "arises out of" a claimant's employment is the one set forth in *Caterpillar Tractor Co. V. Industrial Comm'n*, 129 Ill. 2d 52, 58, 541 N.E.2d 665, 667, 133 Ill. Dec. 454 (1989). The Court in *Caterpillar* held, that as a rule, "an injury arises out of one's employment if, at the time of the occurrence, the employee was performing acts she 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 incidental to her assigned duties. A risk is incidental to the employment where it belongs to or is connected with what an employee has to do in fulfilling her duties." *Id.* 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. *McAllister v Illinois Workers' Compensation Comm'n,* 2020 IL 124828.

In the instant case, Petitioner testified that she was walking around her register to scan an item when the side of her foot impacted with a shopping basket. There has been no testimony or evidence to suggest that she was not performing acts of her employment at the time of the accident. The surveillance video shows Petitioner actively doing her job as a cashier for Respondent.

Accordingly, the Arbitrator finds that Petitioner's accident arose out of and in the course of her employment for Respondent.

**Regarding Issue F, whether Petitioner's current condition of ill being is causally related to the April 21, 2018 accident, the Arbitrator finds as follows:**

Petitioner bears the burden of showing by a preponderance of the evidence that his current condition of ill being is causally related to the workplace injury. See *Horath v Industrial Commission,* 499 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). A prerequisite to the right to recover benefits under the Act is some causal relationship between the claimant's employment and the injury suffered. *Absolute Cleaning/SVMBL v. Illinois Workers' Compensation Comm'n*, 409 Ill.App.3d 463, 470, 949 N.E.2d 1158, 1165 (2011). A Petitioner need only prove that some act or phase of his employment was a causative factor in the ensuing injury. *Vogel v. Industrial Comm'n*, 354 Ill.App.3d 780, 821 N.E.2d 807, (2005). A work-related injury need not be the sole or principal causative factor so 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, 797 N.E. 2d 665. (2003).

In Illinois, employers take their employees as they find them. *Land and Lakes v. Industrial Comm'n*, 359 Ill. App. 3d 582, 834 N.E. 2d 583 (2 Dist. 2005). Although a preexisting condition may make a worker more vulnerable to injury, compensability cannot be denied where a Petitioner can show that a work-related injury accelerated the preexisting disease such that the current

condition of ill being is causally related to the work injury and not merely the result of a normal degenerative process of the preexisting condition. *Sisbro,* 207 Ill.2d at 205. "[A] preexisting condition does not prevent recovery under the Act if that condition was aggravated or accelerated by the claimant's employment." *Caterpillar Tractor Co. v. Industrial Comm'n*, 92 Ill.2d 30, 36, 440 N.E.2d 861, 864 (1982). Further, "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 causal nexus between the accident and the employment." *International Harvester v. Industrial Comm'n,* 93 Ill. 2d 59, 442 N.E. 2d 908 (1982).

In the instant case, Petitioner had a variety of maladies predating her April 21, 2018 accident. She suffered a brain injury from carbon monoxide exposure, right knee pain, low back pain, neck pain, right shoulder pain, and carpal tunnel syndrome. She was already treating with a pain management doctor and was on SSDI when she began her employment with Respondent. She treated with Dr. Onwuta for 4 years prior to this accident. The evidence presented shows no mention of Dr. Onwuta indicating Petitioner complained of pain to her right foot or ankle. In fact, the first visit after the injury, Dr. Onwuta did note the ankle and foot pain, despite not being her treating physician for that condition. Moreover, Respondent offered no evidence to suggest that Petitioner ever had complaints of pain to her right foot and ankle prior to April 21, 2018. She had been working for Respondent since 2014 and never took off work, went on medical leave or complained about right foot pain, despite working 7-hour shifts on her feet.

Petitioner reported her accident and presented to the emergency room that same day and treated consistently until she was released from Dr. Peterson's care. It is worth noting that Petitioner came under the care of Dr. Peterson by a referral by Advocate Outpatient Care, where she was sent by Respondent the day of the accident. Dr. Peterson is a member of the preferred provider program.

Petitioner and Respondent both offered into evidence medical opinions with respect to causation. Petitioner offered the opinion of Dr. Peterson, and Respondent that of Dr. Senall. 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.

Dr. Peterson is a podiatrist by medical training and is double board certified in foot surgery and reconstructive rear foot surgery. Dr. Peterson was able to see the progression of Petitioner's condition at each of her visits with him. However, Dr. Senall only examined Petitioner twice at different stages of her treatment and progression of her condition. And while the video shows a

low impact collision with the shopping basket, which did not appear to be a traumatic event on the video, the Arbitrator notes the temporal and persistent relationship between the collision and the beginning of Petitioner's complaints of foot pain and need for treatment. She began treating with an outpatient clinic chosen by Respondent and when she did not improve, she was referred to Dr. Peterson. The Arbitrator is not persuaded by the opinions of Dr. Senall. The Arbitrator notes that he did not review all the available medical records and was not aware of Petitioner's long-term treatment with Dr. Onwuta which is devoid of any complaints or symptoms regarding the right foot until the date of the accident, April 21, 2018. Dr. Senall further acknowledged the consistency of treatment following her reported accident, that the MRI findings could indicate a stress fracture, and that the symptoms may continue to develop over time.

Based upon the medical evidence, the Arbitrator finds the opinion of Dr. Peterson and the chain of events more credible than that of Dr. Senall. 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).

Every natural consequence that flows from an injury that arose out of and in the course of one's employment is compensable under the Act absent the occurrence of an independent intervening accident that breaks the chain of causation between the work-related injury and an ensuing disability or injury. *National Freight Industries v. Illinois Workers' Compensation Comm'n*, 2013 IL App (5th) 120043WC, 993 N.E.2d 473. Where the work injury itself causes a subsequent injury the chain of causation is not broken. *Fermi National Accelerator Lab v. Industrial Comm'n*, 224 Ill. App. 3d 899, 908, 586 N.E.2d 750, 166 Ill. Dec. 792 (1992). Here, the medical evidence supports Dr. Peterson's testimony, that Petitioner initially suffered a contusion to the foot, then the swelling, stress of ongoing use of the foot caused her to have a stress fracture. Further, her underlying arthritis caused her to have worsening pain and symptoms requiring ongoing treatment and surgery and ongoing pain management for her foot which all stems from her condition after her accident. Accordingly, the Arbitrator finds that Petitioner's current condition of ill being is causally related to the April 21, 2018, accident.

**Regarding Issue J , whether Respondent has paid all reasonable and necessary medical bills, 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).

Having found in favor of Petitioner on the issue of accident and causal connection, the Arbitrator finds the medical bills submitted evidenced in Petitioner's exhibit 8 to be reasonable and necessary. Petitioner offered into evidence, Petitioner's Exhibit 8, detailing medical bills incurred that remain outstanding. Respondent offered into evidence Respondent's exhibit 6, which is a medical bill payment leger.

Review of Respondent's exhibit 6 shows payments made to ADCO Billing Solutions for Medical-Prescription Drug for dates of service June 29, 2018, August 3, 2018, September 7, 2018, October 12, 2018, (RX 6, p 1-2) and CEP America Illinois, LLP for dates of service May 21, 2018, May 22, 2018, May 24, 2018, May 31, 2018, and June 21, 2018. While those entities

are not the medical providers directly, the ADCO payments do coincide with dates of treatment at Suburban Orthopedics. The CEP America payments do not directly coincide with any dates of treatment but is more likely than not the physician bill from Advocate Outpatient care based upon the amounts paid and the Pay code of Medical-Attending Physician. Respondent made no payments on medical bills after August 8, 2020. (RX 6).

Respondent shall pay for the medical treatment outlined in Petitioner's exhibit 8 pursuant to Section 8(a) and the Medical Fee Schedule. Respondent is entitled to a credit for amounts already paid including the ADCO and CEP payments mentioned above.

**Regarding Issue K, the temporary benefits in dispute, the Arbitrator finds as follows:**

It is well-settled that when a claimant seeks TTD benefits, the dispositive inquiry is whether the claimant's condition has stabilized, i.e., whether the claimant has reached maximum medical improvement.

Petitioner is claiming TTD benefits from May 28, 2018, through April 12, 2022 or 202 2/7 weeks. The Arbitrator has already found in favor of Petitioner on the issues of accident, causation, and the reasonableness and necessity of her medical treatment.

Petitioner's testimony, corroborated by the medical records, show that Petitioner has been unable to work since May 28, 2018 and was placed at MMI with permanent restrictions on April 13, 2022 where she was permanently restricted to desk/seated duty only. Respondent has not offered her work within those restrictions and has terminated her from employment.

Under section 8(a) of the Act (820 ILCS 305/8(a) (West 2010)), an employer shall "pay for treatment, instruction and training necessary for the physical, mental and vocational rehabilitation of the employee, including all maintenance costs and expenses incidental thereto." Since maintenance is awarded incidental to vocational rehabilitation, an employer is obligated to pay maintenance only "while a claimant is engaged in a prescribed vocational-rehabilitation program." *W.B. Olson, Inc.*, 2012 IL App (1st) 113129WC, ¶ 39. Vocational rehabilitation may include, but is not limited to, counseling for job searches, supervising job search programs, and vocational retraining, which includes education at an accredited learning institution. See 820 ILCS 305/8(a) (West 2010). An employee's self-directed job search or vocational training may constitute a vocational-rehabilitative program. *Roper Contracting v. Industrial Comm'n*, 349 Ill. App. 3d 500, 506, 812 N.E.2d 65, 285 Ill. Dec. 476 (2004). Additionally, "rehabilitation efforts may be undertaken even though the extent of the permanent disability cannot yet be determined." *Freeman United Coal Mining Co. v. Industrial Comm'n*, 318 Ill. App. 3d 170, 180, 741 N.E.2d 1144, 251 Ill. Dec. 966 (2000).

Having found in favor of Petitioner on the issue of causal connection and based on the evidence of Petitioner's work restrictions, the Arbitrator finds that Petitioner is entitled to TTD from May 28, 2018 through April 12, 2022, or 202 2/7 weeks. Petitioner was engaged in a self-directed job search from May 8, 2021, through August 4, 2022 (PX 5). As such, she is entitled to maintenance benefits commencing April 13, 2022, through September 8, 2022, or 21 2/7 weeks. Respondent shall receive a credit of $3,374.59 for TTD benefits paid.

**Regarding Issue O, whether Petitioner is entitled to Vocational Rehabilitation Services, the Arbitrator finds as follows:**

Awards for vocational rehabilitation are granted pursuant to section 8(a) of the Act, which provides, in pertinent part, that an employer shall compensate an injured employee "for treatment, instruction and training necessary for the physical, mental and vocational rehabilitation of the employee." 820 ILCS 305/8(a) (West 2010). Vocational rehabilitation may include, but is not limited to, counseling for job searches, supervising a job search program, and vocational retraining including education. 820 ILCS 305/8(a) (West 2010). Yet, section 8(a) is flexible and does not limit rehabilitation to formal training. See *Roper Contracting v. Industrial Comm'n*, 349 Ill. App. 3d 500, 506, 812 N.E.2d 65, 285 Ill. Dec. 476 (2004) (citing *Connell v. Industrial Comm'n*, 170 Ill. App. 3d 49, 55, 523 N.E.2d 1265, 120 Ill. Dec. 354 (1988)). *W. B. Olson v. Illinois Workers' Compensation Comm'n*, 2012 IL App (1st) 113129WC, ¶ 32, 981 N.E.2d 25.

Before entering an order for rehabilitation, the evidence must show that rehabilitation is appropriate. *Amoco Oil Co. v. Industrial Comm'n*, 218 Ill. App. 3d 737, 751, 578 N.E.2d 1043, 161 Ill. Dec. 397 (1991). When determining whether rehabilitation is appropriate, certain factors must be considered. *Id*. "The factors favoring rehabilitation include (1) that the employee's injury caused a reduction in earning power and there is evidence rehabilitation will increase his earning capacity, (2) that the employee is likely to lose job security due to his injury, and (3) that the employee is likely to obtain employment upon completion of rehabilitation training." *Id*.

Petitioner has established that her injury caused a reduction in earning power, as she was released with permanent sedentary restrictions, not provided with work within her restrictions by Respondent, ultimately terminated by Respondent, and despite a self-directed job search, she has not found work. Petitioner offered the reports of Mr. Steve Blumenthal as well as a labor market survey that indicated that Petitioner would benefit from vocational rehabilitation services to find work within a stable labor market. Petitioner does not have computer skills, she does not have a high school diploma, or a GED. Mr. Blumenthal indicated that many more jobs will be available to Petitioner if she learned Microsoft Office and other computer skills. Respondent offered no vocational opinions to the contrary. Having found for Petitioner on all other issues above, the Arbitrator finds that Petitioner is entitled to rehabilitation services and orders Respondent to pay for such pursuant to Section 8(a).

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 19WC002481 |
| Case Name | Alyna Walker v.<br>City of Chicago |
| Consolidated Cases | |
| Proceeding Type | Petition for Review under 19(b)<br>Remand Arbitration |
| Decision Type | Commission Decision |
| Commission Decision Number | 23IWCC0548 |
| Number of Pages of Decision | 20 |
| Decision Issued By | Stephen Mathis, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Scott Encher |
| Respondent Attorney | Joseph Zwick |

DATE FILED: 12/29/2023

/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

Alyna Walker,

Petitioner,

vs. NO. 19WC 002481

City of Chicago,

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 medical expenses, causal connection, prospective medical care, 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 January 10, 2023, 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.

**December 29, 2023**

SJM/sj
o-11/01/2023
44

/s/*Stephen J. Mathis*
Stephen J. Mathis

/s/ *Deborah L. Simpson*
Deborah L. Simpson

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

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 19WC002481 |
| Case Name | Alyna Walker v. City of Chicago |
| Consolidated Cases | |
| Proceeding Type | 19(b)/8(a) Petition |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 17 |
| Decision Issued By | Ana Vazquez, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Kurt Hyzy |
| Respondent Attorney | Joseph Zwick |

DATE FILED: 1/10/2023

**THE INTEREST RATE FOR THE WEEK OF JANUARY 10, 2023 4.71%**

/s/Ana Vazquez, 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)**

**Alyna Walker**
Employee/Petitioner

v.

**City of Chicago**
Employer/Respondent

Case # **19** WC **002481**

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 **August 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. ☒ 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, **January 20, 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 $**82,234.36**; the average weekly wage was $**1,581.43**

On the date of accident, Petitioner was **60** 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 $**158,444.28** for TTD, $**0** for TPD, $**0** for maintenance, and $**0,** for other benefits, for a total credit of $**158,444.28**.

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

**ORDER**

Respondent shall pay for the reasonable and necessary medical services, as provided in Px307, with the exception of the $3,000.00 charge for Dr. Thomas Pontinen's evidence deposition testimony, and as provided in Px308 for the 32 sessions of physical therapy from July 21, 2021 through November 12, 2021 at Therapy Providers of America, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act. Petitioner's claim for unpaid bills from Therapy Providers of America for treatment after November 24, 2021 is denied.

Respondent shall authorize and is liable for the prospective medical treatment plan recommended by Dr. Thomas Pontinen, including a right knee MRI, psychological treatment, and a spinal cord stimulator implant, as provided in Section 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of **$1,054.29/week** for **187 1/7** weeks, commencing **January 21, 2019** through **August 22, 2022**, the date of arbitration, as provided in Section 8(b) of the Act. Per the Parties' stipulation, Respondent is entitled to a credit in the amount of **$158,444.28** for temporary total disability benefits paid by Respondent to Petitioner. Ax1.

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.

Ana Vazquez

_____

Signature of Arbitrator

**JANUARY 10, 2023**

ICArbDec19(b)

## FINDINGS OF FACT

Petitioner testified that he worked as a seasonal truck driver for Respondent's Department of Aviation. Petitioner testified that he was on a snow team, and that when O'Hare Airport got heavy snow, the team would go to O'Hare Airport to clear the runways.

Petitioner testified that on January 20, 2019, he was operating a snowplow as part of a team clearing snow at O'Hare Airport. Petitioner testified that his snowplow was struck twice from behind by another snowplow. Petitioner testified that he felt pain in his low back and right knee following the second strike to the snowplow he was operating.

***Medical Records Summary***

Petitioner presented at Presence Resurrection Medical Center Emergency Department on January 20, 2019. Respondent's Exhibit ("Rx") 5. He arrived by ambulance. Petitioner presented with right-sided low back pain with radiation down the leg. Petitioner denied a history of chronic back pain and he denied headache, neck pain, dizziness, blurry vision, chest pain, diaphoresis, cough, and dysuria. On exam, Petitioner exhibited tenderness of the lumbar paraspinal muscles, which was more prominent on the right side. X-rays of the lumbosacral spine were obtained. No fracture, dislocation, or bone destruction were seen. Mild disc space narrowing was seen at L2-L3 and L4-L5. Petitioner's diagnosis at discharge was low back pain, likely muscular in nature, though other diagnoses, including herniated disc and lumbar spine fracture, were considered. Petitioner was instructed to follow up with Physician's Immediate Care in Norridge, Illinois.

Petitioner presented at Concentra in Schiller Park, Illinois on January 21, 2019. Rx6. Petitioner reported a consistent accident history. Petitioner reported throbbing left knee pain and right-sided low back pain, that radiated down to the right thigh. On physical exam of the left knee, tenderness was noted in the lateral patellar retinaculum, but not diffusely over the anterior knee, lateral joint line, or medial joint line. On physical exam of the lumbosacral spine, tenderness was present in L3-L5 of the lumbar spine and right paraspinal. Palpation revealed right-sided muscle spasms. Flexion AROM was noted to be 35 degrees and painful. Left thoracolumbar rotation AROM was noted to be 20 degrees and painful. Right thoracolumbar rotation AROM was noted to be 15 degrees and painful. Bilateral straight leg raise tests were negative. Petitioner's diagnoses were lumbar strain and left knee contusion. Petitioner was prescribed Cyclobenzaprine and Nabumetone, and Petitioner was referred to physical therapy. Petitioner was returned to work with restrictions.

On January 29, 2019, Petitioner presented at the Pain Center of Illinois and was seen by Dr. Neema Bayran. Rx7. Petitioner reported a consistent accident history. Petitioner reported left knee pain and bilateral low back pain with radiation in his left posterior thigh. On physical exam of the lumbar spine, tenderness was noted over the midline and paraspinal muscles bilaterally, with the left side worse than the right. Petitioner also had a 3x3 palpable mass over the right paraspinal muscle. On physical exam of the left knee, decreased range of motion and tenderness to palpation over the knee joint were noted. Petitioner's diagnoses were lumbar radiculopathy, low back pain, and left knee pain, which Dr. Bayran noted were causally related to the January

20, 2019 injury. Petitioner was prescribed Tramadol and naproxen, and physical therapy was recommended. Petitioner was placed off work.

Petitioner testified that he participated in physical therapy at Therapy Providers of America.[1] Petitioner testified that at physical therapy, he received ultrasound therapy, hot towels, and massage treatments, and that he also wore a pulsating machine for 30 minutes around his low back.

Petitioner returned to Dr. Bayran on February 12, 2019. Rx7. Petitioner reported that the pain shifted from one side to the other, that the pain radiated into his right posterior thigh, that his right ankle felt like giving out, and that his left knee pain was better. Petitioner denied significant pain improvement with physical therapy. Petitioner's diagnoses were unchanged. An MRI of the lumbar spine was recommended. Petitioner was kept off work. Petitioner next saw Dr. Bayran on February 19, 2019. Rx7. Petitioner continued to complain of bilateral lower back pain, with pain radiating into his masseter thighs bilaterally. Petitioner also reported occasional pain radiating to his right anterior thigh. Dr. Bayran noted that Petitioner underwent a lumbar MRI and that Petitioner had brought in the films for Dr. Bayran's review. Dr. Bayran noted that the MRI showed that Petitioner had a large disc herniation centrally with extension into his foramina bilaterally causing bilateral neural foraminal narrowing and spinal stenosis. It also showed that Petitioner had facet joint arthropathy with ligamentum flavum hypertrophy contributing to the spinal stenosis. Dr. Bayran noted that Petitioner had an all-disc extrusion causing spinal stenosis at L5-S1 and a disc bulge at L3-L4. Petitioner's diagnoses were lumbar radiculopathy and low back and side pain secondary to lumbar disc herniation at L4-L5 and L5-S1 causally related to the January 20, 2019 injury. Dr. Bayran recommended a lumbar transforaminal epidural steroid injection at the right L4-L5 and L5-S1 to improve Petitioner's symptoms, and that Petitioner continue with physical therapy and use of the previously prescribed medications. Petitioner was kept off work.

Petitioner again saw Dr. Bayran on March 5, 2019. Rx7. Petitioner reported that his pain had worsened, and he complained of excruciating pain in his bilateral lower back, which radiated into his posterior thighs bilaterally. Petitioner complained of occasional pain radiating into his right anterior thigh. Petitioner reported that the pain medication was not working. Petitioner's diagnoses were unchanged. Petitioner was prescribed Tramadol ER, Tizanidine, and Norco. Petitioner was to continue with physical therapy and use of naproxen. Petitioner was kept off work. Petitioner underwent a lumbar transforaminal injection at the right L4-L5 and L5-S1 levels. Petitioner followed up with Dr. Bayran on March 19, 2019. Petitioner denied relief following the injection. Dr. Bayran recommended that Petitioner seek a spinal consultation, and that Petitioner continue with physical therapy and use of the prescribed medications. Petitioner was kept off work. Petitioner testified that Dr. Bayran referred Petitioner to Dr. Sergey Neckrysh following the MRI.

[1] The Arbitrator notes that while Petitioner testified that he participated in physical therapy at Therapy Providers of America in 2019, the only records offered by Petitioner from Therapy Providers of America demonstrate that Petitioner participated in approximately 32 sessions of physical therapy from July 21, 2021 through November 12, 2021. Petitioner's Exhibit ("Px") 308.

On March 21, 2019, Petitioner was seen by Dr. Sergey Neckrysh at Academic Spine Consultants. Rx8. Petitioner reported a consistent accident history. Dr. Neckrysh reviewed the February 15, 2019 MRI of the lumbar spine and noted that it showed facet arthropathy causing a moderate degree of lateral recess and foraminal stenosis at L3-L4 and a central disc herniation at L4-L5, measuring five to six millimeters, which further confounded the degenerative stenosis at that level due to the hypertrophied facets and diffuse disc bulge at that level. Dr. Neckrysh noted that the disc herniation was acute and chronic, producing Schiza's grade D stenosis. Dr. Neckrysh further noted that the presence of a high intensity zone within the disc capsule was indicative of an acute disc herniation caused by the accident at work. Dr. Neckrysh also noted that Petitioner had a moderate degree of degenerative disease with facet arthropathy and moderate to severe lateral recess and foraminal stenosis at the L5-S1 level. Dr. Neckrysh further noted that Petitioner presented with mechanical back pain, neurogenic claudication, and lumbar spondylitic radiculopathy with bilateral leg pain, right worse than left, caused by the disc herniation at L4-L5 level. Dr. Neckrysh recommended Petitioner undergo two or three additional injections and noted that if Petitioner failed to respond to nonoperative care, his recommendation was a surgical decompression at that level in the form of a L4-L5 bilateral laminotomy, medial facetectomy and foraminotomy, and decompression of the nerve roots. Dr. Neckrysh noted that if the surgical decompression did not provide Petitioner with substantial relief, Petitioner would probably need a fusion at L4-L5.

Petitioner returned to Dr. Bayran on April 23, 2019.[2] Rx7. Petitioner continued to complain of bilateral low back pain that radiated into his posterior thighs bilaterally. Petitioner also complained of occasional numbness in his legs and reported that his legs occasionally gave out. Petitioner denied left knee pain. Petitioner reported that he developed neck pain after the first lumbar transforaminal stenosis injection, and that his pain radiated into his upper shoulders and upper bilateral back. Examination of the cervical spine revealed decreased range of motion. Petitioner's diagnoses were unchanged. Dr. Bayran recommended a second lumbar transforaminal epidural steroid injection at the right L4-L5 and L5-S1. Petitioner was kept off work.

Petitioner testified that he underwent an Independent Medical Examination ("IME") with Dr. Charles Slack, that after the IME he decided to treat with Dr. Slack, and that he treated with Dr. Slack until Dr. Slack retired.[3] Petitioner underwent an MRI of the cervical spine, ordered by Dr. Slack, on December 6, 2019, which demonstrated (1) C5-C6 left foraminal stenosis and (2) minor bulging of the C2-C3, C3-C4, and C4-C5 discs. Px302 at 206. Petitioner testified that Dr. Slack referred Petitioner to Dr. Fisher after Dr. Slack retired, but that Dr. Fisher did not want to communicate with Petitioner and would not answer Petitioner's questions. Petitioner then chose to seek treatment with Dr. Thomas Pontinen at Midwest Anesthesia.

[2] The Arbitrator notes that no additional or subsequent records of Petitioner's treatment with Dr. Bayran or at Pain Center of Illinois were offered.

[3] The Arbitrator notes that while Petitioner testified that he treated with Dr. Slack following Dr. Slack's IME, records of Petitioner's treatment with Dr. Slack were not offered.

On February 6, 2020, Petitioner saw Dr. Sean A. Salehi at Neurological Surgery & Spine Surgery, S.C.[4] Px302 at 208-211. Petitioner reported a consistent accident history. Dr. Salehi noted that at the time of the accident, Petitioner felt pain in the low back and to a lesser degree in the neck. Petitioner complained of constant pain in the low back with radiation down into the posterior thighs and calves, right more than left. Petitioner reported that sometimes his feet would "slap." Petitioner reported that when he began therapy for the low back, he started having increased pain in the neck going to the right arm. Petitioner noted that the pain in his neck began when doing exercises lying flat on his stomach. Petitioner noted occasional numbness and tingling going down into either the left or right arms alternatively and involved all the fingers of the hands. Dr. Salehi's impressions were neck pain, degenerative disc disease of the lumbar spine, and lumbar spondylosis with radiculopathy. Dr. Salehi noted that Petitioner had mechanical back pain, bilateral leg pain, and neck pain secondary to the work injury. He noted that Petitioner had multilevel degeneration most significant at L4-L5 with associated lateral recess stenosis. Dr. Salehi noted that Petitioner was reassured that his cervical imaging revealed no significant pathology. Dr. Salehi did not recommend any surgical intervention at that time and referred Petitioner to pain management for discussion of possible spinal cord stimulator trial. Dr. Salehi gave Petitioner a prescription for Ultram and kept Petitioner off work until seen by a pain management specialist.

Petitioner testified that he underwent an IME with Dr. Graf in May 2020 and that he continued to treat with Therapy Providers of America and with Dr. Pontinen after the IME.

Petitioner presented at Midwest Anesthesia & Pain Specialists on July 10, 2020 and was seen by William Hayduk, PA-C. Petitioner's Exhibit ("Px") 302 at 2. Petitioner reported a consistent accident history. Petitioner reported sharp, throbbing low back pain that radiated down both legs. Numbness and tingling were present. Petitioner also reported sharp neck pain that radiated down both arms. Petitioner reported that his right arm would go numb. Petitioner's diagnoses were low back pain, lumbar radiculopathy, cervicalgia, and cervical radiculopathy. Rx302 at 4. On assessment, it was noted that Petitioner had failed conservative care and a spinal cord stimulator implant was recommended. Petitioner was referred for a psych consult and MRIs of the cervical spine and lumbar spine were ordered. Physical therapy was prescribed, and a lumbar orthotic brace was ordered. Petitioner underwent an MRI of the cervical spine on July 15, 2020, which demonstrated (1) a 2 mm posterior disc herniation with central cord distortion and mild to moderate central canal stenosis at C3-C4 and (2) a 1.5 mm posterior disc herniation with mild central canal stenosis at C4-C5. Px302 at 188-189. Petitioner underwent a lumbar spine MRI on July 17, 2020, which demonstrated (1) straightening of the lumbar lordosis with multilevel posterior element spondylosis, which continued to canal and neuroforaminal narrowing from L3-L4 to L5-S1 and facet joint effusions from L1-L2 to L3-L4, which can indicate motion, (2) a 2 mm posterior disc osteophyte with bilateral 4 mm neuroforaminal disc bulge versus herniation at L2-L3 with left greater than right lateral recess impingement, (3) a 2 mm posterior disc osteophyte at L3-L4 accentuated in both neuroforamen with mild central canal stenosis including left and right lateral recess impingement and moderate bilateral neuroforaminal stenosis, (4) a 4 mm posterior disc herniation with disc extrusion in the left neuroforamen at L4-L5 with moderate stenosis and severe bilateral neuroforaminal stenosis, and

[4] The Arbitrator notes that no additional or subsequent records of Petitioner's treatment with Dr. Salehi were offered.

(5) a 4 mm posterior disc herniation with annular fissure and right lateral recess effacement at L5-S1 with mild to moderate bilateral neuroforaminal stenosis.

Petitioner followed up with Dr. Thomas Pontinen at Midwest Anesthesia & Pain Specialists on July 24, 2020 and reported waking up with numbness in the right arm, worsening tingling, and worsening neck pain. Petitioner reported that the low back pain was bothersome and traveled down both legs, and that there was also intermittent numbness and tingling present in his legs. Rx302 at 6. On assessment it was noted that Petitioner had undergone the ordered MRIs, and that the MRIs demonstrated a symptomatic L4-L5 disc that was worsening. A spinal cord stimulator implant continued to be recommended. A psych consult and additional physical therapy were ordered. Petitioner followed up with Dr. Pontinen on August 13, 2020 and September 15, 2020.

Petitioner underwent a presurgical psychological clearance evaluation by Azadeh Ghaffari, Ph.D. at Chicago Behavioral Clinic on September 21, 2020. Px302 at 178-181. Dr. Ghaffari's impressions were that Petitioner endorsed severe symptoms of depression, generalized anxiety, and significantly elevated levels of pain catastrophizing. Dr. Ghaffari also noted that a majority of Petitioner's scores were elevated on the MBMD. Dr. Ghaffari recommended ruling out possible secondary gain for cause of elevated scores on most mood and pain screeners as a result of Petitioner's ongoing litigation. Dr. Ghaffari further noted that cognitively, Petitioner fell WNL. Dr. Ghaffari noted that given Petitioner's results, he was not a candidate for a spinal cord stimulator at that time. Px302 at 181. Dr. Ghaffari noted that Petitioner would benefit from psychotherapy with a focus on mood management, non-pharmaceutical pain management strategies, and pain coping skills. Dr. Ghaffari recommended that Petitioner engage in psychological treatment until symptoms of depression and anxiety were in the mild to moderate range. Dr. Ghaffari also noted that Petitioner may benefit from psychotropic medication for mood management given the intensity of his mental health symptoms. It was also recommended that Petitioner increase his levels of physical activity to improve his mood and wellness. Dr. Ghaffari noted that once psychological treatment had been successfully completed, Petitioner may be reconsidered for a spinal cord stimulator.

Petitioner again saw Dr. Pontinen on October 13, 2020 and November 10, 2020. On October 13, 2020, a lumbar ESI was recommended. Rx302 at 23. Petitioner underwent a lumbar interlaminar epidural steroid injection under fluoroscopic guidance on November 17, 2020. Rx302 at 30. Petitioner followed up on December 8, 2020 and reported that the injection did not significantly help his pain and that he had been having more spasms since the injection. Px302 at 34. On this date, Dr. Pontinen noted that surgery was not a good option given the risks and he continued to recommend a spinal cord stimulator. Px302 at 37.

Petitioner returned to Dr. Pontinen on January 19, 2021, February 23, 2021, and March 30, 2021 for complaints of neck and back pain. Px302 at 39, 44, and 49. On March 30, 2021, Petitioner reported right knee pain in addition to neck and back pain. Px302 at 49. Dr. Pontinen noted that Petitioner's right knee was an issue for Petitioner initially after the accident, but that Petitioner had not undergone treatment for the right knee in the last year and his right knee was bothering him. Px302 at 49. Dr. Pontinen ordered a right knee MRI. Px302 at 49. Petitioner again saw Dr. Pontinen on April 27, 2021. Px302 at 54. At that time, Dr. Pontinen ordered

Petitioner undergo a psychological evaluation and noted that Petitioner's depression was worse because of ongoing pain due to the accident and Petitioner's inability to get the treatment he needs due to insurance denials. Px302 at 54, 58. Petitioner followed up with Dr. Pontinen on May 25, 2021. Px302 at 59-63.

On June 29, 2021, Petitioner returned to Dr. Pontinen and reported that he had noticed foot drop on the right side over the past month, which had made walking more difficult. Px302 at 64-69. Dr. Pontinen noted that Petitioner's physical therapist had also noticed the foot drop and that Petitioner's strength with dorsiflexion had worsened. Petitioner also reported that he had noticed increased sensitivity over the left iliac crest, making it difficult to wear pants. Dr. Pontinen noted that depression continued to be an issue for Petitioner. Dr. Pontinen ordered an MRI of the lumbar spine because of the foot drop.

Petitioner underwent an MRI of the lumbar spine on July 8, 2021. Px302 at 162. The MRI demonstrated multilevel decreased disc signal changes and endplate and posterior spondylosis with superimposed bulging disc/herniation and canal/neuroforaminal impingement. Px302 at 163.

On July 27, 2021, Dr. Pontinen noted that a new MRI had been obtained and reviewed. Px302 at 70. Petitioner followed up with Dr. Pontinen on August 24, 2021, September 21, 2021, and October 19, 2021. Px302 at 76, 80, 86. On September 21, 2021, Petitioner reported that he had undergone a stress test the week before and that he felt that his pain had been worse since the stress test. Petitioner reported that he was discussing surgery with Dr. Salehi.

Petitioner testified that he underwent another IME with Dr. Graf in November 2021, and that he continued to participate in physical therapy and continued treatment with Dr. Pontinen after the second IME.

Petitioner followed up with Dr. Pontinen on December 7, 2021, January 11, 2022, February 8, 2022, March 22, 2022, and April 26, 2022. Px302 at 86, 89, 92, 98, 104. On January 11, 2022, Dr. Pontinen prepared an "IME Appeal for Patient Alyna Walker," wherein he outlined his disagreements with Dr. Graf's November 24, 2021 IME opinions. Px306. On March 22, 2022, Petitioner reported that his pain was unchanged and that his foot drop was slightly worsening. On April 26, 2022, Petitioner reported that his foot drop remained a problem and that he had almost fallen a few times because of it. Petitioner also reported that his pain was unchanged. Dr. Pontinen noted that Petitioner had developed a foot drop on the right side over the last year, which had made walking difficult. He also noted that Petitioner had begun to notice a foot drop on the left side. Dr. Pontinen also noted that contrary to the IME, Petitioner had radiating pain down his legs, more on the right side and primarily down the back of his leg to the ankle. He also noted that Petitioner had tingling in his legs, more on the right side, which Petitioner felt in his feet.

Petitioner next saw Dr. Pontinen on May 24, 2022 and June 21, 2022. Px302 at 116, 122. On June 21, 2022, Dr. Pontinen noted that the foot drop continued to be a problem and that Petitioner fell constantly because of it.

***Current condition***

Petitioner testified that he is limited in his activities, including dancing and playing pool. Petitioner testified that he cannot squat or go up a ladder, and that he has to minimize and take time doing some things because he experiences pain in his back and in his leg. Petitioner described the pain as excruciating and lasting 15 to 20 minutes. Petitioner testified that the back pain affects his walking, and that he has to stop after walking a half block because the pain in his leg travels to his knee and sometimes to his ankle. Petitioner testified that he has "slap feet," which he testified means that his leg can give out at any time and that he walks like a duck.

***Respondent's Utilization Reviews***

Respondent submitted into evidence a Utilization Review ("UR"), dated December 12, 2019, by Antonina Pernice, RN, denying a request for an additional 50 sessions of physical therapy from June 10, 2019 through October 30, 2019. Rx2.

RN Pernice recommended not certifying the requested additional physical therapy because Petitioner had completed 40 physical therapy sessions from February 4, 2019 through May 10, 2019, and there was documentation of remaining functional deficits and function goals. RN Pernice noted that there was no documentation of measured objective improvement with previous treatment, in terms of range of motion and strength, and that there was no documentation of a rationale identifying the medical necessity of continued therapy rather than transitioning to an independent home exercise program.

Respondent also submitted into evidence a UR, dated July 20, 2021, by Dr. Todd Hagle, denying additional physical therapy for a diagnosis of a back strain. Rx3. Dr. Hagle wrote that Petitioner had had excessive physical therapy without significant benefit, and that there was no indication that Petitioner could not utilize a home exercise program.

***Respondent's Section 12 Exam by Dr. Charles M. Slack***

Petitioner was seen by Dr. Charles M. Slack for an evaluation on April 30, 2019 at Respondent's request. Rx9. Petitioner reported a consistent accident history. Dr. Slack 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. Slack opined that Petitioner's diagnosis was a persistent symptomatic aggravation of degenerative disc protrusions at L4-L5 and L5-S1 with radiculopathies. He noted that Petitioner's prognosis was guarded, but generally good regarding conservative care. Dr. Slack opined that Petitioner's state of ill-being at that time was causally related to the work accident of January 20, 2019, as Petitioner denied any prior history of similar symptoms prior to the accident and had been experiencing ongoing symptoms without a pain-free interval since that time. Dr. Slack also opined that the medical treatment that had been provided, including the medications, therapy, and lumbar injections, was reasonable, necessary, and causally related to the work accident. Dr. Slack further opined that Petitioner was unable to perform his duties and he recommended that Petitioner remain temporarily totally disabled until Petitioner had better control of his pain, mobility, and strength in his lower extremity. Dr. Slack recommended one to two additional lumbar epidural steroid

injections, two to three weeks apart, and physical therapy to upgrade Petitioner's strength and endurance. Dr. Slack opined that Petitioner had not reached maximum medical improvement ("MMI") and he expected MMI within the next three months. Dr. Slack also recommended Petitioner start use of Neurontin to help with pain control and continue with physical therapy for modalities for pain control, increasing strengthening, core, and leg strengthening.

***Evidence Deposition Testimony of Dr. Thomas Pontinen***

Dr. Thomas Pontinen testified by way of evidence deposition on June 27, 2022. Px301. Dr. Pontinen testified as to his education and credentials as an anesthesiologist and interventional pain management specialist. Px301 at 6-9.

Dr. Pontinen testified that Petitioner first presented to him on July 10, 2020. Px301 at 9. Dr. Pontinen agreed that he had been treating Petitioner for two years and that Petitioner was still his patient at the time of the deposition. Px301 at 17. Dr. Pontinen testified that he has never picked up on the sense that Petitioner is exaggerating his symptoms. Px301 at 17-18. Dr. Pontinen testified that Petitioner has had difficulties in his personal life and that Petitioner has developed depression and anxiety in the past year. Px301 at 18-19. Dr. Pontinen provided testimony regarding Petitioner's treatment history. Px301 at 9-60.

Dr. Pontinen testified that on June 29, 2021, Petitioner had started to notice foot drop. Px301 at 43. Dr. Pontinen explained that foot drop is when you have nerve compression in your back. Px301 at 43-44. Foot drop affects a person's ability to walk. Px301 at 44. Dr. Pontinen testified that subjectively through Petitioner's complaints and history, along with what the physical therapist had seen at therapy, and what Dr. Pontinen was seeing, the foot drop was worsening, which implied a worsened compression. Px301 at 45. Dr. Pontinen testified that he has always had Petitioner at a fully disabled rating, given Petitioner's pain, weakness, change in sensation, reduced range of motion, and the medication that Petitioner requires. Px301 at 56-57.

Dr. Pontinen testified that Petitioner's injuries were causally related to the January 2019 work accident. Px301 at 57. Dr. Pontinen testified that without definitive treatment in the form of a spinal cord stimulator or surgery, it is almost a certainty that Petitioner will not significantly improve. Px301 at 58. Dr. Pontinen agreed that he has kept Petitioner off work the entire time that he has been treating Petitioner, including at the time of Petitioner's most recent visit prior to the deposition on June 21, 2022. Px301 at 60.

Dr. Pontinen testified that both a spinal cord stimulator and decompression surgery are viable options for Petitioner. Px301 at 62. Dr. Pontinen testified that regarding the decompression surgery, it was best left for discussion with the surgeons. Px301 at 62, 92-93. Regarding the spinal cord stimulator, however, Dr. Pontinen testified that because he implants spinal cord stimulators, he can say that Petitioner is a very good candidate for spinal cord stimulation, assuming that Petitioner is able to address the depression and anxiety that Dr. Ghaffari had referenced. Px301 at 62-63. Dr. Pontinen agreed that Petitioner would have to get his depression and anxiety under control before undergoing a spinal cord stimulator implant procedure, and Dr. Pontinen testified that another option was to have Petitioner reevaluated by

Dr. Ghaffari or any psychologist. Px301 at 64-65. Dr. Pontinen testified that he would have Petitioner psychologically reevaluated again. Px301 at 64-65.

Dr. Pontinen testified that Petitioner had continued to have radicular complaints, and that Petitioner's radicular complaints worsened after his first IME with Dr. Graf. Px301 at 70. Dr. Pontinen testified that Petitioner has never reported a lack of leg symptoms or radiating leg symptoms, and that Petitioner reported worsening symptoms with his foot drop. Px301 at 71. Dr. Pontinen testified that he was confused with Dr. Graf's November 24, 2021 opinions because Dr. Pontinen examined Petitioner on an almost monthly basis for the past few years and Petitioner had never had a significant change in exam. Px301 at 71-72. Dr. Pontinen testified that Dr. Graf could not comment on spinal cord stimulation implant because Dr. Graf does not implant spinal cord stimulators, and that there is a new programming type of generator that focuses specifically on axial-type back pain. Px301 at 74-75. Dr. Pontinen testified that Petitioner was definitely still having radicular symptoms at the time of Dr. Pontinen's deposition, and that Petitioner's biggest problem at that time was the foot drop. Px301 at 75. Dr. Pontinen agreed that the treatment he provided to Petitioner was causally connected to the January 20, 2019 work injury. Px301 at 77. Dr. Pontinen testified that in addition to Petitioner's back injury, he felt that Petitioner's neck injury was also related. Px301 at 77. Regarding Petitioner's right knee, Dr. Pontinen testified that he believed it was an ongoing issue that started with the accident as well, and it was something that had been overshadowed and not focused on because Petitioner's neck and back were so severe and those were the primary concern. Px301 at 78. Dr. Pontinen testified that given the records and history, there was a knee injury, but that he could not substantiate exactly what it was or how bad it was in part because they were never able to get an MRI and they have never been able to focus on it significantly. Px301 at 78. Dr. Pontinen testified that Petitioner's knee has gotten worse due to his back injury and his limp and foot drop. Px301 at 78-79. Dr. Pontinen testified that Petitioner's foot drop creates a limp for him that puts additional pressure on that knee, and that he would like to pursue further work up of the knee, beginning with obtaining an MRI. Px301 at 79. Dr. Pontinen testified that at the time of his deposition, he felt like it was a vague knee pain in general that had slowly worsened over the past few years. Px301 at 79.

Dr. Pontinen agreed that it was his recommendation that Petitioner undergo psychological treatment so that he could undergo a spinal cord stimulator implant procedure and to address the depression and anxiety that Petitioner has developed since the injury. Px301 at 79-80. Dr. Pontinen testified that it was his opinion that the spinal cord stimulator was the best way to resolve Petitioner's symptoms and that it was the next best step in treatment. Px301 at 80.

On cross examination, regarding the MRI of July 17, 2020, Dr. Pontinen testified that there was some disc degeneration involved, which was common for someone of Petitioner's age, but that the main issue was the 4 mm disc herniation at the L4-L5 level. Px301 at 84. Dr. Pontinen explained that you do not generally get a 4 mm herniation without some form of external trauma, and that it was more probable than not that the work accident created the findings that were causing Petitioner's symptoms on MRI and subjectively and objectively. Px301 at 84-85.

Dr. Pontinen explained that Petitioner could undergo a spinal cord stimulator implant, which would alleviate the pain, and that the patient would be able to walk in a more balanced

way and do more in physical therapy to regain muscle strength. Px301 at 87. Dr. Pontinen further explained that a spinal cord stimulator is not a permanent thing, and it is more of a long-term solution, because if Petitioner continued to have significant foot drop, he could still undergo decompression surgery. Px301 at 87. Dr. Pontinen testified that a spinal cord stimulator was a good option to try before undergoing major surgery. Px301 at 88. Dr. Pontinen agreed that at the time of his deposition, Petitioner did not want to pursue surgery, and he testified that Petitioner was interested in trying the spinal cord stimulator first. Px301 at 89. Dr. Pontinen testified that he had not recommended or requested Petitioner undergo a functional capacity evaluation ("FCE") and that he does not usually order an FCE if he feels that there is treatment that can significantly change a patient's capacity. Px301 at 89-90.

***Evidence Deposition Testimony of Dr. Carl N. Graf, III***

Dr. Carl N. Graf, III testified by way of evidence deposition on August 1, 2022. Rx1. Dr. Graf testified as to his education and credentials as an orthopedic spine surgeon. Rx1 at 5-6. Respondent requested that Dr. Graf complete an evaluation of Petitioner. Rx1 at 6. Dr. Graf first met with Petitioner on May 11, 2020. Rx1 at 7. Dr. Graf conducted a physical examination of Petitioner, took a history from Petitioner, and reviewed Petitioner's treatment records. Rx1 at 7. Dr. Graf reviewed the MRI images of February 15, 2019 and December 16, 2019. Rx1 at Exhibit Graf No. 1. Dr. Graf agreed that at the time of Petitioner's May 11, 2020 exam, Dr. Graf wanted to review additional MRI films because he felt that Petitioner may require lumbar decompression surgery. Rx1 at 10, 23. Dr. Graf testified that at that time, he felt that Petitioner's cervical complaints were unrelated to the 2019 accident. Rx1 at 10. Dr. Graf testified that he reviewed additional MRI films on December 3, 2020. Rx1 at 10.

Dr. Graf reevaluated Petitioner on November 24, 2021. Rx1 at 11. Dr. Graf agreed that at that time, his opinion was that Petitioner no longer required lumbar decompression surgery. Rx1 at 13, 21, 23. Dr. Graf testified that Petitioner had improvement as compared to his May 11, 2020 examination. Rx1 at 13. Dr. Graf agreed that his opinions of November 24, 2021 were based solely on Petitioner's subjective complaints at that time. Rx1 at 13. Dr. Graf then testified that his opinions of November 24, 2021 were based on Petitioner's subjective complaints, physical exam findings, and medical records. Rx1 at 13. Dr. Graf agreed that his opinion regarding Petitioner no longer being a surgical candidate was because Petitioner no longer had nerve root tension signs. Rx1 at 21.

Dr. Graf agreed that he felt that a spinal cord stimulator was not indicated and should not be performed. Rx1 at 14. Dr. Graf has recommended spinal cord stimulators to a number of patients. Rx1 at 14. Dr. Graf performs the spinal cord stimulator implant procedure. Rx1 at 14. Dr. Graf testified that most surgeons perform a laminectomy to implant the spinal cord stimulator. Rx1 at 14. Dr. Graf testified that he sits on the U.S. Food and Drug Administration's Orthopedic and Rehabilitation Committee and reviews spinal cord implants coming to market for the United States. Rx1 at 15. Dr. Graf testified that he is very well-qualified to review spinal cord implants and provide opinions regarding them. Rx1 at 15. Dr. Graf testified that spinal cord stimulators do not work well for axial back pain and in his opinion, back pain is not an indication for a spinal cord stimulator. Rx1 at 16. Dr. Graf testified that for someone who presented with complaints similar to those that Petitioner had initially, six to eight weeks of physical therapy

would be indicated and if the patient was not improving then no further physical therapy would be indicated. Rx1 at 16.

On cross examination, Dr. Graf testified that foot drop is not a nerve root tension sign, and that foot drop is weakness of ankle dorsiflexor and EHL muscles. Rx1 at 21. Dr. Graf then testified "I mean, you can have it -- you have nerve retention sensitivity in combination with foot drop…I assume [Petitioner] didn't have a foot drop the two times I saw him." Rx1 at 21-22, 23. Dr. Graf testified that Petitioner had some vague subjective complaints of radiating pain in November 2021, but not as severe as his May 2020 complaints. Rx1 at 22, 23. Dr. Graf testified that in November 2021, Petitioner did not have any nerve retention signs, which he believed that Petitioner's pain specialist agreed with. Rx1 at 24.

## 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. 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 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).

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.

***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. *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). 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 if the claimant can show that a work-related injury played a role in aggravating or accelerating his preexisting condition. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205 (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 to prove a causal connection between the accident and the claimant's injury. *International Harvester v. Industrial Com.*, 93 Ill. 2d 59, 63 (1982).

The Arbitrator finds that Petitioner's current condition of ill-being as to his lumbar spine, cervical spine, and right knee are causally related to the January 20, 2019 injury. The Arbitrator relies on the following in support of her findings: (1) the medical records of Presence Resurrection Medical Center, (2) the medical records of Concentra, (3) the medical records of Pain Center of Illinois, (4) the medical records of Dr. Sergey Neckrysh, (5) the medical records and testimony of Dr. Thomas Pontinen, and (6) the fact that none of the records in evidence reflect any lumbar spine, cervical spine, or right knee issues or treatment prior to January 20, 2019. The Arbitrator notes that the evidence demonstrates that Petitioner was able to work full duty and without restrictions immediately prior to the work accident.

Regarding Petitioner's right knee condition, the Arbitrator notes that Petitioner's initial right knee pain complaints were noted on March 30, 2021, over two years after the accident. Dr. Pontinen, however, credibly testified that Petitioner's right knee condition is due to Petitioner's back injury and the foot drop, which creates a limp for Petitioner that puts additional pressure on the knee. The record supports that Petitioner has been experiencing foot drop since February 6, 2020, where Dr. Salehi documented that Petitioner reported that sometimes his feet would "slap." Px302 at 208-211. Respondent did not offer any evidence to rebut Dr. Pontinen's testimony regarding Petitioner's right knee condition, and the Arbitrator notes that Dr. Graf documented that Petitioner demonstrated an antalgic gait at his November 24, 2021 examination. Px305.

Regarding Petitioner's lumbar spine and cervical spine conditions, the Arbitrator has considered the opinions of Dr. Graf and finds that the opinions of Dr. Graf do not outweigh the opinions of Dr. Pontinen, as they are inconsistent with Petitioner's persistent complaints, continuous symptomology, and treatment records. The Arbitrator notes that Dr. Pontinen has provided Petitioner with continuous treatment since July 24, 2020 on an almost monthly basis, whereas Dr. Graf has examined Petitioner on only two occasions. Regarding Petitioner's cervical spine condition, Dr. Graf opined that Petitioner's cervical spine condition was not related to the work injury, and seemingly based his opinion on the complaints of neck pain having started over 10 months after the work injury. Px303. The Arbitrator notes, however, that Petitioner initially complained of neck pain on April 23, 2019, three months after the injury, and he reported that the pain developed after the first transforaminal stenosis injection. Rx7. The records demonstrate that at some time during treatment, Dr. Slack ordered a cervical MRI, which Petitioner underwent on December 6, 2019. The record supports further neck complaints on February 6, 2020, which Petitioner reported began with physical therapy exercises. The records further demonstrate that Petitioner has consistently complained of neck pain since his first office visit at Midwest Anesthesia & Pain Specialists on July 10, 2020. Regarding Petitioner's lumbar spine

condition, the Arbitrator notes that while Dr. Graf testified that foot drop is not a nerve root tension, he then conceded that foot drop can be a nerve root tension sign, where he testified that "I mean, you can have it -- you have nerve retention sensitivity in combination with foot drop…" and admittedly assumed that Petitioner did not have foot drop at the time of his examinations. Rx1 at 21-22, 23.

In resolving the issue of causal connection, the Arbitrator also finds that Petitioner is not at MMI for his lumbar spine, cervical spine, or right knee conditions of ill-being. Lastly, the Arbitrator notes that Petitioner initially treated for left knee pain that was diagnosed as a left knee contusion. Petitioner denied left knee pain on April 23, 20219. Accordingly, the Arbitrator finds that Petitioner was at MMI for his left knee contusion on April 23, 2019.

***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 follow***:

Consistent with the Arbitrator's prior finding as to causal connection, the Arbitrator finds that the medical services that were provided to Petitioner were reasonable and necessary, and that Respondent has not paid all appropriate charges. At arbitration, Petitioner presented the following unpaid medical bills: (1) Midwest Anesthesia and Pain Specialists, S.C. ($4,935.00), Px307, and (2) Therapy Providers of America ($32,158.00), Px308. The Arbitrator notes that Px307 reflects a $3,000.00 charge for Dr. Pontinen's June 27, 2021 evidence deposition testimony. The Arbitrator further notes that no records of Petitioner's treatment at Therapy Providers of America after November 24, 2021 were offered within Px308, and that records for only 32 sessions of physical therapy from July 21, 2021 through November 12, 2021 were offered to support the amount claimed by Petitioner as unpaid by Respondent. Accordingly, the Arbitrator further finds that all bills, as provided in Px307, with the exception of the $3,000.00 charge for Dr. Pontinen's evidence deposition testimony, and all bills, as provided in Px308 for the 32 sessions of physical therapy from July 21, 2021 through November 12, 2021, are awarded and that Respondent is liable for payment of these bills, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act. Petitioner's claim for unpaid bills from Therapy Providers of America for treatment after November 24, 2021 is denied.

Respondent is entitled to a credit for any payments made towards the awarded outstanding expenses and shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit.

***Issue K, whether Petitioner is entitled to any prospective medical care, the Arbitrator finds as follows***:

Consistent with the Arbitrator's prior findings, including that Petitioner is not at MMI for his lumbar spine, cervical spine, or right knee conditions of ill being, the Arbitrator finds that Petitioner is entitled to prospective medical care as recommended by Dr. Pontinen. Dr. Pontinen's treatment recommendations include a right knee MRI, psychological treatment to address Petitioner's depression and anxiety, and a spinal cord stimulator implant. The Arbitrator notes that no treatment for Petitioner's cervical spine has been recommended. Accordingly, the

Arbitrator finds that Petitioner is entitled to a right knee MRI, psychological treatment, and a spinal cord stimulator implant, which is contemplated as compensable treatment under Section 8(a) of the Act, and therefore, Respondent is responsible for authorizing and paying for same.

***Issue L, whether Petitioner is entitled to temporary total disability, the Arbitrator finds as follows***:

Consistent with the Arbitrator's prior findings, the Arbitrator finds that Petitioner is entitled to TTD benefits. Petitioner claims that he is entitled to TTD benefits from January 20, 2019 through August 22, 2022, the date of arbitration. Ax1. Respondent disputes Petitioner's claim and Respondent claims that Petitioner is entitled to TTD benefits from January 21, 2019 through November 24, 2021. Ax1. Thus, the Parties dispute whether Petitioner is entitled to TTD benefits for January 20, 2019 and from November 25, 2021 through August 22, 2022, the date of arbitration.

The Arbitrator notes that the record demonstrates that Petitioner was at work and working on January 20, 2019. The record further demonstrates that Dr. Pontinen has consistently and continuously kept Petitioner off work since July 10, 2020 through August 22, 2022, the date of arbitration. Accordingly, the Arbitrator finds that Petitioner is entitled to TTD benefits from January 21, 2019 through August 22, 2022, the date of arbitration.

Further, based on the Parties' stipulation, Respondent is entitled to a credit in the amount of $158,444.28 for TTD paid by Respondent to Petitioner.

Ana Vazquez

ANA VAZQUEZ, ARBITRATOR